U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 November 2015

BALCA Case No.: 2015-PWD-00006
ETA Case No.: P-200-14213-870957

In the Matter of:

UNIVERSITY OF MICHIGAN,
Employer

Center Director: William K. Rabung
National Prevailing Wage Center

Appearances: David Muusz
Assistant Director
Faculty and Staff Immigration Services
International Center
University of Michigan
For the Employer

Juan C. Lopez, Esquire
Office of the Solicitor
Division of Employment and Training Legal Services
For the Center Director

Before: Stephen R. Henley, *Chief Administrative Law Judge*; Morris D. Davis and Larry S. Merck, *Administrative Law Judges*

DECISION AND ORDER OVERRULING PREVAILING WAGE DETERMINATION

PER CURIAM. This matter arises from the Employer's appeal, pursuant to 20 C.F.R. § 656.41, of the Employment and Training Administration, Office of Foreign Labor Certification, National Prevailing Wage Center's ("NPWC") prevailing wage determination for the position of "Senior Associate Regulatory Analyst" in Ann Arbor, Michigan.

BACKGROUND

Procedural Background

The Employer filed an *Application for Prevailing Wage Determination* (ETA Form 9141) in connection with its efforts to hire an H-1B worker. (AF 27-31).[1] The Employer noted on the Form 9141 that it was an institution covered by the American Competitiveness and Workforce Improvement Act ("ACWIA").[2] (AF 27). The Employer indicated the job opportunity corresponded with the SOC/O*Net code for "Compliance Officers," but requested that the Certifying Officer ("CO") use an EduComp wage survey to calculate the prevailing wage instead of the OES data for Compliance Officers. (AF 28). The survey provided by the Employer contained wage data from several universities for the position of "Institutional Review Board Specialist" and listed an average annual salary of $57,428.00. (AF 37-91).

The CO rejected the Employer's wage survey for reasons not relevant to this appeal and relied on the OES data for "Compliance Officers" to issue a prevailing wage determination ("PWD") of $95,534.00. (AF 30). The Employer filed a redetermination request that addressed each of the CO's reasons for rejecting the wage survey. (AF 15-36). In response, the CO issued a Request for Information, which outlined the following deficiency:

> The survey documentation provided by the employer does not provide a representation of wages for substantially comparable jobs in the occupational category as the data was not collected across the various industries in the area of intended employment. The provided survey sample limits the nature of employers to institutions of higher education within the expansions of the area of intended employment. Limiting the sample to a particular segment of the labor market does not meet the Departmental regulations at 20 CFR 655.731 or 20 CFR 656.40.

(AF 12-13). The CO directed the Employer to:

> provide survey documents that include wages from ACWIA employers including institutions of higher education[,] an affiliated or related nonprofit entity[,] a nonprofit research organization[,] or a governmental research organization. "

Id.

The Employer argued in its response that the regulation at 20 C.F.R. § 656.40(e) does not require an ACWIA wage survey to sample the entire typology of ACWIA entities. (AF 9). In support of its argument, the Employer cited a March 2010 FAQ that stated, in response to the

[1] Citations to the Appeal File are abbreviated as "AF" followed by the page number.

[2] Section 415 of ACWIA, codified at 8 U.S.C. 1182(p)(1), addresses the methodology to be utilized in establishing the prevailing wage for institutions of higher education, nonprofit entities affiliated with or related to institutions of higher education, nonprofit research organizations, and governmental research organizations. The Department's implementing regulations are found at 20 C.F.R. § 656.40(e).

question "How do I request that a Higher Education American Competitiveness and Workforce Improvement Act (ACWIA) wage be used?", "ACWIA wages which provide a prevailing wage based on a sample of similar institutions apply to occupations of higher education, related or affiliated nonprofit entities, nonprofit research organizations, or governmental research agencies." (AF 10) (Emphasis in the Employer's response).[3] The Employer, a public university, argued the EduComp survey contained an appropriate "sample of similar institutions" because the survey sampled public and private nonprofit institutions of higher education. *Id.*

The CO rejected the Employer's argument and upheld the initial PWD because "[t]he employer did not provide survey documents that include wages from ACWIA employers including institutions of higher education; an affiliated or related nonprofit entity; a nonprofit research organization; or a governmental research organization within the expansion of the area of intended employment." (AF 8).

