2019 UPDATE
“You Win Some, You Lose Some” – What Practitioners Can Learn from Recent BALCA Decisions

Update by Sarah Peterson, Linda Rose, Robert (Bob) White

This addendum to the 2018 article “You Win Some, You Lose Some” – What Practitioners Can Learn from Recent BALCA Decisions provides practitioners with a recap of more recent BALCA decisions of note. It should be read in conjunction with the 2018 article.

Supervised Recruitment

Denial reversed in Hi Tech Pro Labs, 2014-PER-01243 (February 27, 2019). In this panel decision, BALCA refused to uphold the denial based on the fact the employer submitted the required Recruitment Schedule documentation after the timeframe stated within the Recruitment Instructions Letter (“RIL”). BALCA, while mentioning two prior panel decisions that upheld such denials based on Section 656.21(c), failed to follow the same logic. Rather, BALCA stated that neither of these decisions addressed the two additional regulatory references, Sections 656.21(f) and 656.21(b)(1), that provide employers 30 days to supply information to the CO before an application can be denied. As such, BALCA vacated the decision and remanded for certification. Therefore, while employers should at all times comply with the timeframe listed in the RIL, BALCA has in, at least one panel decision, determined that the regulations provide employers 30 days to supply information to the certifying officer before denying an application.

NOTICE OF FILING ISSUES

A seemingly harmless procedure can still be the source of challenges. Typographical errors on the Notice of Filing (NOF) can land you in front of BALCA. If the error nonetheless satisfies the regulatory requirements, BALCA is inclined to reverse a denial grant certification, but where the error results in the Employer’s failure to satisfy the regulation, denial of certification will be affirmed. The best advice is to give the Notice of Filing the attention it deserves to avoid unnecessary stress.
**Denial reversed** in *Matter of Esscala Trading, LLC*, 2014-PER-01646 (Feb. 27, 2019). In the NOF, the Employer listed a wage higher than the offered wage. The Form 9089 listed an annual salary of $70,325.00, but the NOF listed an annual salary of $71,614.00. The CO denied the case. On reconsideration, the Employer explained that the error occurred because it inadvertently submitted the NOF for another case, albeit for the same position. The Employer included with the request for reconsideration the correct NOF that was posted during the requisite period. Nonetheless, the CO denied certification. BALCA agreed with the CO that refusal to accept the correct NOF on reconsideration was proper. But BALCA disagreed with the CO that the difference in salary served as a purpose to deny certification. Citing *Advantage Technical Resourcing, Inc.*, 2013-PER-00231 (Jan. 29, 2018), BALCA agreed the higher wage did not violate the regulations and that the NOF, despite the higher wage, adequately apprised workers of the job opportunity.¹

**Denial affirmed** in *Matter of Beth Israel Deaconess Medical Center, Inc.* 2015-PER-00004 (Jan. 23, 2019). Here, instead of listing on the NOF a wage greater than the offered wage, the Employer listed a wage less than the offered wage. The wage listed on the NOF was $57,221, but the wage listed on Form 9089 was $58,365.76. BALCA agreed with the CO that the wage listed on the NOF was less favorable than that offered on the application. Therefore, the NOF failed to satisfy the regulations.

Just because one BALCA panel endorses some flexibility in the PERM process, doesn’t mean every panel will. In the next case the BALCA panel took a very narrow view of the NOF requirements.

**Denial affirmed** in *Matter of SLV Pharmacy, Inc.*, 2014-PER-00722 (Feb. 27, 2018). In the NOF, the Employer properly listed its address, but failed to include the CO’s suite number (Suite 410). This error, which would seem non-material, served as the basis for the CO to deny certification and for BALCA to affirm. BALCA noted that the regulation at § 656.10(d)(3) requires the Employer to list specifically the address of the CO, which ensures the CO will receive relevant information regarding the PERM application. Since it was unclear whether the CO address without the suite number

¹See also *Matter of Infosys Solutions, Inc.*, 2015-PER-00119 (Mar. 26, 2019) (Denial reversed. Wage with typographical error was higher than offered wage).
would have reached the CO, the Employer’s error was “fatal to its application.” *Id.* at 3.

**Denial reversed** in *Sprint Nextel Corporation*, 2015-PER-00377 (March 22, 2019). Not every omission will result in a denial, however. In this case, the Employer required drug testing and background checks on Form 9089, but did not include these requirements on the NOF. The CO denied certification. Citing 20 CFR § 656.17(f)(3), BALCA noted that the regulations require the Employer’s NOF to “[p]rovide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought.” *Id.* at 2. Employer merely needs to provide a logical nexus between the NOF and the position offered. Here, Employer did that and its omission of the drug and background checks did not impact notice to employees. It is worth noting that BALCA indicated the CO could have ordered supervised recruitment if it remained unconvinced that the omission failed to adequately apprise workers of the job opportunity. Since it did not, the CO’s denial was reversed.

**Denial affirmed** in *Matter of Fallwood Corp.*, 2015-PER-00047 (Feb. 27, 2019). Supervised recruitment raises a new host of potential challenges as it did in the *Fallwood* case. The CO ordered supervised recruitment and directed the Employer to post a very specific Notice of Filing that went beyond the normal NOF, such as requiring the Employer to list its experience and education. Employer followed the instructions almost to a tee, but for the requirement of the CO’s reference number and post office box number where applicants were to send resumes. Instead, Employer included the usual CO address on Peachtree Street as listed in the regulations. This case represents the CO’s authority and broad discretion in supervised recruitment to require measures it deems necessary to achieve “special scrutiny” of a case. *Id.* at 4, citing *Unisoft International Inc.*, 2015-PER-00045, slip op. at 6 (Dec. 29, 2016). BALCA agreed with the CO that Employer had to comply with the CO’s requirement.

**REJECTION OF U.S. WORKER APPLICANTS**

BALCA continues to deny PERM applications where the employer does not fully consider U.S. worker applicants for offered positions. BALCA will review the reason for the rejection and how the employer determined that an applicant was not
qualified for the position. BALCA has indicated that if an applicant is rejected for failing to possess a “major” requirement, rejection based upon information contained in the resume without follow-up such as an interview may be appropriate. However, what BALCA considers to be a “major” requirement is very limited with a college degree being provided as an example. However, if an applicant is rejected for failing to possess a “subsidiary” requirement, an employer is required to inquire further about whether the applicant possesses the required skill and a rejection based upon the review of a resume alone may not be sufficient. A “subsidiary” requirement is defined by BALCA as something a candidate might not indicate explicitly on his/her resume though he/she possesses it. Therefore, because BALCA considers most requirements to be “subsidiary” requirements, BALCA will uphold a PERM denial if the employer failed to follow up with an applicant to determine whether he/she possesses the required skill. See Halliburton Energy Services, 2015-PER-00565 (March 20, 2019); Hanuman, 2015-PER-00619 (March 26, 2019); Cannon Design, 2015-PER-00202 (March 26, 2019); UBE America, 2014-PER-00755 (January 24, 2019).

BALCA also continues to remind employers that an applicant’s failure to meet a requirement does not automatically support an employer’s rejection of the applicant as unqualified. Instead, employers must determine not only that the U.S. applicant does not meet the requirements listed on the application, but also that any deficiencies cannot be remedied through reasonable on-the-job training. Other than stating that one year is not a reasonable period for on-the-job training, BALCA has not further refined what more limited timeframe it may consider to be a reasonable. See Continental Airlines, Inc., 2011-PER-00696 (October 12, 2012). Instead, BALCA requires employers in their audit responses to provide the specific period of time that training would take in addition to why it could not train the applicant on the missing skill sets. Such documentation may include: a vocational expert opinion letter comparing the exact job requirements to the Applicant’s education, knowledge, experience, and skills; industry expert opinion letter explaining the minimal requirements necessary to commence work in the position and why training in noted deficiencies is an not acceptable course of action; or an affidavit of the hiring official detailing the deficiencies noted with the basic job requirements and establishing a business necessity as to why the deficiencies cannot be corrected with any period of on-the-job training. More than a bare
assertion is needed to prove that it is infeasible to train new workers within a reasonable period of on-the-job training. See \textit{Microsoft Corp}, 2014-PER-00615 (February 25, 2019); \textit{JP Morgan Chase & Co.}, 2016-PER-00308 (June 29, 2018); and \textit{Cannon Design}, 2015-PER-00202 (March 26, 2019).

\textbf{ERRORS AND “OMISSIONS”}

BALCA continues to uphold PERM denials when a typographical error results in a violation of the requirements set forth in the regulations. In the rare case when an employer makes a harmless error and the audit response materials indicate that the employer was in actual compliance with the recruitment and prevailing wage requirements, BALCA has been forgiving. However, this forgiveness is not routine and employers should not rely upon it because BALCA reminds employers that the PERM process is an exacting process. See \textit{Infosys Solutions}, 2015-PER-00119 (March 26, 2019).

Additionally, if an employer attempts to remedy an omission as part of the Request for Reconsideration (RFR) to the DOL’s Certifying Officer (CO) after a PERM denial, BALCA reminds employers that for applications submitted after July 16, 2007, a RFR may only include: (1) documentation the CO actually received from the employer in response to a request from the CO; or (2) documentation the employer did not have an opportunity to present to the CO, but which existed at the time the application was filed. 20 C.F.R. § 656.24(g)(2)(i)-(ii). Furthermore, BALCA’s review of a PERM denial is limited to evidence that was part of the record upon which the CO’s decision was made. See 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c). See \textit{Zylog Systems Limited d/b/a ZSL, Inc.}, 2014-PER-00217 (February 27, 2019); \textit{Tranter, Inc.}, 2012-PER-01960 (February 25, 2019). Therefore, employers should double check their audit responses prior to submitting them in order to ensure completeness.

\textbf{OTHER ISSUES}

We noted two cases addressing education and equivalency requirements. The first addresses the use of an all-inclusive education and experience requirement. The second provides some guidance in careful drafting.
Education and Experience Equivalency

Denial reversed in Matter of Corillian Corporation, 2015-PER-00250 (Aug. 23, 2018). This case implicates Kellogg-type language\(^2\) and reaffirms its validity for those Employers that opt to employ this language. The Employer required a bachelor’s degree or alternatively “a combination of degrees, diplomas and/or professional experience equivalent to a Bachelor’s degree.” *Id.* at 1. The CO considered the alternative requirement vague so that the CO could not determine the actual minimum requirements. BALCA disagreed, citing a host of other decisions upholding the alternative language. BALCA noted that the “broad language for the alternative education requirement widens, rather than limits, the pool of U.S. applicants . . . .” *Id.* at 3.

Denial reversed in Matter of Blue Cross and Blue Shield of Florida, Inc., 2013-PER-00788 (Oct. 26, 2018). This case addresses potentially ambiguous drafting. In section H.4 and H.6 of the Form 9089, Employer required a bachelor’s degree and one year of experience. Alternatively, in section H.8, Employer indicated it would accept one year of experience for one year of education toward a bachelor’s degree, for a total of 5 years’ experience. Employer further explained in section H.14: “5 years experience is required if [the] person has earned 0 years of education toward a Bachelor’s Degree; 4 years [of] experience is required if [the] person has earned 1 year of education toward a Bachelor’s Degree” and so on. The CO interpreted the requirement to be a Bachelor’s degree and 5 years’ experience. BALCA noted that this interpretation was not necessarily wrong, if section H.8 were read in isolation. But, BALCA pointed out, Employer clarified its alternative requirement in section H.14, noting the Employer’s reference to five years’ experience was simply an example of the maximum amount of experience allowed under the alternative. The difficulty, BALCA explained, is in the structure of the form, not in the drafting of the requirement. The lesson learned from this case is to use section H.14 to explain any ambiguities or elaborate upon and clarify the Employer’s requirements.

