

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 29 August 2013

BALCA Case No.: 2013-PWD-00003

ETA Case No.: 12306-542533

In the Matter of:

**AMERICAN RED CROSS BLOOD SERVICES –
RIVER VALLEY DIVISION,**

Employer

Center Director: William Rabung
National Prevailing Wage Center

Appearances: Kendra S. Elliott, Esquire
Law Offices of Kendra S. Elliott
Enola, Pennsylvania
For the Employer

Emalene Clark, Attorney
For the Center Director

Before: Sarno, Bergstrom, Krantz
Administrative Law Judges

DECISION AND ORDER AFFIRMING PREVAILING WAGE DETERMINATION

This matter arises from a request for review of a National Processing Center PERM prevailing wage determination pursuant to 20 C.F.R. § 655.11(e).

BACKGROUND

On November 1, 2012, American Red Cross Blood Services – River Valley Division (“Employer”) filed a prevailing wage request with the National Prevailing Wage Center (“NPWC”) for the occupation of “Technologist II, IRL.” (232-238). Employer stated it qualified for the American Competitiveness and Workforce Improvement Act (“ACWIA”) wage provisions due to its nature as a non-profit research organization under 20 CFR § 655.40(e)(1)(iii).

Employer received a prevailing wage determination (“PWD”) from the National Prevailing Wage Center (“NPWC”) on December 14, 2012 for the occupation of “Technologist II, IRL.” (AF 232-237) The NPWC determined that Employer did not qualify as a non-profit

research organization and was thus subject to the Occupational Employment Statistics (OES) – All Industries wage source. An O*Net Code and Standard Occupational Title of 29-2011, Medical and Clinical Laboratory Technologists was assigned to the position. The NPWC established An O*Net JobZone 4 classification with a wage level IV. (AF 235) In determining the wage level, the NPWC increased the wage level by one level due to Employer’s certification requirement and two wage levels due to the required experience being at the high end of the experience range for an O*Net Job Zone 4 occupation.

Employer requested a redetermination of the PWD on December 17, 2012, supplying a letter from the IRS stating that Employer is a tax-exempt 501(c)(3) organization and arguing that the ACWIA wages should apply. (AF 227-231) On January 16, 2013, the PWD was upheld. (226) On February 14, 2013, Employer requested review of the PWD determination by the Center Director (“CD”). Employer disputed both the failure to apply the ACWIA wage rates and the assigned wage level of IV. (AF 186-225) The Center Director (“CD”) affirmed the PWD on April 15, 2013. (AF 183-185) This appeal followed. (AF 1-182) A Notice of Docketing and Order Setting Briefing Schedule was issued on July 24, 2013. Employer submitted its statement of intent to proceed on August 19, 2013, relying on its brief contained in the underlying request for review. The CD submitted a brief on August 23, 2013, urging affirmance of the CD’s decision.

DISCUSSION

BALCA applies an abuse of discretion standard to the Center Director’s or Administrator’s decision on an employer’s appeal of a prevailing wage determination. *See Emory University*, 2011-PWD-1 and 2, slip op. at 6-7 (Feb. 27, 2012); *RP Consultants, Inc. d/b/a Net Matrix Solutions*, 2009-JSW-1 (June 30, 2010). Accordingly, we will review the CD’s decision in this case to determine whether it was consistent with the applicable regulations and is a reasonable exercise of that discretion. *See RP Consultants*, slip op. at 10.

Applicability of the ACWIA Wage Rates

Section 212(p)(1) of the Immigration and Naturalization Act provides:

In computing the prevailing wage level for an occupational classification in an area of employment for purposes of subsections (n)(1)(A)(i)(II)2 and (a)(5)(A) in the case of an employee of-

(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.

American Competitiveness and Workforce Improvement Act of 1998, Pub. L. 105-277, 112 Stat. 2681-654; 8 U.S.C. § 1182(p)(1). Nonprofit and governmental research organizations are defined by regulation as:

Nonprofit research organization or Governmental research organization means a research organization that is either a nonprofit organization or entity primarily engaged in basic research and/or applied research, or a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

20 CFR § 656.40(e)(1)(iii). The question at issue is thus whether Employer meets the definition of a nonprofit research entity such that it is entitled to a PWD calculated based on the wages of employees at other such institutions and organizations. Employer argues that it engages in significant applied research in support of its service based mission. The CD disagrees, stating that Employer is not primarily engaged in research, but only performs some research in order to fulfill its primary mission of providing services to those in need.