The Employer filed a request for Center Director ("CD") review arguing that the plain language of the regulation "clearly indicates that a survey which is based on data from one type of ACWIA-compliant employer, rather than multiple types, must be acceptable."[4] (AF 5). The CD affirmed the PWD and rejected the Employer's argument on the basis that it was inconsistent with agency policy:

> The National Prevailing Wage Policy Guidance issued November 2009 states "factors relating to the nature of the employer, such as whether the employer is public or private, for profit or nonprofit, large or small, charitable, a religious institution, a job contractor of a struggling or prosperous firm, do not bear in a significant way on the skills and knowledge levels required, and therefore, are not relevant to determining the prevailing wage for an occupation under the regulations at 20 CFR 655.10 and 20 CFR 656.40" … In this instance, the employer requests the Survey wage for an "Institutional Review Board Specialists" which is an occupation not limited to institutions of higher learning and can be found in other industries, such as research organizations… The survey limits the nature of the employer and is not acceptable.

(AF 1-3).

[3] www.foreignlaborcert.doleta.gov/pdf/National%20Prevailing%20Wage%20and%20Helpdesk%20Center%20(NPWHC)%20_FAQs_Round%201.pdf

[4] The Employer focused on the use of the word "or" in the following section of 20 C.F.R. § 656.40(e): "institutions of higher education; an affiliated or related nonprofit entity; a nonprofit research organization; or a governmental research organization."

The Employer's Brief

Within 30 days of the CD's decision, the Employer filed an appeal directly with BALCA.[5] Employer's Brief at 1. In its brief, the Employer acknowledged that private wage surveys must sample those who are "similarly employed" in the area of intended employment. The Employer further acknowledged that the Board has held "the term 'similarly employed' does not refer to the nature of the Employer's business as such; on the contrary, it must be determined on the basis of similarity of the skills and knowledge required for performance in the job offered." *Id*. at 5-6 (quoting *Hathaway Childrens Services*, 1991-INA-388 (Feb. 4, 1994) (*en banc*)).

The Employer went on to note that ACWIA created an exception to the *Hathaway* standard for institutions of higher education and other entities. Employer's Brief at 6. According to the Employer, this exception allows an institution of higher education to sample wages only from other institutions of higher education (in other words, to limit the sample based on the nature of the employer's business). In support of its argument, the Employer claimed "Congress split the types of organizations covered by ACWIA into two separate categories" by placing them in different subsections of the statute.[6] *Id.* In particular, the Employer noted that the two subsections are separated by the word "or":

> The usage of the word "or" [to separate the subsections] shows that Congress intended to have wages for these types of organizations be determined separately as these organizations are substantially different. Had Congress intended for all of these groups to be treated together when setting the prevailing wage, it would not have had to separate [the statute] into sections (A) and (B).

Id. Furthermore, the Employer argued that the preamble to the PERM regulations state:

> … [T]hat institutions of Higher Education should be treated separately from other ACWIA "compliant" employers:

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[5] The regulation at 20 C.F.R § 656.40(d)(2) requires an employer to file its appeal with the National Processing Center.

[6] The Employer emphasized the following language from 8 U.S.C. § 1182(p)(1):

> In computing the prevailing wage level for an occupational classification in an area of employment for purposes of subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II) in the case of an employee of—
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> (A) an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965), or a related or affiliated nonprofit entity; **or**
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> (B) a nonprofit research organization or a Governmental research organization,
>
> **the prevailing wage level shall only take into account employees at such institutions and organizations in the area of employment**.