\(^2\) In Matter of Francis Kellogg, 1994-INA-465 (Feb. 2, 1998), BALCA required the following statement as appropriate language for alternative education and experience requirements: “[A]ny suitable combination of education, training or experience would be acceptable.” This has never been strictly followed by OFLC, and as of this writing most practitioners advise against the use of this language in PERM recruitment. See Matter of Global TPA LLC, 2014-PER-01533 (Mar. 15, 2019) (Denial reversed. *Kellogg* language not required.)
INTRODUCTION

One of the first steps in beginning a case under the Program Electronic Review Management (PERM) system is obtaining a prevailing wage determination (PWD) on the Application for Prevailing Wage Determination, Employment and Training Administration (ETA) Form 9141. In fact, this is a prerequisite to filing a PERM application. Few issues cause greater consternation than discovering that the employer’s salary offer is below the prevailing wage. To sponsor a foreign national employee for labor certification, the employer might be willing to put up with strange recruitment requirements, recasting the job description and requirements, and even posting a notice telling employees where to lodge complaints about the process. Informing the employer that it must pay a higher salary is a different story altogether. A salary increase means cash outlay. Telling the employer what wage it must pay the foreign national worker to succeed in a labor certification requires a thorough understanding of the prevailing wage structure, deep analysis of the rules, and a little bit of tact.

The PERM regulation extensively discusses the complex issues relating to the employer’s obligation to offer a salary that meets the prevailing wage. Although wages are touched on throughout the regulation, the most significant rules are found in 20 CFR part 656, subpart D—§§656.40 and 656.41. There, the Department of Labor (DOL) identifies the acceptable wage sources, lays out the standards for alternative surveys, and provides a review and appeal procedure.

You cannot, however, limit yourself to the regulations. Multiple other sources, including frequently asked questions (FAQs), stakeholder meeting minutes, and Board of Alien Labor Certification Appeals (BALCA) decisions elaborate

* Ester Greenfield is of counsel at MacDonald Hoague & Bayless. Her practice is limited to immigration law with an emphasis on labor certification, outstanding researchers, and other employment based immigration. She is a past chair of the AILA Washington State Chapter and has taught immigration law and an immigration clinic as an adjunct professor at University of Puget Sound (now Seattle University). Ms. Greenfield has written and lectured nationally on immigration topics. She has served on local, regional, and national Department of Labor (DOL) liaison committees. She was co-editor of AILA’s Department of Labor Directory for Immigration Lawyers (2002–03 Eds.), and was co-editor of AILA’s The David Stanton Manual on Labor Certification (AILA 3rd Ed. 2005). She enjoys playing stand-up jazz bass and is a regular with the Seattle Jazz Night School Performance Big Band.

Linda Rose is the managing partner at the Rose Immigration Law Firm, PLC in Nashville. Her firm emphasizes business immigration in the music and entertainment industries, international transfers, higher education research and teaching, and religious worker cases. She also teaches immigration law at Vanderbilt University Law School. Ms. Rose received her J.D. from the University of Hawaii, master’s degree in anthropology (MLS) from Boston University, and master’s degree in public health from the University of Hawaii. She taught immigration law at Vanderbilt Law School for 17 years and has lectured and written extensively on labor certification and other business immigration topics. Since the advent of Program Electronic Review Management (PERM), Ms. Rose has served on various PERM-related AILA committees, including the PERM Implementation Group and national Department of Labor (DOL) liaison. When not practicing law, she plays jazz vibraphone with her band Rose OnVibes Quintet, and she hopes to recruit Ester to play a gig with her sometime.

We wrote the first version of this article in 2005 when the PERM regulation was implemented. We substantially revised the article in 2007, 2011, 2015, and have now rewritten portions for this book to account for changes in the regulations, guidance, policies, practices, BALCA case law, and our experiences in seeking prevailing wage determinations over the last three years.
on this thorny area of a PERM practice. This article will cover four key areas in prevailing wage analysis: (1) how to find the right wage source, (2) how to locate the right job classification, (3) how to get to the right wage level, and (4) how to use the right forms and procedures. In sum, this article will outline the steps a practitioner must take to do the right thing and get the right prevailing wage.

IDENTIFYING THE RIGHT WAGE SOURCE

The PERM regulation recognizes several appropriate sources for prevailing wage information. The regulation also addresses some of the components and variables of each type of wage source.

Collective Bargaining Agreements, University Wage Scales, and Salaries for Athletes

Under PERM, when a collective bargaining agreement covers a job opportunity, the negotiated salary will be the prevailing wage for the labor certification. When the employer is an institution of higher education, related nonprofit entity, or nonprofit or governmental research organization, the prevailing wage will be determined based on data that include only employees of other such organizations. Prevailing wages for professional athletes will be based on professional sports league rules or regulations.

The Davis-Bacon Act and Service Contract Act

Use of the Davis-Bacon Act (DBA) or the Service Contract Act (SCA) wage sources is at the employer’s option under PERM. So long as the employer suggests a wage with the correct occupational classification, the applicable geographic area, and the proper level of skill, the DOL National Prevailing Wage Center (NPWC) must accept the DBA or SCA wage in lieu of the Occupational Employment Statistics (OES) wage. The DBA covers occupations in the construction industry, including carpenters, electricians, mechanics, and equipment operators. The SCA covers a wide range of occupations, from cook to computer systems analyst, that have in common the fact that they involve provision of services. The SCA does not include certain executive, administrative, or professional employees. DBA and SCA wages are available to the public on the Internet. The employer who chooses to rely on the SCA or DBA should provide sufficient information on the prevailing wage request form to justify that the match is appropriate for the job.

100 Percent of Prevailing Wage

Even though wage surveys inherently involve a margin of error, PERM requires that the employer offer at least 100 percent of the prevailing wage. However, the employer is not required to pay the

---

1 In 2016 and 2017, DOL released a treasure trove of documents consisting of internal policies and training materials for processing prevailing wage requests, all in response to FOIA request for these materials, available at AILA Docs. No. 18010230 and 16062004.
2 20 CFR §656.40(b)(1). A collective bargaining agreement always has been the first tier of the wage hierarchy, and it remains so under PERM.
3 20 CFR §656.40(c).
4 20 CFR §656.40(f).
7 20 CFR §656.40(b)(4).
8 The National Prevailing Wage Center (NPWC) adjudicates and issues prevailing wage determinations for the entire country.
11 Prior to PERM, employers were allowed to reduce the survey wage by up to five percent and still satisfy the prevailing wage requirement. PERM eliminated that practice.
12 Immigration and Nationality Act (INA) §212(p)(3). DOL required 100 percent in the initial PERM rule because Congress recently had amended INA §212(p) to require payment of 100 percent of the prevailing wage. 69 Fed. Reg. 77325, 77367 (Dec. 27, 2004). In Matter of Superior Landscape, Inc., 2009 PER 00083 (BALCA Aug. 28, 2009), the Board of Alien Labor Certification Appeals (BALCA) granted certification when the job order gave a wage that was $0.40/hour too low, (99.95 percent of the prevailing wage) and the BALCA appeal was filed pro se. See also Matter of Kohler Co., 2011 PER 00722 (BALCA June 14, 2012). However, BALCA declined to round up when a posting was at 99.51 percent of the prevailing wage in Matter of Baily International of Atlanta, Inc., 2010 PER 00468 (BALCA Apr. 19, 2011). Don’t rely on the rounding up argument; make sure
offered wage until the time permanent residence is granted. Unless it refers to state tax records, DOL will not be able to determine if the employee’s current salary is below the prevailing wage, because neither the current nor the proposed ETA Form 9089 provides a place to report the current salary. Even if the beneficiary’s salary at the time of filing is less than 100 percent of the prevailing wage, the employer has some time to adjust the salary before the beneficiary is granted permanent residence.

The sting of the 100 percent rule has been cushioned by a four-tiered wage system, but battles still remain over the appropriate occupational classification and wage level to be selected, as discussed later in this article.

Private Surveys

The history of the use of private surveys as prevailing wage sources is instructive. The regulation prior to PERM predated the development of the OES survey. As explained in the former Technical Assistance Guide (TAG), the 1981 regulation anticipated that state workforce agency (SWA) office staff would determine the prevailing wage by calling a sample of employers, asking for the salaries of workers in similar jobs, and then computing the arithmetic mean of wages so obtained. By the mid-1990s, DOL was well aware that the SWA offices were not interpreting prevailing wage guidance and policy in a consistent manner. After a reengineering process, DOL issued General Administration Letter (GAL) 2-98, which required SWAs to use wage surveys conducted by the OES or, in the alternative, to consider employer-provided data that met the requirements of section J of the GAL. PERM codifies GAL 2-98 at 20 CFR §656.40(b)(2).

Survey Criteria

In the supplementary information to the PERM rule, DOL took the view that the standards for acceptability of a private survey are the same in GAL 2-98 and in the PERM rule:

We believe that as long as the employer-provided survey meets the criteria outlined in §656.40(g) of the regulations, or that were described in section J of GAL 2-98 or other guidance issued by ETA, the survey should be accepted by the SWA.

Though there are some minor differences in the details, this statement is substantially correct. The PERM rule requires that a published survey must have been published within the last 24 months, that the survey data must have been collected within 24 months of the publication date, and that it must be the most current edition. The PERM rule fails to state explicitly that the job description must be an adequate match, but the current prevailing wage FAQs and policy guidance clarify that the private survey must be an adequate match for the position.

Employers are frequently turning to private surveys, because the OES survey often results in PWDs that are unrealistically high for local market conditions. As a result, DOL has provided specific policy guidance that cover some key issues regarding private surveys:

1. Some surveys are now published only electronically and are updated every month. Employers relying on frequently updated

13 INA §212(a)(5)(A)(i)(II); 20 CFR §656.10(c)(1). This is also an attestation on ETA Form 9089. If the employee is in H-1 status, the employer must pay the higher of the actual or prevailing wage throughout the employment. The H-1 prevailing wage could have been obtained earlier or could have been based on a different source.

14 Even BALCA has objected to the use of the OES survey. In Matter of Millershor, Inc., 2000 INA 288 (BALCA Jan. 8, 2002), BALCA held that the OES survey for “Designer” could not be used for a fashion designer because the survey job category was too broad. INA §212(p)(4) requires the government to provide at least four levels of wages commensurate with experience, education, and the level of supervision.

15 The prior regulation was found at former 20 CFR §656.40.


17 E.g., GAL No. 4-95 (May 18, 1995) (reprinted in AILA’s Manual on Labor Certification (D. Stanton, ed. 1997)). GAL 4-95 was rescinded by GAL 1-00, issued May 16, 2000, AILA Doc. No. 00052301. DOL maintains a website with current and archived policy guidance available at http://wdr.doleta.gov/directives.

18 69 Fed. Reg. 77325, 77368 (Dec. 27, 2004). See also id. at 77372 (“[A]n alternative source of wage data ... could also be an ad hoc set of wage data from a survey that has been conducted or funded by the employer, so long as each of the criteria from section J were met.”) (Emphasis added).

19 20 CFR §656.40(g)(3)(i).

20 The employer, however, must provide the NPWC with adequate information about the survey job to enable the SWA to determine the sufficiency of the data. 8 CFR §656.40(g)(2).

21 See also Minutes from DOL Stakeholder Meeting, December 12, 2013, AILA Doc. No. 14011449.
surveys should submit the publication schedule as part of the supporting documentation. If the survey was the most recent at the time of submission, it will not be rejected even if a new survey is released before the PWD is issued.22

2. In its adjudications as well as in stakeholder meetings, DOL has clarified that a private survey will be rejected if the sample size is fewer than three employers and 30 incumbents.23

3. The prevailing wage FAQs say that if the employer includes nonnormal or restrictive requirements, a private survey must have multiple levels, and DOL will increase the wage by one level for each restrictive requirement.24 Of course, the employer relying on a survey in this situation should submit documentation of all levels of the survey occupation.

4. DOL may reject a survey describing a nonmanagement role if the job duties on Form 9141 indicate management duties. DOL may be aware that the survey has another occupation with management duties that is a better match.25

The PERM rule omits any reference to the requirement that a survey be conducted across industries. DOL has acknowledged that when the occupation is present in a single industry only, a survey for that industry is acceptable.26 Indeed, there are very reliable single-industry surveys that could be accepted. Some reputable surveys break down the data by size of employer or by the profit or not-for-profit status of the employer. However, DOL’s prevailing wage guidance reiterates that private surveys should be across industries.27 Moreover, BALCA has firmly rejected the argument that because the employer was a nonprofit institution, the prevailing wage should be computed solely on similar nonprofit employers.28 BALCA’s decision supports the policy of requiring cross-industry surveys.29

There is no comprehensive list of private surveys that are acceptable to the NPWC. However, DOL has published a sample list of acceptable wage survey sources for the purpose of filing labor condition applications.30

Use of the Median

In employer-provided surveys, PERM permits use of a median rather than the arithmetic mean to


23 E.g., Minutes of DOL Stakeholder Meeting, February 13, 2013, AILA Doc. No. 13022144, Though the DOL’s prevailing wage guidance of November 2009 says that the minimum sample size of three employers and 30 incumbents applies to employer-conducted surveys, DOL has clearly applied the same minimal sample size to private surveys as well.