Employer argues that the United States Citizenship and Immigration Services has already determined that Employer is a nonprofit research organization and so is not subject to the H-1B caps, submitting prior decisions of the USCIS documentation in its request for review. Employer urges the Department to apply the USCIS standard to the instant PWD determination. However, 20 C.F.R. § 656.41(c) states that “[t]he director will review the PWD solely on the basis upon which the PWD was made and, upon the request for review, may either affirm or modify the PWD.” Thus, because Employer did not submit any evidence of the prior USCIS decisions until it filed an appeal to BALCA, this evidence may not be considered. Employer had the opportunity to submit the USCIS evidence in its original application or, at the latest, in its request for reconsideration, given that the PWD stated that Employer did not meet the definitions listed in 20 C.F.R. §§ 656.40(e)(1)(i), 656.40(e)(1)(ii), or 656.40(e)(1)(iii), placing Employer on notice that it did not qualify as a nonprofit research entity.

The information Employer submitted to the CD is insufficient to support a finding that Employer fulfills the ACWIA requirements for nonprofit research entities, merely stating that Employer engaged in research to support its primary objectives, such as disaster relief, research, health and safety training and education, and blood supply. Accordingly, the decision of the CD to apply the OES All Industries wage was not an abuse of discretion and so is affirmed.

Appropriate Wage Level

Employer also disputes the assigned wage level of IV. Employer argues that the proper wage level is III, based on an additional two points due to the position's experience requirement, but without an additional point in consideration of the licensure requirement. Employer argues that the licensing requirement is required for entry to the field in many states and further notes that the only requirement for sitting for the Medical Technologist certification exam is a bachelor's degree, which is already included in the job description.

The Employment and Training Administration ("ETA") has issued *2009 PWD Guidance*, which outlines a step-by-step, standardized approach for determining the appropriate wage level for the job opportunity. The Employer contends that the CD's assignment of Wage Level IV is erroneous. According to the procedure provided in the *2009 PWD Guidance*, every occupation begins at wage level I, which is considered an entry-level wage. *See PWD Guidance Letter* at 8. The *2009 PWD Guidance* explains that the employer's requirements for experience, education, training, and special skills are compared to those generally required for the occupation as described by O*Net and will be used as indicators that the job opportunity is for an experienced (Level II), qualified (Level III) or fully competent (Level IV) worker, thereby warranting a PWD at a higher wage level. *Id.* Accordingly, when determining the wage level, a point (or level) is added based on: 1) experience, 2) education, 3) special skills and other requirements, and 4) supervisory duties. *2009 PWD Guidance* at 9-13.

The *PWD Guidance Letter* provides that an additional wage level can be added if a job requires skills that are beyond those of an entry-level worker. *2009 PWD Guidance* at 11-12. Specifically, the Guidance Letter provides:

In situations where the employer's requirements are not listed in the O*NET Tasks, Work Activities, Knowledge, and Job Zone Examples for the selected occupation, then the requirements should be evaluated to determine if they represent special skills. The requirement of a special skill not listed in the O*NET does not necessitate that a point be added. If the specific skills required for the job are generally encompassed by the O*NET description for the position, no point should be added. However, if it is determined that the requirements are indicators of skills beyond those of an entry level worker, consider whether a point should be entered on the worksheet in the Wage Level Column.

Id.

The CD stated that it added an additional point based on Employer's licensure requirement because such certification is not a normal requirement for entry to the occupation as a whole, nor specifically in the state of Kentucky. Although Employer argues that licensure is often required in the instant occupation, it provides no evidence that this is the case. Nor does Employer dispute the CD's statement that Kentucky, the place of employment in the current application, does not require certification. Employer's argument that the certification exam only requires a bachelor's degree as a prerequisite ignores that the exam itself also entails specific study and passage. Accordingly, the CD did not abuse his discretion in determining that an

additional point should be added to the wage level based on Employer's licensure requirement and the wage level of IV is affirmed.

CONCLUSION

The PWD determination of the CD is hereby affirmed.

For the Board:

DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR/JRS/jcb
Newport News, Virginia