Employer's Brief at 6.

> because pay scales for Governmental research laboratories and other related activities are established by the Federal Government and do not necessarily correspond with the other three types of entities set forth under ACWIA. For this reason, we do not contemplate including Governmental research organizations in the same universe unless the technical problems in determining the prevailing wages for such entities prove to be insurmountable.

Id. at 7 (quoting 69 Fed. Reg. 77326, 77371 (Dec. 27, 2004)).

Based on its analysis of the statute and the regulatory preamble, the Employer argued the CD improperly rejected the EduComp wage survey because the Employer had no obligation to provide a survey that sampled the entire universe of ACWIA entities. Employer's Brief at 7. The Employer further argued that the CD was required to consider the EduComp survey because it was more accurate than the OES data used to determine the prevailing wage. *Id*. at 8. Finally, the Employer argued the CD violated its due process rights by rejecting the survey for inconsistent reasons after the initial determination. *Id*. at 9.

The CD's Brief

The CD argued the Employer's appeal should be dismissed because it "was not filed within the time frame and in the manner mandated by 20 C.F.R. § 656.40(d)." CD's Brief at 5. The CD noted that the regulations required the Employer to file its request for review with the National Processing Center ("NPC") within 30 days of the CD's decision. The NPC did not become aware of the appeal until after the 30-day deadline because the Employer filed its brief directly with BALCA. The CD argued BALCA should dismiss the Employer's request for review on this basis. *Id*. at 6.

The CD further argued that the filing deadline should not be equitably tolled because the Board has "noted that equitable tolling of the filing deadlines contained throughout Part 656 is limited to those 'rare instances in which failing to toll regulatory deadlines would result in manifest injustice.'" *Id*. (quoting *Madeleine S. Bloom*, 1989-INA-152 (Oct. 13, 1989) (*en banc*)). The CD also argued that "manifest injustice" only occurs "where circumstances evidence some egregious factor necessitating extraordinary relief." CD's Brief at 6 (citing *Park Woodworking Inc.*, 1990-INA-93 (Jan. 29, 1992) (*en banc*); *Andin International*, 1994-INA-128 (Dec. 5, 1994)). The CD claimed the Employer's misinterpretation of the regulatory filing requirement was not an extraordinary circumstance that justifies equitable relief. CD's Brief at 6-7. According to the CD, dismissing the appeal would merely hold the Employer responsible for its own mistake. *Id*. at 7.

In the alternative, the CD argued his determination should be affirmed because his was not an abuse of discretion. *Id*. The CD relied on the text of ACWIA to support its argument. The CD noted that while the statute separates institutions of higher education and research organizations into different subsections, the clause that determines how prevailing wages are calculated provides that the "wage level shall only take into account employees at such

institutions ***and*** organizations."[7] *Id.* (emphasis in CD's Brief). The CD argued the use of the word "and" indicates that an ACWIA prevailing wage must sample all of the institutions and organizations that fall under the scope of ACWIA. According to the CD, rejecting a wage survey that sampled only institutions of higher education was not an abuse of discretion because the action complied with the plain language of the statute and the regulation.

The CD further argued that the Employer cited the PERM preamble "out of context" and that "nothing in the preamble…can be read as relieving employers from their obligation under ACWIA to take into account institutions of higher education (or related entities) and nonprofit or governmental research organizations." CD's Brief at 11. According to the CD, the section of the preamble cited by the Employer is properly understood as "part of a broader discussion addressing public comments" regarding the U.S. Department of Labor's ("Department") inability to gather data for certain ACWIA entities. *Id.* The CD noted the preamble states the Department resolved this problem by using the "wage data OES currently collects in surveying institutions of higher education to determine a prevailing wage for [all ACWIA-covered entities]." *Id.* at 12 (quoting 69 Fed. Reg. at 77326, 77371). However, the CD argued the Employer could not avail itself of the same methodology because the preamble also provides that "employers are always free to submit alternative sources of wage data that survey individuals employed by the affected entities" to overcome the Department's deficient wage data. *Id.*