26 GAL No. 1-00 (May 16, 2000), AILA Doc. No. 00052301, at attachment A (Prevailing Wage Policy “Q&As”), question 14.

27 DOL’s initial guidance was entitled “Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs.” See AILA Doc. No. 05030864. The current version, with the same title, was revised in November 2009. AILA Doc. No. 10010468; www.foreignlaborcert.doleta.gov/pdf/NPWC_Guidance_Revised_11_2009.pdf. DOL has also updated its frequently asked questions (FAQs) on prevailing wages. It is necessary to consult both the revised prevailing wage guidance and the FAQs to understand DOL’s policies. The FAQs are found at www.foreignlaborcert.doleta.gov/faqanswers.cfm#prevailing wage. A set of prevailing wage FAQs was issued on February 6, 2013.

28 Matter of Hathaway, 91 INA 388 (BALCA Aug. 20, 1993). Hathaway, of course, pre-dates the PERM regulation and also pre-dates the mandate to use American Competitiveness and Workforce Improvement Act (ACWIA) wages for occupations in institutions of higher education, related or affiliated nonprofit research organizations, or governmental research agencies. ACWIA wages may be higher or lower than “all industries” wages.

29 The “across industries” requirement is modified in the ACWIA context. Matter of University of Michigan, 2015-PWD-00006 (Nov.18, 2015) held that a private survey that included only institutions of higher education and not the other two types of ACWIA employers (nonprofit affiliates of institutions and higher education and nonprofit research institutions) had to be accepted. DOL reasoned that the government could not adequately define or identify the other two types of ACWIA employers. Therefore, DOL had to accept a private survey that included only institutions of higher education. DOL says it is aware of this decision but has not made any changes in its prevailing wage processing. AILA Notes from DOL OFLC Quarterly Stakeholders Meeting, AILA Doc. No.18061460.

30 Some of the surveys listed at AILA Doc. No. 16062004, supra n. 1, include Radford, Towers Watson Data Services, Dietrich, and Mercer. DOL also mentioned surveys conducted by organizations such as APWD and The Survey Group.
determine the prevailing wage, but only if the survey does not provide an arithmetic mean.\textsuperscript{31} If a private survey provides both mean and median, only the mean may be applied to determine the prevailing wage.

Continuation of Past Policies

In the supplementary information to the final PERM rule, DOL affirmed several prior practices and policies. DOL will not preapprove private surveys. Each survey must be evaluated to ensure that the job classification, geographic area, and level of skills are appropriate.\textsuperscript{32} In addition, DOL affirmed that an employer-provided survey does not have to be formally published, but can be collected and funded by the employer itself, as long as the data meet each of the criteria in section J of GAL 2-98.\textsuperscript{33}

In another continuation of past policy, the supplementary information adopted the definition of area of intended employment provided in GAL 1-00.\textsuperscript{34} Employers may provide survey data from a geographic area that is larger than a primary metropolitan statistical area (PMSA) if they can show that they are unable to obtain a representative sample of similarly employed workers from the PMSA. Data from an entire consolidated metropolitan statistical area (CMSA) will also be accepted if all points in the CMSA are within normal commuting distance.\textsuperscript{35}

Use of the BLS

Another potential source of salary data is the National Compensation Survey (NCS) published by the Bureau of Labor Statistics (BLS). The regulation at 20 CFR §656.40 does not mention the BLS survey, but DOL said in its introduction to the regulation that BLS surveys are acceptable if they include only one skill level for each occupation and use a median wage rather than an average. DOL said it would provide “appropriate guidance” for use of such BLS surveys.\textsuperscript{36} However, with the enactment of the 2011 federal budget, the Locality Pay Survey portion of the National Compensation Survey was eliminated, and therefore the BLS survey is no longer applicable or useful. The NCS website now refers users to the OES survey for occupational data by location.\textsuperscript{37}

Some NCS data are still posted on the Internet but are too dated to meet DOL requirements.

Permissible Components of Compensation

The wage offer must not be based on commissions, bonuses, or other incentives unless the employer guarantees a prevailing wage paid on a weekly, biweekly, or monthly basis that equals or exceeds the prevailing wage.\textsuperscript{38} Commissions paid on an annual basis cannot be included as part of the employee’s compensation. There is no discussion in PERM about fringe benefits, so presumably employers still can count fringe benefits as part of the salary offered, if the fringe benefits are not required by law and if they are not commonly paid in the industry.\textsuperscript{39}

Although the original PERM rule did not prohibit the beneficiary from paying the costs of the labor certification process,\textsuperscript{40} DOL’s “anti-fraud” rule, effective July 16, 2007, squarely bars beneficiaries from paying costs and attorney’s fees in connection with a labor certification. The beneficiary may hire an attorney to represent him or her in the labor certification, but if the same attorney also represents the employer, the fees of that attorney must be paid by the employer.\textsuperscript{41} The prohibition on payment of the employer’s expenses extends to reimbursement arrangements whereby a beneficiary who leaves the employer would reimburse labor certification expenses incurred by the employer.\textsuperscript{42} Thus, there is

\textsuperscript{31} 20 CFR §656.40(b)(3). The arithmetic mean is the sum of all numbers in the list divided by the quantity of numbers. The median is determined by selecting the number in the middle of the sequence, when the sequence is ordered from the lowest to the highest number. Under some circumstances, the median is considered a more reliable measure of central tendency. DOL noted that the median is widely used by statistical agencies such as the Bureau of Labor Statistics (BLS). 69 Fed. Reg. 77325, 77368 (Dec. 27, 2004). BALCA held that DOL may not reject a private survey that reports only the median when the survey has the data to compute a mean but chooses not to do so. Matter of Bilinguals, Inc., d/b/a Achieve Beyond, 2015-PWD-00001 (Aug. 3, 2015).


\textsuperscript{33} Id. at 77372.

\textsuperscript{34} Id. at 77369.

\textsuperscript{35} Id. It is unclear if both conditions (inadequate sample from PMSA and all points within normal commuting distance) must be satisfied or if either will suffice.

\textsuperscript{36} Id. at 77368.

\textsuperscript{37} https://www.bls.gov/opub/hom/ncs/history.htm.

\textsuperscript{38} 20 CFR §656.10(c)(2).


\textsuperscript{40} 69 Fed. Reg. at 77325, 77336 (Dec. 27, 2004).

\textsuperscript{41} 20 CFR §656.12(b), as amended by 72 Fed. Reg. 27904, 27945 (May 17, 2007).

\textsuperscript{42} DOL, “FAQs on Final Rule to Reduce the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity of May 17, 2007” (PERM fraud rule FAQs),
no longer an issue as to whether the payment of attorneys’ fees and costs may be deemed to be part of the salary offered; such payments are not part of the salary and must be borne by the employer.

**FINDING THE RIGHT JOB DESCRIPTION OR CLASSIFICATION**

The right job description is critical to the prevailing wage determination. Even though the Application for Prevailing Wage Determination, ETA Form 9141, elicits a suggested Standard Occupational Classification (SOC) system code, the job description itself also can lead the NPWC to the employer’s desired occupational classification. Such classifications typically fall within the OES/SOC, DBA, or SCA. Considering that most prevailing wage determinations will come from the government’s own sources, understanding how a job is assigned to one classification or another is important.

As a best practice, the employer should obtain a prevailing wage determination before placing a job order, placing the notice, running an advertisement, or engaging in any of the other required recruitment activities. This is so for at least two reasons. First, if the Notice of Filing contains a wage different from the prevailing wage determination, the notice will have to be reposed in accordance with the determination. Also, in the course of considering an applicant, the employer might have to offer a wage, and that offered wage must equal or exceed the wage on the determination. Therefore, it is always best to know ahead of time the government’s wage determination. Before seeking a prevailing wage determination, however, the practitioner needs to be sure the job description is solidified. This is important because the wording of the job order and the ETA 9089 should match materially and substantially the language of the prevailing wage determination. Likewise, if the job duties and requirements are included in the Notice of Filing or the advertisements, they too must match materially and substantially the language of the prevailing wage determination. The first step, then, is to develop the right job description to obtain the right wage.

A logical starting point for the job description is the employer itself. Many employers, large and small, do not have formal job descriptions, however, and if they do have a job description often it is so general that it does not embrace the particular position for which certification will be sought. Therefore, the practitioner might have to assist and guide the employer in developing the job description. There are several government resources available to aid in this endeavor. The most valuable source in this context is the O*NET Online. But practitioners are not limited to that one source; there is also the OES Dictionary of Occupations, the Service Contract Act Dictionary of Occupations, and various websites. These

---

43 The minutes of a DOL stakeholder’s meeting in 2013 note that DOL omitted a response to the question of whether the duties must be mirrored. See Minutes from DOL Stakeholders Meeting of Feb. 13, 2013, AILA Doc. No. 13022144. The best practice is to match the job duties and mirror the degree and experience requirements.

44 www.onetonline.org.


47 We would be remiss if we did not mention the Dictionary of Occupational Titles, a DOL publication with more than 14,000 job listings. DOL, Dictionary of Occupational Titles (DOT) (4th ed. 1991), available at www.oalj.dol.gov/libdot.htm. This document, last updated some 20 years ago, is no longer considered a primary resource. Furthermore, its SVP codes are outdated and its use relative to prevailing wage determinations is extremely limited, at best. Therefore, the DOT will not be addressed in this article.
resources contain hundreds of job titles and descriptions. DOL has released its own training materials consisting of internal PowerPoints that explain how to select the correct SOC code for sample groups of related occupations. These resources provide an invaluable window into the mind of the DOL analyst as he or she determines the best match.\textsuperscript{30}

**Shopping for an SOC code**

The OES/SOC database is comprised of approximately 800 job titles.\textsuperscript{51} There is more than one way to search for the SOC code that will provide the right job description and the right prevailing wage. On O*NET Online, at www.onet online.org/find, you can;
- Enter a key word in the “Keyword” field; or
- Click on the appropriate “Field Cluster,” such as finance; or
- Click on the appropriate “Industry,” such as Manufacturing.

For example, enter “soccer coach in the “Keyword” field. This will yield a list of 20 SOCs for that particular occupation. You then can select job titles that sound close to the position for which the employer is seeking certification. Do not be overwhelmed by a long list of finds. Some will be obvious mismatches (example in this case: bus drivers and janitors), and others can be eliminated easily simply by clicking on the occupation and quickly reviewing the first few lines of the occupational description. But once you find the right occupational listing, you will have access to the government’s detailed analysis of job duties (or tasks) and other occupational descriptors. This is a resource you will need for PERM matters, in addition to wage analysis.

If none of the primary occupational descriptions seems like a good fit, you might find a better match within the occupational classification tagged “All Other.”\textsuperscript{52} In the past, DOL expressed reluctance to use this category in making a wage determination,\textsuperscript{53} despite the fact an “All Other” job description might appear to be the perfect match. Nevertheless, BALCA has ruled that it is an abuse of discretion to refuse to consider an “All Other” SOC code if it is the most appropriate classification of a position.\textsuperscript{54} To maximize the likelihood that DOL will accept an “All Other” code, be sure to include a detailed analysis of why the duties of the job offered are best matched to the duties of a particular “All Other” occupation.\textsuperscript{55}

\textsuperscript{50} These training materials include instructions for the SOC 11-0000 series of management occupations; the SOC 13-0000 series of business and financial operations occupations; the SOC 23-0000 series of legal occupations; the SOC 15-0000 series of computer and mathematical occupations; the SOC 19-0000 series of science occupations; the SOC 17-0000 series of architectural and engineering occupations; the SOC 31-0000 series of healthcare support occupations, and others. See DOL FOIA Response on Prevailing Wage Policy Guidance, AILA Doc. No. 18010230 (Dec. 5, 2017).

\textsuperscript{51} The SOC classifications are updated from time to time. In 2011, the OES survey began using updated SOC codes for some familiar occupations. For example, SOC 15-1051, Computer Systems Analysts, is now found at SOC 15-1121. See “New SOC 2010,” AILA Doc. No. 11072630. The Bureau of Labor Statistics published its 2018 SOC System. Some occupations (such as Software Developer, Applications and Software Developer, Systems, have now been combined.

\textsuperscript{52} “All Other” occupations are tagged as a subclassification of a more inclusive occupation. For example, “All Other” surgeons and physicians includes Hospitalists, SOC 29-1069.03. To see how “All Other” classifications are listed, enter the key words “Surgeons and Physicians.” Then click on “Physicians and Surgeons, All Other” to find another dozen medical specialties, such as Hospitalists and Radiologists.

\textsuperscript{53} At the stakeholders’ meeting of April 2014, DOL stated: “The use of an ‘all other’ code is the exception to the rule.” Minutes from DOL Stakeholders Meeting (April 9, 2014) AILA Doc. No. 14070742. A year later, in the face of the BALCA decisions Matter of Meltwater News US1, Inc., 2014 PWD 0005 (BALCA July 16, 2014) and Matter of Quest Diagnostics, 2015 PWD 00002 (BALCA Feb. 12, 2015) (the “All Other” category was an appropriate classification), DOL stated: “OFLC is familiar with the BALCA decisions, but does not interpret those decisions to mandate use of the ‘All Other’ category if there is a more appropriate occupational category available.” Minutes from DOL Stakeholders Meeting (April 15, 2015), AILA Doc. No. 15052805.

\textsuperscript{54} Matter of CSID, 2015-PWD-00009 (Nov. 18, 2015).

\textsuperscript{55} See Practice Pointer, “The Challenge of Obtaining an “All Other” SOC Classification on a Prevailing Wage Determination (by the AILA DOL Liaison Committee), AILA Doc. No. 15061102 (posted June 23, 2015). By 2017, DOL’s internal guidance has come to recognize that the “All Other” category may be used when the job duties match the tasks from one of the break out occupations and cannot be reasonably classified elsewhere. OFLC Internal SOP on Use of All Other SOCs, in DOL FOIA Response on Prevailing Wage Policy Guidance. AILA Doc. No., 18010230 (Dec. 5, 2017).
The best SOC code shopper may have trouble selecting the right code for job descriptions that seem to match aspects of several codes within a single occupational series. Here, the DOL training materials for specific SOC occupation categories may help you out. For example, the training materials for the SOC 15-0000 series of computer and mathematical occupations provide specific tips for distinguishing between Computer Systems Analysts (SOC 15-1121), Computer Programmers (SOC 15-1131), and Software Developers, Applications (SOC 15-1132). Some nuggets from these training materials include:

- A job that requires “use” of programming languages may indicate that SOC 15-1132 is the right SOC code but “knowledge” of programming languages does not preclude SOC 15-1121 (which often has a lower prevailing wage).
- “High-level” design duties are consistent with SOC 15-1121, but if the job involves “low-level” design duties, such as designing details of components and designing application programming interfaces (APIs), SOC 15-1132 is more appropriate.
- SOC 15-1131 does not include design duties at all. To show the DOL analyst that the job does not involve design duties, consider stating that the job duties involve coding at that direction of a developer (emphasis added).  

As of this writing, DOL OFLC and BALCA take inconsistent approaches when a job includes duties from two different SOC occupations. In OFLC Stakeholder meetings, DOL OFLC has said that it will identify which occupations are encompassed by the job description and assign the SOC classification with the higher wage.  

BALCA, on the other hand, engages in a comparison of the PERM job duties with the detailed job descriptions in O*NET, to find the SOC job description that best corresponds to the PERM job duties.  

LOCATING THE RIGHT LEVEL

Once you have identified what you believe to be the right SOC code, the next challenge is to lead NPWC to the appropriate wage level. INA §212(p)(4) requires the government to provide at least four levels of wages.

In November of 2009, DOL updated and reissued policy guidance for the NPWC on determining prevailing wage levels under the four-tier wage system. The 36-page memorandum provides a qualitative description of the four OES wage levels, and a quantitative five-step method for analyzing jobs and determining which level should apply. If you want to determine which level and wage will be assigned the position, you should go through the same analysis the NPWC will undertake as described in the guidance memorandum.

First, consider the descriptions of the four levels. As you read these descriptions, assess how the employer can incorporate some of the applicable necessary to perform this computation. See www.flcdatacenter.com.

www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. DOL has also updated its FAQs on prevailing wages. It is necessary to consult both the revised prevailing wage guidance and the FAQs to understand DOL’s policies. The FAQs are available at www.foreignlaborcert. doleta.gov/faqanswers.cfm#prevailingwage. Be sure to use the revised version, dated November 2009, which updated the previous guidance issued in 2005. The guidance was revised in November of 2009 essentially to reflect that determinations would be issued by the NPWC on ETA Form 9141. DOL made no other substantive changes to the guidance.

Arguably, guidance of this nature should be promulgated in the form of a regulation under the Administrative Procedure Act’s formal notice and comment rulemaking procedures. However, the H-1B Visa Reform Act became effective 90 days after passage. The need for immediate practical guidance could not have been satisfied had the DOL engaged in the time-consuming rulemaking procedures, although there has been ample time since passage of the H-1B Visa Reform Act.
The four levels are as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer’s methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Level II (qualified) wage rates should be assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Level III (experienced) wage rates should be assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained either through education or experience special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered. Frequently key words in the job title can be used as indicators that an employer’s job offer is for an experienced worker. Words such as ‘lead’ (lead analyst), ‘senior’ (senior programmer), ‘head’ (head nurse), ‘chief’ (crew chief), or ‘journeyman’ (journeyman plumber) would be indicators that a Level III wage should be considered.

Level IV (fully competent) wage rates should be assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment’s procedures and expectations. They generally have management and or supervisory responsibilities.

Just what do these convoluted paragraphs from the guidance memorandum really say? Filter out the extraneous language, and the four levels can be more readily understood. Below are the key characteristics of each level. These are the phrases an employer should try to incorporate in its job description.

**Level 1 (Entry)**

1. Performs routine (noncomplex) tasks;
2. Exercises limited independent judgment;
3. Work exposes employee to employer’s methods, practices, programs;
4. Performs higher-level work for the purpose of training and development;
5. Receives close supervision;
6. Receives specific instructions.

Level 1 employees can include positions for persons in all occupations, for, indeed, there is always an entry level for every type of job. In practice, you should argue for level 1 where the position is at the first tier of the employer’s hierarchy. Thus, for example, a first-year research fellow in the biomedical department of a prestigious university can fill a level 1 position if the job involves routine biomedical research that is noncomplex in comparison to other aspects of the research. The research fellow might report directly to the principal investigator, be closely supervised, and receive specific instructions. Performing some limited complex research activities does not automatically

---

*62 The NPWC will search the job description for key words as part of its analysis in determining which wage level to assign the position.

bump the position up to level 2 or 3. Instead, the research fellow might engage in complex research for the purpose of gaining experience and knowledge and for the purpose of honing certain skills, with the expectation of being assigned more advanced duties in the future.

**Level 2 (Qualified)**

1. Performs moderately complex tasks;
2. Exercises limited independent judgment;
3. Education and experience requirements within O*NET job zones.

Unfortunately, the description for the level 2 position is cryptic. The distinction between level 1 and level 2 lies with the complexity of the tasks performed on a regular basis. The level 2 worker will perform *moderately* complex tasks, as opposed to routine or noncomplex tasks. There is no distinction between level 1 and level 2 in terms of exercise of judgment; workers at both levels exercise limited independent judgment. Thus, it can be inferred that the level 2 worker also will be closely supervised and receive specific instructions. Level 2 workers have a “good” understanding of the occupation, whereas level 1 workers have only a “basic” understanding of the occupation. Although most job descriptions do not state whether the worker has a basic or a good understanding of the occupation, a level 2 position could be framed as follows: “Using a good understanding of . . . .”

Another distinguishing factor found in this definition is the reference to the specific vocational preparation (SVP). The level 2 worker’s education and experience requirements will be those “that are generally required as described in the O*Net Job Zones.” For example, consider an industrial-organizational psychologist (SOC 19-3032). The O*NET job zone for this occupation is zone 5, with an SVP of 8 (four to ten years) and graduate education required by most employers. If the employer requires only a bachelor’s degree and two years’ experience, the position requirements would be below those required by O*NET, thus suggesting no more than a level 1. As explained below in the discussion of the worksheet, the bachelor’s degree would not use any of the SVP points for the specific purpose of determining a level for prevailing wage.

**Level 3 (Experienced)**

1. Exercises judgment;
2. Coordinates activities of other staff;
3. Has supervisory authority;
4. Education and experience requirements fall at higher end of O*NET job zones.

Level 3 employees exercise judgment beyond the “limited” scope of level 2. The duties also might include some supervision. Arguably, an entry-level management trainee would supervise as well, but if the trainee does not exercise independent judgment, level 3 might be too high.

Compare the employer’s education and experience requirements to the O*NET job zone. If the same industrial-organizational psychologist (SOC 19-3032) position now requires a master’s degree and five years of experience, level 2 would be indicated. This is because five years of the SVP fall above the minimum but toward the lower end of the SVP range of four to ten years. (Add a level.) However, the requirement of a master’s degree is the typical education requirement for this occupation. (Do not add a level.) But if the position were lead industrial-organizational psychologist, level 3 probably would be appropriate. DOL indicates that titles bearing words such as “lead” or “chief” suggest level 3.

**Level 4 (Fully Competent)**

1. Performs independent evaluation, selection, modification, application of standard procedures, and techniques;
2. Solves unusual and complex problems;
3. Receives technical guidance only;
4. Work reviewed for sound judgment and effectiveness;
5. Generally, has management and supervisory responsibilities.

This description is difficult to understand, because it appears to overlap with the other levels. Receiving guidance and having work reviewed both suggest

---

64 SVP is the amount of lapsed time required to prepare for the job. SVP levels are defined at 20 CFR §656.3. The O*NET expresses the SVP as, for example, 7.0 < 8.0. Interpret this to mean an SVP of 7. See Report of DOL Stakeholder Liaison Meeting (Jan. 9, 2008), AILA Doc. No. 08011660. Refer to the SVP chart at 20 CFR §656.3 to see that an SVP of 7 means two to four years of training or experience.

65 Other factors, such as special skills and supervisory duties, will affect the wage level. See *infra* for discussion on levels worksheet.
lower-level work. And one would think that education and experience at the upper end of the SVP would suggest level 4, not level 3. Indeed, use of the term “competent” to describe the highest level of work is problematic. Employees can be competent at any level; the highest level of employee should be termed “expert” or “senior.”

Nonetheless, the most salient and distinguishing feature of a level 4 position is involvement in “unusual and complex problems.” This language in the job description surely will yield a level 4 wage. Furthermore, the level 4 job description will involve “independent” duties and decision-making.

DOL’s revised policy guidance did not advise the NPWC to match the job offer to one of the four levels based on an overall comparison of the employer’s job description with the DOL level descriptions. Instead, the guidance provides a mechanistic, step-by-step worksheet for the NPWC to complete in the process of determining the correct wage level.

The Levels Worksheet

The revised prevailing wage guidance includes a worksheet and instructions specifying five steps the NPWC should take to determine the appropriate prevailing wage level. The guidance advises the NPWC to go through each step, enter relevant information on a worksheet, assign points, and add up the points. All positions start at level 1. Level 4 is the maximum.

Practice Pointer: A good practice is to prepare a worksheet to predict which level and wage level NPWC will assign to a position. This will help you to formulate strategy with your client and know what wage level to expect from the NPWC. Of course it is germane to the case that the NPWC use the same SOC code the practitioner has identified. The Application for Prevailing Wage Determination, Form 9141, provides a place to enter the employer’s job title, as well as the suggested SOC code and title, at boxes D.2 and D.3, respectively. There is no guarantee that the NPWC will use that code, however.66

Whatever SOC classification the NPWC assigns, bear in mind that it will use both the levels description and the worksheet calculation as guiding factors in making its wage determination. The revised prevailing wage guidance clarifies that the worksheet is not an automated process and that the assigned wage level should be commensurate with the complexity of tasks, degree of independent judgment, and amount of supervision for that wage level. Each step of the worksheet is analyzed below.