DISCUSSION

Equitable Tolling

The regulation at 20 C.F.R. § 655.731(a)(2)(ii)(A)(1) provides that an employer seeking to appeal a PWD issued in connection with an H-1B application must contest the NPC's decision in accordance with the procedures at 20 C.F.R. § 656.41. Section 656.41(d) requires an employer to "make a request for review by the BALCA within 30 days of the Director's decision." Furthermore, "the request for review must be in writing and addressed to the director of the NPC making the determination." 20 C.F.R. § 656.41(d)(2). While the Employer's appeal in the instant case was filed within the 30 day timeline, the brief was incorrectly submitted to BALCA instead of the NPC.

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[7] The Solicitor also emphasized the following language from 8 U.S.C. § 1182(p)(1):

> In computing the prevailing wage level for an occupational classification in an area of employment for purposes of subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II) in the case of an employee of—
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> (A) an ***institution*** of higher education (as defined in section 101(a) of the Higher Education Act of 1965), or a related or affiliated nonprofit entity; or
>
> (B) a nonprofit research ***organization*** or a Governmental research ***organization***,
>
> the prevailing wage level shall only take into account employees at such ***institutions and organizations*** in the area of employment.

Solicitor's Brief at 8.

In a series of decisions decided under the permanent alien labor certification regulations in effect prior to March 28, 2005, BALCA adopted the doctrine of equitable tolling in "those rare instances in which failing to toll regulatory deadlines would result in manifest injustice." *Madeleine S. Bloom, supra*. In *Bloom*, the employer provided its attorney with a piece of evidence that would have made certification inevitable if timely filed in accordance with 20 C.F.R. § 656.25. However, the attorney absconded with the evidence and cut all contact with the employer. The Board granted equitable relief, but noted that "it is not the intent of this Board to ignore or disregard the filing deadlines contained throughout Part 656 of the regulations." A subsequent *en banc* decision clarified that the holding from *Bloom* "should be construed strictly, in order to assure clarity and consistency in the application of the rebuttal requirements of 20 C.F.R. § 656.25." *Park Woodworking Inc., supra*. The Board declined to grant equitable relief in *Park* because there were no "egregious factors" that prevented the employer from meeting the Section 656.25 deadline. The Board has cited *Bloom* to grant equitable relief under the PERM regulations, but has reiterated that such relief is limited to rare instances involving egregious circumstances. *See Benish Corp.*, 2011-PER-510 (Oct. 18, 2012); *Cumberland Food Market*, 2011-PER-87 (May 10, 2011).

ALJs have also adopted the doctrine of equitable tolling when interpreting immigration regulations outside the context of permanent labor certifications. *See Northern Lights Cattle*, 2009-TLC-4 (Nov. 3, 2008); *Global Horizons, Inc.*, 2006-TLC-13 (Nov. 30, 2006); *Wakileh v. Kentucky University*, 2003-LCA-23 (Oct. 6, 2003). In these cases, ALJs generally proceed to the merits of an untimely appeal in the following circumstances:

1. When a party has been actively misled;
2. When a party has in some extraordinary way been prevented from asserting its rights; or
3. When a party mistakenly raised the precise statutory claim in the wrong forum.