Step 1: Find the Correct O*NET Code and Enter the Job’s Requirements

The first step is to find the correct O*NET code and enter the O*NET requirements on the worksheet. This step is important because the analyst is searching for the “right” occupational code. The guidance directs the NPWC analyst to enter the job title from the employer’s job offer using the Quick Search function on O*NET, locate the best occupational match, and review the tasks, knowledge, work activities, and job zone in the O*NET summary report to gain an understanding of the occupational requirements. The NPWC then enters the employer’s requirements and the O*NET requirements at step 1 on the worksheet. The default wage is level 1, which is where all positions begin. Subsequent steps on the worksheet might boost the position to other levels.

Practice Pointer: Employers may choose the O*NET job title in lieu of the employer’s internal job title to help ensure that the NPWC selects the correct and intended O*NET title. However, since the form offers a box for both the employer’s title and the SOC title, the job title is not quite as critical, unless the employer’s job title could misdirect the NPWC to a different SOC classification.

O*NET titles for certain “all other” occupations (those tagged with a decimal point) might have an incomplete summary report or lack a job zone assignment. For example, data warehouse specialist, 15-1199.07, includes a notation that “data collection is underway” and there is no job zone or SVP assignment. While it remains unclear exactly how the NPWC determines the SVP for these incomplete occupations, it appears that DOL usually will look to the most similar or most closely related occupation listed in O*NET. As noted earlier in this article, the DOL practice is to resort to “all other” occupations only when there is no other match available.

Step 2: Complete the Experience Section

The NPWC must compare the overall experience in the O*NET job zone to the years of experience in

66 See, supra, n.1 and discussion of DOL training materials on SOC code selection.
the employer’s job offer.\textsuperscript{67} For occupations in job zone 1, the NPWC enters a number from zero to three, depending on the amount of experience required.\textsuperscript{68}

For occupations in job zones 2 through 5, which represent the majority of the occupations for which an employer will be seeking certification, the NPWC compares the number of years of experience required to the SVP range. This relatively simple calculation has caused practitioners and even certifying officers unimaginable difficulty.\textsuperscript{69} The rule is simple:

If the employer’s experience requirement is “at or below” the minimum of the SVP range, the NPWC enters “0.” There is no increase in the wage level.

If the employer’s experience requirement is above the minimum of the SVP range, but still in the low end of that range, the NPWC enters “1” on the worksheet.\textsuperscript{70}

If the employer’s experience requirement is in the high end of the SVP range, the NPWC enters “2.”

If the employer’s experience requirement exceeds the SVP range, the NPWC enters “3.” In this latter case, the maximum wage at level 4 likely will be assigned.\textsuperscript{71}

In determining where the experience requirement falls in the job zone range for step 2, do not count education as part of the years of preparation.\textsuperscript{72} Per the revised prevailing wage guidance, for the purpose of experience factor for wage analysis. BALCA set the CO straight in its excellent analysis and explained, “[T]he Guidance Letter explicitly states that educational requirements are not to be commingled with experiential requirements when conducting wage level analyses.” Id. at 7.

These instructions are not consistent with the check sheet provided as appendix B in the guidance. The check sheet provides, in contrast, that the NPWC should enter “1,” “2,” or “3” only if the years of experience in the job order are greater than O*NET’s usual requirements. Based on sample worksheets DOL has provided, however, we believe the check sheet instructions are not accurate and should be disregarded.

\textsuperscript{71} See \textit{Matter of Reed Elsevier, Inc.}, 2008-PER-00201 (Apr. 13, 2009). If the employer’s requirements exceed the O*NET requirements for the occupation, the employer must state this on the ETA 9089, item H.27, and be prepared to submit a business necessity letter if DOL audits the application. DOL has not clarified officially whether education takes up SVP time for the purpose of determining if job requirements are normal to the occupation. Education does not take up SVP time for the purpose of computing wage levels. The reference to H.27 is based on the version of the revised ETA 9089 that DOL sent to OMB in March 2008. See 73 Fed. Reg. 16912 (Mar. 31, 2008), AILA Doc. No. 08040330.

\textsuperscript{72} In an AILA-sponsored webcast held on May 3, 2005, the DOL spokesperson affirmed that education does not use any of the SVP years in the step 1 analysis. Further, no points are update added if the employer’s experience requirement is at the bottom of the SVP range. Thus, for jobs within job zone 4 (two to four years required), no points are added if the employer requires two years of experience. This, of course, contradicts the sample worksheet provided by DOL, in the webcast, DOL also said that only two points would be added for the occupation of specialty cook (SOC 35-2014) when the employer’s requirements exceeded the SVP range. This contradicts DOL’s prior written guidance saying that three points should be added where the employer’s requirements exceed the SVP range.

\textsuperscript{67} Although the prevailing wage guidance does not explain the meaning of SVP ranges, AILA liaison notes from January 2008 state that DOL apparently adjudicates applications based on the assumption that SVP 7.0 < 8.0 means SVP 7.0. See Report of DOL Stakeholder Liaison Meeting (Jan. 9, 2008), AILA Doc. No. 08011660. Thus, a job zone 4 occupation is limited to the SVP of 7, or, to put it another way, two to four years of training or experience. In the context of prevailing wage determinations, DOL’s position means that if an employer requires more than four years of experience for an occupation in job zone 4, it is likely that the NPWC will assign a level 4 wage determination. For example, if the employer requires a bachelor’s degree plus five years of experience, the amount of experience required would be greater than the high end of the SVP range of two to four years’ experience. Therefore, the NPWC could add three wage levels, which results in a level 4 wage determination. While centralized wage determinations by the NPWC were created by DOL to achieve consistency, AILA members have reported wide variations in wage determinations. Apparently, not all NPWC adjudicators will apply the levels rules mechanically. Some might look at the totality of the circumstances and decide that even if the occupation is matched to job zone 4, a job requiring a bachelor’s degree plus five years of experience could be matched to wage level 2, or level 3. However, if DOL were to interpret SVP 7.0 < 8.0 to include some jobs in SVP 8, where four to ten years of experience or training are permitted, requirements of a bachelor’s degree plus five years’ experience would not automatically result in a level 4 determination.

To date, DOL has consistently rejected arguments that SVP 7.0 < 8.0 means anything other than SVP 7.0. DOL’s interpretation of the SVP ranges also impacts when business necessity documentation is required. The topic of business necessity is covered in other articles in this book.

\textsuperscript{68} Specifically, if the experience requirement is SVP of 1, enter “0” in the wage level column; for SVP of 2, enter “1”; for SVP of 3, enter “2”; and for SVP of 4, enter “3.”

\textsuperscript{69} See \textit{Matter of Reed Elsevier, Inc.}, 2008 PER 00201 (BALCA Apr. 13, 2009). In this case the SWA and the certifying officer (CO) erroneously combined the employer’s education and experience requirements to come up with the
a level assignment in computing prevailing wage, education is viewed independently in step 3.

Consider the position of chief executive, SOC 11-1011. The job zone is 5 with an SVP of 8 (four to ten years). If an employer required a master’s degree and five years of experience, the NPWC would add only one point at step 2 because the five years of experience fall at the low end of the SVP range. The NPWC would not consider the degree as relevant in deciding where the employer’s experience requirement falls within the job zone or SVP range. The degree requirement and its impact on the prevailing wage are evaluated in the next step of the worksheet.

**Step 3: Complete the Education Section**

In step 3, the NPWC determines if the employer’s job offer requires a higher level of education or training than what is normally required for the occupation. This analysis begins with a determination whether or not the job is professional. Look to appendix D of the guidance (Professional Occupations Education and Training Categories). If the occupation does not appear on this list, it is a nonprofessional job. For nonprofessional jobs, the NPWC must refer to the education and training requirements as described in the O*NET job zone. The job zones speak in terms of what is “usually” required, what “most” occupations require, and what “may” be required. If the education or training is equal to or less than what most occupations require or usually require, the NPWC will make no entry. If the employer’s education or training is more than what most occupations require or usually require, the NPWC will enter “1” on the worksheet. If the education or training is higher than what some may require, the NPWC will enter “2” on the worksheet.

For professional jobs, the revised prevailing wage guidance directs the NPWC to appendix A to the supplementary information in the PERM regulation: Education and Training Categories [ETCs] by O*Net-SOC Occupation. This list also is published as appendix D to the revised prevailing wage guidance. The list categorizes professional occupations into one of five codes, ranging from bachelor’s degree to professional degrees. If the employer’s degree requirement is “equal to or less than” that indicated on the list, the NPWC enters “0.” There is no increase in the wage level.

If the education required by the employer exceeds the level of education on the list by one category, the NPWC enters “1” on the worksheet. If the employer’s educational requirement exceeds the level of education by more than one category, the NPWC enters “2” on the worksheet.

Consider the example of the financial analyst (SOC 13-2051), assuming that the employer requires a bachelor’s degree plus additional experience. This is a professional position assigned ETC code 5—a bachelor’s degree—on the list of professional occupations. In this case, then, no point would be added in the education step, because the employer’s requirement does not exceed that which is minimally required. If the employer required a master’s degree, however, the NPWC would add one point for within job zone 4, yet O*NET says the ETC code for each occupation is for a master’s degree.

Specifically, ETC code 5 is for a bachelor’s degree, ETC code 4 is for work experience plus a bachelor’s or higher degree, ETC code 3 is for a master’s degree, ETC code 2 is for a doctoral degree, and ETC code 1 is for a first professional degree. According to DOL, this list is the most comprehensive database of occupations that require a bachelor’s or higher degree as an entry requirement. 69 Fed. Reg. 77325, 77346 (Dec. 27, 2004). This list was developed by BLS, based on its analysis of occupations’ usual education and training requirements used to produce the *Occupational Outlook Handbook*. 67 Fed. Reg. 30465, 30471 (May 6, 2002), AILA Doc. No. 02050740 (proposed PERM rule). If the job is ETC code 5 and the employer requires a bachelor’s degree plus work experience, it is not necessary to add a point in step 3, because this step is only comparing the education required with the standard education for the occupation.

---

73 But see Revised Prevailing Wage Guidance, www.flcddatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf, suggesting that no points should be added for experience if the employer’s requirement is at, but not above, the low end of the SVP range. While there has been no clarification from DOL on this inconsistency, in practice the “at or below” rule seems to apply consistently.

74 Some SOC codes have changed since appendix D was published. If you know the previous code, look for that code on appendix D. This annotated table cross-references the SOC codes that have changed over the years, providing both the old and new codes. The Kurzban annotated table was omitted from the 16th edition – the most recent – only because O*NET was in an update transition at the time of publication.

75 The education requirements in the ETCs are not consistent with the job zones, leading to confusion regarding the normal educational and experience requirements for many occupations. O*NET’s description of job zone 4 says that most occupations in this zone require a bachelor’s degree, but some do not. However, there are a number of occupations, such as market research analyst (SOC 19-3021), that fall below the degree requirements for job zone 4.

76 Specifically, ETC code 5 is for a bachelor’s degree, ETC code 4 is for work experience plus a bachelor’s or higher degree, ETC code 3 is for a master’s degree, ETC code 2 is for a doctoral degree, and ETC code 1 is for a first professional degree. According to DOL, this list is the most comprehensive database of occupations that require a bachelor’s or higher degree as an entry requirement. 69 Fed. Reg. 77325, 77346 (Dec. 27, 2004). This list was developed by BLS, based on its analysis of occupations’ usual education and training requirements used to produce the *Occupational Outlook Handbook*. 67 Fed. Reg. 30465, 30471 (May 6, 2002), AILA Doc. No. 02050740 (proposed PERM rule). If the job is ETC code 5 and the employer requires a bachelor’s degree plus work experience, it is not necessary to add a point in step 3, because this step is only comparing the education required with the standard education for the occupation.

exceeding the minimum by one degree level. The DOL-provided sample worksheets provided at appendix A and appendix B to this article demonstrate this as well. For a chemical engineer, SOC 12-2041, the employer requires a master’s degree. The ETC code for this occupation, however, is 5, which indicates only a bachelor’s degree. DOL added one level point because the master’s exceeded the bachelor’s by one degree-level. By contrast, the employer recruiting for a special education elementary school teacher, SOC 25-2041, required a bachelor’s degree. The ETC code for this occupation is also 5 (bachelor’s degree). DOL did not add a level point because the degree requirement was equal to the usual education required for that occupation.

**Step 4: Complete the Special Skills and Other Requirements Section**

In step 4, the NPWC must review the employer’s job description and special requirements to identify the special skills and other requirements. If the employer’s requirements are not listed in the O*NET description of the tasks and skills required, then the NPWC enters “1” on the worksheet. You should advise your client to act sparingly in adding special skills that are not absolutely required to perform the job. The NPWC will make note of use of machines, equipment, tools, or computer software to determine if the employer’s requirements indicate the need for skills beyond an entry-level worker and justify a boost in the salary level. DOL recognizes that O*NET descriptions are generic and do not include specific skills needed for a particular job opportunity. A rule of reason should prevail. For example, two or three computer languages for a systems analyst should not add a point. However, if the employer requires six or seven languages, the employer should expect the NPWC to add a point for skills in excess of O*NET requirements.

Appendix A to this article is a DOL-provided sample worksheet for a chemical engineer. The employer required coursework in industrial application of acids and other caustic chemicals. These specific skills are not stated in the O*NET description for chemical engineer at SOC 17-2041, but DOL did not add a point for special skills, presumably because the knowledge gained from such coursework is inherently required to perform the job.

Another special skill that can increase the wage level is a foreign language. As a general rule, a foreign-language requirement will add a point. If the language is intrinsic to the job, however, no point is added. For occupations such as foreign-language teacher, interpreter, and caption writer, a foreign-language requirement is considered essential to perform the job and does not raise the level. For other occupations, such as a marketing manager, a foreign-language skill likely will require an increase in wage level. However, the revised prevailing wage guidance clarified that there may be circumstances in which a foreign language is required for the job, but no points should be added if the foreign language requirement does not sufficiently increase the seniority or complexity of the position.

**Practice Pointer:** If the position involves working in a Latin American territory, for example, you should argue that the foreign language is necessary and intrinsic to performing the job. If a foreign language is in fact necessary, DOL has advised that the language requirement be listed in the “Special Requirements” section of Form 9141.

Travel requirements that are greater than minimal domestic travel will likely trigger a level increase, too, depending on the nature of the occupation. DOL has been reticent on its standards for adding a level point when travel is required. What is clear is that international travel will almost always trigger a travel requirement and therefore should be listed on Form 9141, Form 9089, Notice of Filing, and all recruitment advertisements. (Hereinafter these multiple listings are referred to as “all PERM places.”) Based on practitioner experience and reports, we recommend the following considerations:

- If domestic travel is incidental or inherent to the position, for not more than excess of O*NET requirements.

---

79 Review all the descriptive listings included in the O*NET Summary Report. Of particular importance are the tasks, technology skills, knowledge, (general work) skills, abilities, work activities, and detailed work activities. Also, be sure to expand each category for the full description.

78 It is a mistake to assume that any requirement that is not normal to the occupation will result in a wage level bump. *Matter of ETH Cargo Services*, 2013-PWD-00001 (Aug. 19, 2014).

80 Revised Prevailing Wage Guidance, available at www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. DOL advised that employers should be clear in describing the job duties and requirements of the position so that the analyst knows when to classify the position as a foreign language teaching role, in which case a level would not be added to the wage determination. See Minutes from DOL Stakeholders Meeting (Apr. 15, 2015) AILA Doc. No. 15052805.
several days a few times a year, or occupying only 1% of the employee’s time, travel does not have to be cited on Form 9141.

- If the travel requirement is intermittent or little, up to 60 days a year or 24% of the time, it should be listed on all PERM places noted above. Intermittent travel probably will not trigger a level increase, however, if travel is considered normal to the occupation. If travel is not normal, intermittent travel likely will trigger a level increase.

- If the travel is limited, occurring weekly or occupying the employee 25% to 49% of the time, such travel will trigger a level increase and must be listed on all PERM places noted above.

- “Some” travel—that is, travel that occurs two to three weeks a month or occupies 50% to 79% of the employee’s time—must be listed on all PERM places noted above. This travel will most definitely trigger a level increase.

- If the travel is extensive, it too must be listed in all PERM places and will trigger a level increase.

- If the travel is international, no matter to what extent required, it must be listed in all PERM places and will trigger a level increase.

The above percentages are found in an internal DOL training document entitled “Travel Explanation.” The document does not explain when a point will be assigned, however. For a fuller discussion and guidance on this sticky factor, see the AILA DOL Practice Alert: PERM Travel Bug Advisory. Expect that DOL will err on the side of issuing a higher wage when travel is implicated. Further, a DOL training document explains the different types of travel, the Application for Prevailing Wage, Form 9141, specifically asks the employer to answer whether travel is required and, if so, to explain the travel requirement. You might also add an explanation of the travel at box H.14 on Form 9089.

The DOL guidance addresses licensure and certification requirements in this step as well. When a license or certificate is required by state law or a similar regulatory procedure, the employer’s requirement would not add a level point to the wage. For example, an extra point is not required for licensure in occupations such as attorney or teacher, because licenses are standard requirements in these occupations. The DOL-provided sample worksheet at appendix B demonstrates this point. The license requirement for a special education elementary teacher did not trigger a level increase because teacher licensure is required by state law. If, however, the employer insists on an occupational license or certification that is not required by national or state law, the NPWC will evaluate whether the occupational license requirement takes the position to a more experienced level and therefore warrants the addition of a point.

**Step 5: Complete Supervisory Duties Section**

Supervisory duties may require an increase in the wage level. If, however, supervision is a customary duty of the O*NET occupation, no adjustment is required. To determine if supervisory duties are generally required to perform the job, review the O*NET summary report. For example, the O*NET summary report for nutritionist (SOC 29-1031) says that a nutritionist may supervise activities of a department. Therefore, supervision can be deemed a customary duty for a nutritionist. If the occupation is classified as a management occupation, SOC 11-0000, supervisory duties will not require a boost in the salary level. Likewise, the SOC classifies supervisors of production, service, and sales workers in categories that inherently involve supervisory duties, so these occupations would not require a point for supervision.

Note that Form 9141 makes a distinction between peer supervision and subordinate supervision. Even if

Id. at 5. It took many practitioners by surprise when DOL began implementing its “long-standing policy” as recently as the summer of 2010.

**Nonexperience requirements, such as licensure and certifications, should also be disclosed at the very end of Section K on Form 9089.** Exactly how to do this is addressed elsewhere in this publication.

---

81 AILA Doc. No. 18010230, supra, n. 1.
82 Rose and Ware, “DOL Practice Alert: PERM Travel Bug Advisory,” AILA Doc. No. 14040745. While the advice contained in this advisory is unofficial, the guidance has proved to be accurate and useful.
83 See Minutes from DOL Stakeholders Meeting of Oct. 28, 2010, AILA Doc. No. 10111762. DOL announced its “long-standing practice of viewing travel as a special requirement.”
supervision is inherent in the occupation, the nature of the supervision can trigger a level point. An example of peer supervision, DOL explained, is a manager who supervises other managers; this could trigger a level point. Subordinate supervision that is inherent in the position will not, however.85

A potential problem lies with certain supervisors of professional and technical workers, however. Some are classified in the SOC with the workers they supervise, so that the listed job duties do not inherently include supervision. For these positions, employers might need to pay salaries at the higher levels.

**Practice Pointer:** Provide NPWC with information about the nature and scope of supervision. Rather than leave it up to the imagination of the analyst, include the job titles of the workers to be supervised and explain the type of work and duties to be supervised.

**Final Step: Total the Points**

After completing all the steps, the NPWC adds the number of points. The total generally will be the wage level the NPWC will assign.86 However, DOL did state in an FAQ dated August 5, 2005, that the “step-by-step process provided in the guidance is not intended to be an automatic process. The wage level assigned to a prevailing wage request should be commensurate with the wage level definitions.” 87

Thus, the practitioner should pay particular attention to the language of the job duties as well as the mathematical calculation of the worksheet. Together, these two techniques involving qualitative and quantitative factors will help you determine the wage in advance so that you can properly advise your client on what to expect.

**FINDING THE RIGHT WAGE LEVEL WHEN THE EMPLOYER SPECIFIES ALTERNATIVE JOB REQUIREMENTS**

Employers may state alternative job requirements in a PERM application. If Form 9089 has alternative requirements, the prevailing wage request on Form 9141 must also list the same alternative requirements. The alternative requirements should be listed in the Special Requirements block E.b.5 or the Job Duties block at E.a.5. Although the DOL guidance notes that alternative experience requirements must be substantially equivalent to the primary requirements, common alternative requirements will not always produce the same wage level. For example, consider the alternative requirements of a master’s degree plus three years of work experience or a bachelor’s degree plus five years of work experience for an occupation in job zone 4.88 It is feasible that the master’s plus three years could result in a wage at level 3, and the bachelor’s plus five years would produce a wage at level 4.

May the employer specify the requirements with the lower wage level as the primary requirement when the beneficiary only qualifies for the job under the alternative requirement? On the one hand, a master’s degree plus three years is often considered to be the primary requirement, especially in light of the fact that a bachelor’s degree plus five years of experience is the equivalent of a master’s degree under the EB-2 regulations. However, DOL’s FAQ did not specify which set of requirements should be listed as the primary set. It will issue the wage determination based on the set of requirements in the Minimum Requirements section of Form 9141 (Block E.b.) If the employer seeks a prevailing wage determination for each of the alternative requirements, BALCA holds that the employer must offer the higher wage if the two wages in the determinations are different.89 However, the regulations and guidance do not require employers to obtain prevailing wage determinations for each of the alternative requirements.

---

85 AILA Notes from the U.S. Department of Labor OFLC Quarterly Stakeholder Meeting (Oct. 20, 2015), AILA Doc. 15112536.

86 If the sum is greater than 4, the wage level will be level 4. See Revised Prevailing Wage Guidance, available at www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf, at appendix A.


FINDING THE RIGHT LOCATION FOR THE ROVING EMPLOYEE

The prevailing wage must be based on the place of intended employment, but not all employees work out of fixed work locations. In general, the place of employment (and the prevailing wage determination) can be the location of company headquarters in the following circumstances: when the employee works out of company headquarters but is assigned to work at various unanticipated places around the country; when the employee is a telecommuter but uses company headquarters as his or her base; or (stated in a different way) when the employee is based out of company headquarters but can live wherever he or she chooses.

A variant of this scenario occurs when the employee roves to multiple unknown locations, but the locations are concentrated in a specific geographic area that is wider than an MSA. For example, suppose the company headquarters is in Los Angeles, but the employee is based in the Boston regional office and assigned to client locations within the New England territory. Under these circumstances, it would seem reasonable to recruit from the Boston regional office and indicate Boston as the area of intended employment. The fact that the employee is roving should definitely be disclosed on Form 9141, Form 9089, and the recruitment.

If there are multiple known locations, that is a different matter. Please note that the current prevailing wage form has space for 200 work locations. If the worksite locations for a roving employee are known, they could all be listed on the prevailing wage form. It is not necessary to include specific addresses for additional worksites; the city and county (or the MSA) are sufficient. Per its FAQ, DOL will issue a prevailing wage for each worksite listed. If, however, the company requires the employee to work from home in a region other than company headquarters, then the worksite becomes the employee’s home address. The prevailing wage and the recruitment (except for the posted notice) would take place where the employee resides.90 However, the fact that the worksite and the employee’s home address are the same may lead to an audit.

Traveling employees, as distinct from roving employees, are discussed above. Travel that is more than de minimus is likely to result in a wage level bump.

USING THE RIGHT FORM AND PROCEDURES

Since obtaining a prevailing wage determination is an absolute prerequisite to filing the labor certification application, it should be high on your list of things to do.91 As discussed above, a recommended practice is to obtain a workable prevailing wage determination first, before initiating recruitment.