See, e.g. Administrator, Wage & Hour Division, v. Cyberwiz, Inc., 2011-LCA-50 (Jul. 20, 2011). ALJs first adopted this standard in the context of Wage and Hour Division cases after the Administrative Review Board ("ARB") used it to review an ALJ's decision. *Administrator v. IEM Services*, 2005-LCA-34 (July 26, 2005) (citing *Wakileh v. Western Kentucky University*, ARB No. 04-013, ALJ No. 2003-LCA-23 (ARB Oct. 20, 2004)). This standard has also been used in H-2A cases where the ALJ's ruling was the final decision of the Secretary. *Northern Lights Cattle; Global Horizons, Inc.*

The ARB adopted this standard from a federal appellate decision that synthesized relevant Supreme Court precedent. *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 1999-ERA-14 and 15 (ARB Aug. 31, 2000) (citing *School Dist. v. Marshall*, 657 F.2d 16 (3d Cir. 1981)). The "wrong forum" ground for equitable tolling has its origins in *Burnett v. New York C.R. Co.*, 380 U.S. 424 (1965), which involved a plaintiff who mistakenly filed a Federal Employers' Liability Act claim in a state court that lacked venue. While there were no extraordinary circumstances that caused the plaintiff to file its suit in the wrong court, the Supreme Court nevertheless tolled the statute of limitations. *Burnett* at 430.

ALJs have also granted "wrong forum" equitable tolling even though no egregious factors excused the improper filing. In *Northern Lights Cattle*, the H-2A regulations required the employer to file an appeal directly with the Chief ALJ within a short timeframe. While the employer addressed its appeal to the Chief ALJ, it submitted the request to the CO. When it became apparent the Chief ALJ never received the appeal, the CO forwarded a copy and argued the appeal should be dismissed because the Chief ALJ received it after the filing deadline had passed. Nevertheless, the Chief ALJ found that "the 'wrong forum' ground for equitable tolling applies" because it was "beyond dispute" that the Employer was appealing the CO's denial. *Northern Lights Cattle*, slip op. at 3.

The CD argues we are bound by *Bloom* and *Park* to apply the "egregious factor" standard in the instant case. We disagree. While a footnote in *Bloom* broadly referenced the deadlines in Section 656 of the permanent labor certification regulations in effect prior to March 28, 2005, *Park* clarified that *Bloom*'s holding applied to 20 C.F.R. § 656.25, a section of the regulations that no longer exists.[8] While subsequent BALCA panels have applied the "egregious factor" standard to the PERM regulations, we do not interpret *Bloom*, *Park*, or the panel decisions as limiting our ability to grant equitable relief to a party that mistakenly files its claim in the wrong forum, especially when such relief is recognized by the Supreme Court, federal courts of appeal, the Administrative Review Board, and ALJs interpreting other immigration regulations.

As was the case in *Northern Lights Cattle*, it is beyond dispute that the Employer in the instant case was appealing the CD's decision. Accordingly, we find it appropriate to proceed to the merits of the appeal.

The Wage Survey

The Board applies an abuse of discretion standard when reviewing the CD's decision in a Prevailing Wage Determination appeal. *See Emory University*, 2011-PWD-1/2 (Feb. 27, 2012); and *RP Consultants, Inc.*, 2009-JSW-1 (June 30, 2010). The Board will uphold the CD's decision unless it is inconsistent with the regulations or does not constitute a reasonable exercise of discretion. *Quest Diagnostics, Inc.*, 2015-PWD-2 (Feb. 12, 2015).

An employer seeking to hire an H-1B nonimmigrant must pay the H-1B employee the prevailing wage or the actual wage it pays other employees with similar experience and

[8] That section had to do with the timeliness of a rebuttal to a Notice of Findings, a procedure that no longer exists under the current permanent labor certification regulations. That regulation was also written in a manner that strongly warned of the failure to make a timely rebuttal:

> …if the rebuttal evidence and/ or argument have not been mailed by certified mail by the date specified:
> (i) The *Notice of Findings* shall automatically become the final decision of the Secretary denying the labor certification;
> (ii) Failure to file a rebuttal in a timely manner shall constitute a refusal to exhaust available administrative remedies; and
> (iii) The administrative-judicial review procedure provided in § 656.26 shall not be available; …

20 C.F.R. § 656.25 (2004).

qualifications, whichever wage is higher. 20 C.F.R. § 655.731(a). An employer may elect to have the National Processing Center determine the prevailing wage. 20 C.F.R. § 655.731(a)(2)(ii)(A). While the NPC typically uses OES data to calculate a prevailing wage, an employer may request that the NPC instead use a private wage survey of "workers similarly employed in the area of intended employment." 20 C.F.R. § 656.40(b)(3).