An employer obtains a prevailing wage determination by submitting an Application for Prevailing Wage Determination, Form 9141, to the NPWC. DOL strongly encourages users to submit the form electronically via DOL’s online iCERT portal, although the agency will still accept mail-in applications.

Form 9141 comes with detailed instructions92 and DOL has provided additional guidance in FAQs93 and through liaison.94 Notable points in filling out Form 9141 include:

90 See Minutes from the DOL Stakeholders Meeting (Mar. 15, 2007), AILA Doc. No. 07041264. These minutes state that the prevailing wage and recruitment also can take place at company headquarters when the employer requires the employee to work from home at a location other than the company headquarters.
91 In Matter of David W. Jackson, 2008-PER-00192 (Apr. 9, 2009), BALCA summarily rejected the employer’s claim that it could proceed without a PWD because the SWA did not respond to its request for a PWD. See also King’s Garden Chinese Restaurant Inc., 2008-PER-00228 (Apr. 13, 2008).
92 The instructions to Form 9141 may be found at www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9141_General_Instructions.pdf.
93 DOL FAQs on prevailing wages have been updated several times since January 2010. The current set of FAQs is posted in a separate wage section of PERM website at: www.foreignlaborcert.doleta.gov/faqanswers.cfm#prevailingwage. One FAQ notes common user errors. These include failure to specify the job duties or place of employment. In addition, the FAQ points out that the requestor must specify the nature of degree when Form 9141 says that an “other” degree is required.
94 Liaison minutes that include prevailing wage questions regarding Form 9141 include: Notes from DOL Stakeholders Meeting (Dec. 12, 2013), AILA Doc. No. 14011449; Unofficial Notes from Office of Foreign Labor Certification Stakeholder Teleconference (Feb. 10, 2011), AILA Doc. No. 11021834, and Notes from DOL Stakeholders Telephone Conference (June 22, 2010), AILA Doc. No. 10062462. See also AILA Doc. No. 13061841, announcing that DOL published a new version of Form 9141.
• Fields marked with an asterisk (*) are mandatory and must be completed; fields marked with a section symbol ($) must be completed if the previous question was answered in the affirmative or as specified in the marked question.

• The requestor must specify which visa classification the PWD will support, i.e., PERM, H-1B, H-1B1, or one of the temporary programs. However, DOL has clarified that a PWD issued for an H-1B may also be used for a PERM provided it is for the same job opportunity.95

A requestor need not enter an e-mail address. However, submitting the form electronically and providing your e-mail address to DOL results in better service. A requestor will receive acknowledgment of the filing via e-mail. And the NPWC will e-mail an electronic copy of the PWD to the requestor.

• In entering the address of the requestor and the employer, Form 9141 provides a field for “province,” indicating that either the employer or the person requesting the PWD could have an address outside the United States. The place of employment, however, must be a U.S. address.

• Form 9141 includes fields that are not present on the current version of Form 9089. For example, Form 9141 asks whether the position supervises other employees, whether travel is required, whether the employer requires a second U.S. diploma/degree, and if work will be performed in multiple locations. None of these questions are asked in Form 9089. The employer may (and should) include information about these aspects of the job requirements in the text field of H.14 of Form 9089, to ensure consistency between the prevailing wage request and the PERM application itself. If Form 9141 indicates multiple MSAs, a DOL FAQ says that the prevailing wage determination will include wages for all of the MSAs listed. The employer must meet the highest of multiple PWD amounts.

• The requirements for the job (education, training, employment experience, and special skills) must match the requirements that are later stated on Form 9089. The PERM will be denied if the employer fails to state its experience or other requirements in Form 9141.96 Understating the requirements on Form 9141 is likely to lead to a prevailing wage that is too low for the actual requirements.

• Section E.a.5 of Form 9141 is a large text field that provides space for the employer to explain or list special requirements that do not fit in the field for special requirements. All information that the analyst needs to make a prevailing wage determination must be on the ETA Form 9141, (except for other documentation that is the basis for the wage, such as private surveys). Additional documents, such as separate memoranda and legal arguments, will not be considered.97 Section E.a.5 can also be used to provide other information, such as a request to use a published wage survey in lieu of the OES wage survey. However, the current version of Form 9141 also asks at section D.4 whether the employer is requesting a survey and if so, the survey name and date of publication.

• If an employer is filing a prevailing wage for a position that is identical to that in a prior prevailing wage determination, the employer may make a note in Section E.a.5 referencing the prior determination case number and noting that the positions are identical. This should help ensure consistency.98

DOL’s prevailing wage FAQs provide detailed instructions for how to rely on surveys other than OES. First, in the large text block on Form 9141 for description of job duties, the employer should reference the wage source it wants to use by name, edition,99 revision, and publication date. If the alternative source is the Service Contract Act or Davis Bacon Act, no additional documentation needs to be submitted. If you are relying on a collective bargaining contract, submit a copy of the relevant portion as well as letters from the employer and the union citing the relevant section of the contract, job title, and appropriate wage. If you wish to rely on an

95 Notes from DOL Stakeholders Telephone Conference (June 22, 2010), AILA Doc. No. 10062462.
97 AILA Notes from the U.S. Department of Labor OFLC Quarterly Stakeholder Meeting (May 24, 2016), AILA Doc. No. 16062232.
98 U.S. DOL OFLC Quarterly Stakeholder Meeting (Dec. 6, 2016), AILA Doc. No. 16122301.
99 Note that Form 9141 is used to support wage determinations for H-2B, H-1B, H-1B1 Chile, H-1B1 Singapore, and E-3 visa petitions and applications as well as for PERM applications. Some of the extraneous data is needed to collect the data needed for these programs.
ACWIA wage, Form 9141 should include a statement that the employer is an institution of higher education or associated research entity (or is otherwise entitled to rely on ACWIA wages). Finally, the FAQ includes details as to what documentation to submit to support reliance on a private survey. This information includes the survey name, its publication schedule, when the data was collected, the job duties of the surveyed job, the methodology used, the geographic area, a list of employer participants, whether the wage is mean or median, and the sample size, among others. It is wise to refer to the FAQ on use of published surveys before seeking to rely on such a survey.

Note that the request to rely on a survey other than OES must be included in the initial 9141 filing. If Form 9141 is submitted without a request to rely on non-OES wages, and the employer wants to use an alternative source, it needs to submit a new Form 9141.

The information provided on the form cannot be changed after Form 9141 is submitted. However, the form may be withdraw electronically after it has been submitted electronically. Errors and omissions may be corrected on a new Form 91441 and submitted anew to DOL. Before submitting a second prevailing wage request, it makes sense to reevaluate the job opportunity with the employer and see if it is appropriate to redefine the position. For example, the employer might be willing to decrease the education requirements or increase the amount of supervision the worker will receive. These factors directly affect the level determination and can result in a lower prevailing wage.

The NPWC will void and return an incomplete Form 9141. However, if the NPWC needs clarification about the meaning of an entry on the form, it may e-mail a request for more information (RFI) to the party seeking the PWD. The NPWC will allow seven days to respond.

**PWD Form Validity Date**

Once you receive the PWD you should check the validity of the determination. The regulation at 20 CFR §656.40(c) authorizes a validity period of 90 days to one year. If the determination is issued between the start of July and the end of March of the following year, the PWD should be valid to the next June 30. If the PWD is issued between April 1 and June 30 of the same year, it should be valid for 90 days only. DOL limits the validity period of springtime PWDs because OES wage data are updated every year on July 1.

The validity date is very important. The regulation at 20 CFR §656.40(c) provides the timeframe during which the employer must file the application or begin recruitment. The employer must begin recruitment or file the application within the validity period of the PWD. Practitioners should be aware that placing the SWA job order triggers commencement of the recruitment period, as does placing a newspaper advertisement. However, the Notice of Filing is not a form recruitment, and therefore posting it does not trigger the recruitment period.

Since recruitment must take place within 180 days of filing the application, and often can take up to 180 days, the employer can elect to begin recruitment prior to obtaining the prevailing wage determination. However, if the employer starts its recruitment before obtaining the PWD, Form 9089 must be filed prior to the PWD expiration date.

---


101 See discussion, supra, regarding finding the right job classification.

102 Minutes of DOL Stakeholders Telephone Conference (Mar. 25, 2010), AILA Doc. No. 10040533. For a time, the NPWC was asking employers to identify the occupations of employees who report to the position and pasting the employer’s response onto the final PWD. See Notes of OFLC Stakeholders Meeting, Apr. 11, 2013, AILA Doc. No. 13052441.

103 Failure to specify the exact end date of the PWD on Form 9089, or listing dates that are less than 90 days or more than one year will lead to denial. Matter of Guilbert Tex., Inc., 2012-PER-00292 (Oct. 14, 2015); Matter of Simona Luca Vricella, 2012-PER-00373 (Sept. 29, 2015); Matter of Heung K. Choe d/b/a Sengyo, 2008-PER-00145 (Jan. 5, 2009). These decisions should impel you to require a second pair of eyes to review each 9089 before filing, or at least to wait 24 hours and do a second review yourself, just to make sure you avoid filing applications with correctable, but fatal, errors!

104 After amendment in 2009, the regulation stated that “[t]o use a SWA PWD, employers must file their applications or begin the recruitment required by [20 CFR] §§656.17(e) or 656.21 within the validity period specified by the SWA.” The regulation at 20 CFR §656.17(e) refers to prefilling procedures and the regulation at §656.21 refers to supervised recruitment. 20 CFR §656.40(c).

105 Advertising and recruitment must be completed within 180 days of the filing of the labor certification application. 20 CFR §656.17(e)(1)(i).

---
In Matter of Karl Storz Endoscopy, BALCA resolved a prior inconsistency in its rulings on this point. BALCA has now confirmed that an employer begins recruitment when it takes the first recruitment step. Therefore, when the first recruitment step starts before the PWD is issued, and the PERM is filed after the PWD has expired, the PERM must be denied. It is not "safe" to rely on an expired PWD when some of the recruitment pre-dates the PWD’s issuance.

If the employer awaits issuance of the PWD, a different rule applies. In that case, the employer must commence recruitment within the validity period and complete recruitment within 180 days of placing the first advertisement of the job order. None of the recruitment steps require listing the salary offered. However, the practitioner should alert clients that conducting recruitment without knowing the prevailing wage involves some risk. For example, many applicants will refuse job offers below a specified minimum salary; others will ask about the wage. If the wage is not acceptable to the job applicant, the applicant will decline the employer’s job offer. If the employer cannot articulate the offered wage at the interview, it cannot provide the applicant with an opportunity to decline. Without firm knowledge of the applicable prevailing wage, the employer has to project or anticipate. If the projection is wrong and the employer does not offer the proper wage, the employer might have to begin the recruitment process anew. If, however, you follow the suggestion in this article about using the DOL worksheet, and do the “right” analysis, you should be able to advise the employer with some confidence and reliability as to what the prevailing wage will be. This in turns should allow the employer to reasonably articulate to an applicant an offered wage.

Practice Pointer: If the offered wage on Form 9089 exceeds the prevailing wage, the employer must state that higher, offered wage in the Notice of Filing. If the employer chooses to include the offered wage in any of the advertisements, the higher, offered wage must also be stated in the advertisements. In other words, the employer may not offer only the prevailing wage if it is lower than the wage being offered to the foreign national.

The Notice of Filing requires listing a salary or salary range, which must meet or exceed the prevailing wage. This point can lead to timing issues when the PERM is initiated in the spring of the year while prevailing wage determinations are valid for only 90 days. Suppose the employer posts the Notice of Filing with a salary range that encompasses the foreign national’s salary before knowing what the prevailing wage determination will be. If the DOL issues a 90-day prevailing wage that is higher than the lower end of the Notice of Filing, the Notice of Filing cannot be used. The employer must act promptly (within 45 days) to repost the Notice of Filing using a higher salary that meets the prevailing wage—or the prevailing wage determination could expire before it can be used to support the PERM filing. At the same time, employers may wish to “lock in” this year’s prevailing wage at last year’s level if it seems likely that wages will increase on July 1. If the employer does not initiate recruitment until after receiving the prevailing wage determination, the determination may be used after its expiration date and this timing issue is avoided.

Arguing for the Right Wage Determination
—Creating an Appeal Record

Assume you receive a PWD, but it is not within the employer’s salary range. If you believe the wage is incorrect for any reason, you may seek its correction.

---

107 Id. BALCA refers to the “recruitment period” as the six months prior to filing. Be sure, however, to double check whether that six-month period is within 180 days.
108 The offered salary (or salary range) only has to appear in two places: the Notice of Filing and at section G of Form 9089. Furthermore, those entries must match.
109 See Matter of Classic Cruise & Travel, 1999 INA 197 (BALCA June 28, 1999). The employer cannot reject an applicant merely because the applicant stated he or she wanted a higher salary. If an applicant is qualified and available, the employer must make an offer and allow the U.S. worker to reject the job offer on the basis that the salary was not sufficient. Key to this notion is that the applicant takes the action of withdrawing. Once the applicant declines the position, the employer can consider the application withdrawn.
110 We reiterate this is some risk if the wage analysis if not correct.
There are several methods to seek correction of a prevailing wage determination with the NPWC. First, if the PWD has a clear government error, you may submit a correction request via e-mail to flc.pwd@dol.gov. Examples of obvious errors might include a validity period of less than 90 days or an OES wage where the salary amount in box F.4 matches a different level than the wage level checked by the NPWC in box F.4a of the PWD. If the salary is correct for level 4, but the wage level checked is level 1, this is an obvious mistake by DOL.

A second method of correcting what you perceive to be an error on the PWD is to seek a redetermination. The iCERT portal has a redetermination button that allows you to pull up any certified ETA 9141 and request a redetermination. You are allowed 1000 characters to specify the reason and explanation as to why the determination is wrong. This is sufficient space to provide a cogent factual explanation of what is wrong with the result and why a different wage is correct.

For example, if the DOL matched the job to the wrong SOC code, a redetermination request would be a good method of making your argument as to why a different SOC code is a better match. The redetermination button can also be used to advocate the reasons why the assigned wage level is too high. In addition to filling out an explanation of why the determination was wrong, the employer may submit additional documentation to provide any supplemental information via e-mail to FLC.PWD@dol.gov. The request for redetermination should be submitted within 30 days of the issuance of the PWD.

When seeking a redetermination, be sure to identify the legal issue that serves as a basis for your position. Further, be sure to add any factual documentation material to the record when you seek redetermination. For example, if the issue is the level assignment, you could include an affidavit from the company human resources director or from an industry expert explaining the various levels of the specific occupation and why the position in question is a level 3 and not a level 4. You might also include the employer’s various job descriptions and wage structures that differentiate the internal levels within the company. Subsequent levels of review will not consider factual material not already in the record, so the request for redetermination is the one opportunity for the employer to submit additional evidence.

Normally, employers would make prevailing wage challenges only if they found the DOL determination to be too high. But some employers may not want to take advantage of a wage level that any neutral observer would agree is too low. We have heard of at least one PERM application that was denied without audit because DOL found that the prevailing wage and level stated in Form 9089 was too low for the job requirements stated in Section H of the 9089. The employer requested reconsideration in the government error queue and submitted the low PWD in support, ultimately winning approval of the PERM. While we do not see this as a trend, an employer might consider requesting correction or confirmation of an unreasonably low prevailing wage determination up front, rather than risking a denial and delay on such a trivial issue.

If the employer still disagrees with the wage after the redetermination, it has the option to seek review by the Prevailing Wage Center Director per 20 CFR §656.41(d)(2) within 30 days of the determination. Review at this stage is solely on the record. Like a redetermination, you go to the iCert portal to lodge your request for review (appeal). Click on the Center Director Review Request button.

There is no specified format for the appeal, but a safe method is to lodge the appeal by way of a short letter or pleading (appeal document). The FAQs provide the address to which the appeal should be sent. The appeal should identify the PW tracking number of the PWD being appealed and must explain the basis for the appeal.

The NPWC will add any supplemental materials that the employer might have omitted. The NPWC also will include all materials it used in making its determination. The Center director can only consider materials that were used to make the determination. Because the regulations do not provide the employer an opportunity to respond to the materials submitted by the NPWC, the practitioner should request copies

---

\[112\] 20 CFR § 656.40(h). See also DOL FAQs on PERM Appeals Director Best Practices. Go to: https://www.foreignlaborcert.dol.gov/faqsanswers.cfm?faqid=254.

\[113\] 20 CFR §656.41(d). See also DOL FAQs. In these FAQs, DOL reviews the appeal procedure. The FAQs do not contain any information that varies from the regulation.
of the resources the NPWC used in making its determination. This should be explored early on, when you are taking your “one bite at the apple.” In other words, anticipate an appeal and submit any pertinent supplemental materials at the redetermination stage.

There is no time frame in which the Prevailing Wage Center director must complete the review.\textsuperscript{114} The certifying officer has two options: affirm or modify. But if the certifying officer’s determination remains unfavorable, you can appeal that decision to BALCA.\textsuperscript{115}

**BALCA Review**

An appeal of the decision of the certifying officer can be made to BALCA within 30 days.\textsuperscript{116} Here is where the more formal process begins. Only legal arguments and documentation that are part of the record at the NPWC will be considered by BALCA.\textsuperscript{117} This again brings attention to the point that the practitioner needs to establish its prevailing wage appeal record at an early stage—that is, at the time of the request for redetermination.

The request for review by BALCA must be in writing and directed to the address specified in the FAQ. An accepted practice is to use a pleading format. The Prevailing Wage Center director then will assemble the appeal record and submit the file to BALCA, which will handle the appeal according to its normal appeal procedures.\textsuperscript{118}

It is well established that the standard of review for appeals of prevailing wage determinations is whether the Center Director abused his discretion. Thus, the Center Director’s determination will be upheld unless it is inconsistent with the regulations or the decision does not constitute a reasonable exercise of discretion.\textsuperscript{119}

Prevailing wage appeals involve risk. Wages have a tendency to rise over time. If the appellant loses after one or more layers of review, the original PWD is likely to have expired. A new PWD may show a sizable wage increase; wage increases as high as $10,000 have been reported from one survey to the next.

**Practice Pointer:** Appeals to BALCA are important and should not necessarily be avoided. BALCA decisions often help to form better DOL policies. But there might be times when an employer cannot endure the prolonged appeal process. In that instance, rather than lodging a formal BALCA appeal, consider having the employer analyze whether the job duties and requirements can be reformulated so that a new prevailing wage request could be filed. In the alternative, if the first prevailing wage determination has expired, you might also consider filing an exact copy of the previous request. A fresh look at the request by a different analyst might yield a different result. However, if there are multiple valid and unexpired PWDs for the same position, the employer should use the PWD with the highest wage.\textsuperscript{120}

**Using the Right PWD in an Audit Response**

After the PERM has been filed, DOL may audit the application and request, among other documents, a copy of the prevailing wage determination. A reading of the regulations should make it obvious that the employer’s audit file must contain a complete and properly endorsed PWD that was issued before the PERM was filed. In case there was any doubt, BALCA has rejected arguments seeking acceptance of PWDs issued after the PERM was filed.\textsuperscript{121} Further, the data on Form 9089 must be consistent with the PWD. BALCA denied certification after audit when the SOC code listed in Form 9089 was different than the job code listed in the PWD.\textsuperscript{122} However, when an

\textsuperscript{114} Since the timeframe within which the government must act remains open, the practitioner might want to submit a new, amended PWD request form while the review process is ongoing.

\textsuperscript{115} 20 CFR §656.41(d). However, the appeal to BALCA must be filed with the National Prevailing Wage Center Director, not to BALCA directly. Matter of University of Michigan, 2015-PWD-00006 (Nov. 18, 2015).

\textsuperscript{116} Id.

\textsuperscript{117} 20 CFR §656.41(d)(1).

\textsuperscript{118} BALCA appeal procedures are found at 20 CFR §§656.26 and 656.27. BALCA prevailing wage decisions are available at www.oalj.dol.gov, and they are numbered XXXX-PWD-XXXX.

\textsuperscript{119} E.g., Matter of CSID, 2015-PWD-00009 (Nov. 18, 2015); Matter of Emory University, 2011-PWD-1 (Feb. 27, 2012).

\textsuperscript{120} See, e.g., Matter of Take Solutions, Inc., 2010-PER-00907 (April 28, 2011).

\textsuperscript{121} E.g., Matter of Apollo Consulting Services Corporation, 2010-PER-00280 (Jan. 11, 2011).

\textsuperscript{122} Matter of J & R Technical Services, 2010-PER-00074 (July 20, 2010). Although the employer entered the wrong SOC code on Form 9089, the employer entered the correct wage, as determined by the SWA, on Form 9089. Since the SOC code itself is not part of the recruitment, it is hard to understand why a discrepancy in the SOC code would impact the validity
addendum to the PWD was omitted from the audit response due to an inadvertent clerical error and the audit response was otherwise complete, BALCA vacated the denial, finding that the certifying officer abused his discretion in refusing to reconsider the denial.\footnote{Matter of Washington Hospital Center, 2010-PER-00720 (May 13, 2011).}

**CONCLUSION**

Finding the right prevailing wage continues to be a complex component of labor certification practice. Wage sources, wage matches, and wage levels plague the practitioner with a host of options and ambiguities. Although the process seems to have settled in place, the guidance provided by DOL is often contradictory, and policy changes are unending. No doubt, getting the “right” wage will continue to challenge the practitioner. The techniques and methods described in this article will certainly point you in the right direction.
## Appendix A
(AILA Doc. No. 05040763)

### Worksheet for Use in Determining OES Wage Level

**Employer’s Job Title:** Chemical Engineer  
**O*NET Title:** Chemical Engineer  
**O*NET Code:** 17-2041.00

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Job Offer Requirements</th>
<th>O*NET-Usual Requirements</th>
<th>Comments</th>
<th>Wage Level</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Step 1. Requirements</strong></td>
<td>Chemical Engineer, Atlanta, Georgia - Another example is an industrial manufacturing company in Atlanta, Georgia that wants to hire a Chemical Engineer, with the job requiring a Master's degree and no experience, but where the job does requires coursework in the industrial applications of acids and other caustic chemicals.</td>
<td>See Custom Report from O*NET OnLine listed below</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td><strong>Step 2. Experience</strong></td>
<td>no experience</td>
<td>Job Zone 5 — ...many require more than 5 years of experience, SVP 8 – over 4 years and up to 8</td>
<td>Well below range described</td>
<td>0</td>
</tr>
<tr>
<td><strong>Step 3. Education</strong></td>
<td>Master's degree – coursework in the industrial applications of acids and other caustic chemicals</td>
<td>Coursework is within the O*NET Knowledge area of chemical composition, structure, and properties of substances</td>
<td>Professional Occupation Category 5 bachelor's usually required – add 1 point because of master's degree requirement</td>
<td>1</td>
</tr>
<tr>
<td><strong>Step 4. Special Skills</strong></td>
<td>None noted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Step 5. Licensure/ Certification</strong></td>
<td>None noted</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Step 6. Supervision</strong></td>
<td>None noted</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*SUM: 2*
## Appendix B
(AILA Doc. No. 05040763)

Worksheet for Use in Determining OES Wage Level

**Employer’s Job Title:** Special Education Elementary School Teacher  
**O*NET Title:** Special Education Teachers, Preschool, Kindergarten, and Elementary School  
**O*NET Code:** 25-2041.00

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Job Offer Requirements</th>
<th>O*NET-Usual Requirements</th>
<th>Comments</th>
<th>Wage Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1.</td>
<td>Special Education Elementary School Teacher – New York, New York – Another example is a private school in New York, New York specializing in teaching children with learning disabilities that wants to hire a teacher, with the job requiring a Bachelor’s degree in education and certification to teach in the State of New York and to provide special needs education.</td>
<td>See Custom Report from O*NET OnLine listed below</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Step 2.</td>
<td>None mentioned</td>
<td>None noted</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Step 3.</td>
<td>Bachelor’s degree in education</td>
<td>Professional occupation category 5 – BA required No points</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Step 4.        | Special Skills, certification to teach in the State of New York and to provide special needs education | Reference [www.acnet.org License Finder](https://www.acnet.org)  
NY Teacher licensure and certification required by state law. | NY law requires teacher certification/licensure no points                              |            |
| Step 6.        | Supervision                                                                            | None noted                                                                               |                                                          |            |

**SUM:** 1