In *Hathaway Childrens Services*, the Board determined that "similarly employed" did not refer to the nature of an employer's business, but rather to the "skills and knowledge required for performance of the job offered." The Board found "no basis, under the Act or under its implementing regulations" to justify allowing an employer to limit the universe of business entities sampled when calculating a prevailing wage. After *Hathaway,* PWDs had to sample similarly employed workers across the relevant industry as a whole.

Congress passed Section 415 of ACWIA in response to *Hathaway* so that certain entities could calculate prevailing wages without sampling across an industry as a whole. The regulation at issue reflects this provision:

> In computing the prevailing wage for…an employee of an institution of higher education, or an affiliated or related nonprofit entity, a nonprofit research organization, or a Governmental research organization, the prevailing wage level takes into account the wage levels of employees only at such institutions and organizations in the area of intended employment.

20 C.F.R. § 656.40(e)

The CD argues ACWIA and the implementing regulation created only two sets of wages: a standard wage comprised of cross-industry data and an ACWIA wage consisting of data from institutions of higher education, affiliated and related nonprofit entities of institutions of higher education, nonprofit research organizations, and governmental research organizations. The Employer argues for a more flexible standard that would allow entities covered by the statute to obtain prevailing wages by surveying only other similar business entities.

A complete analysis of the preamble to the final rule implementing this section of ACWIA indicates the Department has interpreted the statute as establishing a wage for each category of entity covered by ACWIA.[9] The Department's use of the word "universe"

[9] The relevant section of the preamble reads as follows:

> A number of commenters, largely university representatives, addressed prevailing wage issues pertinent to nonprofit institutions. Some commenters were concerned DOL had failed to meet its statutory obligation to calculate prevailing wages for the academic community. One commenter urged DOL to meet that obligation by accepting and using wage scales already in place, and suggested a number of sources, including the National Institutes of Health and similar Government agencies, the Journal Academe, and the Council on Teaching Hospitals.
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> The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Pub. L.105-277, 112 Stat. 2681-641, amended the INA (Section 212(p)(1), 8 U.S.C. 1182(p)(1)) to require the

throughout the relevant section of the preamble is determinative. The section begins by identifying a problem - the Department warns it may not be able to define a "universe" of wage data for nonprofit research organizations and nonprofit entities affiliated with and related to institutions of higher education because it is difficult to determine which entities should be surveyed:

> With respect to commenters' suggestions that DOL has yet to fully comply with the ACWIA mandate in determining prevailing wages for the affected institutions, we continue to believe it may not be feasible to identify the different kinds of entities that might comprise educational institutions' related or affiliated nonprofit entities, or nonprofit research organizations. If those entities can not be identified, **it may not be possible for DOL to properly define the universe** that should be surveyed to determine the appropriate prevailing wages.

69 Fed. Reg. at 77326, 77371 (Emphasis added). The Department's solution to this problem was to use the wage data it collected from institutions of higher education to create one "universe"

> computation of the prevailing wage for employees of institutions of higher education, nonprofit entities related to or affiliated with such institutions, nonprofit research organizations, and Governmental research organizations only take into account the wages paid by such institutions and organizations in the area of intended employment. With respect to commenters' suggestions that DOL has yet to fully comply with the ACWIA mandate in determining prevailing wages for the affected institutions, we continue to believe it may not be feasible to identify the different kinds of entities that might comprise educational institutions' related or affiliated nonprofit entities, or nonprofit research organizations. If those entities can not be identified, it may not be possible for DOL to properly define the universe that should be surveyed to determine the appropriate prevailing wages. It should be noted that despite these difficulties in identifying the appropriate entities to be surveyed, employers are always free to submit alternative sources of wage data that survey individuals employed by the affected entities.
>
> In order to comply with these requirements in the absence of a solution to this issue, the OES data we currently make available is broken out into two data sets. In the absence of a better alternative, we will continue to use the prevailing wage data OES currently collects in surveying institutions of higher education to determine a prevailing wage for one universe consisting of institutions of higher education, affiliated or nonprofit research institutions, and nonprofit research organizations.
>
> We continue to discuss with BLS the possibility of obtaining data for "Governmental research organizations," because pay scales for Governmental research laboratories and other related activities are established by the Federal Government and do not necessarily correspond with the other three types of entities set forth under ACWIA. For this reason, we do not contemplate including Governmental research organizations in the same universe unless the technical problems in determining the prevailing wages for such entities prove to be insurmountable. Although BLS has data from the Office of Personnel Management on Federal wages, it must be determined whether we can extract from that data those wages paid in organizations in which the primary function is research. Until that analysis occurs and it is determined if that information can be used, the prevailing wage data obtained from surveys of institutions of higher education will continue to be used for these types of organizations as well.

69 Fed. Reg. at 77326, 77371

that could be used by institutions of higher education, their affiliated and related nonprofit entities, and nonprofit research organizations:

> In order to comply with these requirements in the absence of a solution to this issue, the OES data we **currently make available** is broken out into two data sets. In the absence of a better alternative, we will continue to use the prevailing wage data OES currently collects in surveying institutions of higher education to determine a prevailing wage **for *one universe* consisting of institutions of higher education, affiliated or nonprofit research institutions, and nonprofit research organizations**.

Id. (Emphasis added). Critically, the preamble states there are "currently" two sets of data, indicating that the number might change. The CD's argument requires that there "only" be two sets of data - an ACWIA set and a standard industry set. The next paragraph of the preamble, which discusses governmental research organizations, confirms that the number of data sets may fluctuate:

> We continue to discuss with BLS the possibility of obtaining data for "Governmental research organizations," because pay scales for Governmental research laboratories and other related activities are established by the Federal Government and do not necessarily correspond with the other three types of entities set forth under ACWIA. For this reason, **we do not contemplate including Governmental research organizations in the same universe unless the technical problems in determining the prevailing wages for such entities prove to be insurmountable**.

Id. (Emphasis added). Not only does this passage indicate that the number of ACWIA data sets may change based on practical considerations, it also demonstrates that the Department treats ACWIA entities differently based on their respective characteristics. Under the CD's interpretation of the statute, the Department could not use the unique nature of the federal pay scale to separate governmental research organizations from the other ACWIA entities.

The preamble therefore indicates the Department has interpreted ACWIA as establishing a universe of prevailing wage data for each type of ACWIA entity. Because the Department could not gather enough data (i.e., define the universe) for nonprofit research organizations and affiliated and related nonprofit entities of institutions of higher education, it collapsed those entities into the same universe as institutions of higher education. The Department also indicated that it had not exhausted its efforts to obtain data for government research organizations, but should the difficulties become insurmountable, government research organizations would also be collapsed into the same universe as the other ACWIA entities.

Under the regulations, an ACWIA wage for an institution of higher education may sample only other institutions of higher education. The CD's insistence that the Employer provide a survey that sampled each type of ACWIA entity is inconsistent with the Department's interpretation of the regulation and therefore constitutes an abuse of discretion.

ORDER

IT IS HEREBY ORDERED that the prevailing wage determination made by the Center Director is **OVERRULED**, and this matter is **REMANDED** to the Center Director for further processing consistent with this order.

Entered at the direction of the panel by:

Digitally signed by TODD R. SMYTH
DN: CN=TODD R. SMYTH, OU=LEGAL COUNSEL, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

Todd R. Smyth
Secretary to the Board of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting en banc review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.