



Issue Date: 12 September 2014

BALCA Case No.: 2014-PWD-00014
ETA Case No.: P-100-12331-705321

In the Matter of:

**GENERAL ANESTHESIA SPECIALISTS PARTNERSHIP MEDICAL GROUP
(GASP),**

Employer

Center Director: William K. Rabung
National Prevailing Wage Center

Appearance: Catherine L. Haight, Esquire
Haight Law Group, PLC
Los Angeles, California
For the Employer

Before: Paul R. Almanza, *Administrative Law Judge*; William S. Colwell,
Associate Chief Administrative Law Judge and Stephen R. Henley,
Associate Chief Administrative Law Judge

PAUL R. ALMANZA
Administrative Law Judge

DECISION AND ORDER
AFFIRMING PREVAILING WAGE DETERMINATION

This matter arises from the Employer's appeal pursuant to 20 C.F.R. § 656.41 of the Employment and Training Administration, Office of Foreign Labor Certification ("OFLC")'s prevailing wage determination for the position of Medical Scientist Assistant.

BACKGROUND

On July 28, 2014, General Anesthesia Specialists Partnership Medical Group (“GASP” or “Employer”) requested that the Board of Alien Labor Certification Appeals (“BALCA”) review the Center Director’s July 17, 2014 decision to affirm the Prevailing Wage Determination (“PWD”) issued on March 14, 2014. (AF 64). The request is in support of permanent alien labor certification for the position of “Medical Scientist Assistant.” (AF 1-57).¹ The Center Director affirmed the PWD, which assigned a wage level of II to the position under the Standard Occupational Classification (“SOC”)/Occupational Informational Network (“O*NET”) code of 19-1042.00, corresponding to the occupation title “Medical Scientists, Except Epidemiologists.” (AF 58-60; AF 89-93).²

The issue in this appeal is whether the position’s requirement for a completed anesthesia residency is, or is not, normal for an entry level, wage level I person in the occupation of Medical Scientists, Except Epidemiologists. Employer argues that it is normal for those in this occupation who have an M.D. rather than a Ph.D. to have completed a medical residency. Employer’s September 2, 2014 Legal Brief on Appeal (“Employer’s Legal Brief”), at 2; Employer’s July 28, 2014 Request for Review by Center Director of Prevailing Wage Determination (PWD) No. P-100-12231-705321 (“Employer’s Request for Review”), at 3-6.

The Center Director takes the position that “[n]othing in the SOC description nor O*Net defined tasks indicate the occupation [of Medical Scientists, Except Epidemiologists] requires completion of a residency.” Center Director’s August 21, 2014 Memorandum, Subject: Prevailing Wage Determination Appeal for General Anesthesia Specialists Partnership Medical Group (GASP), *Employer*, For the position of Medical Scientist Assistant in Los Angeles, California, ETA Case No. P-100-12331-705321 (“Center Director’s Memorandum”), at 3. The Center Director further explains:

[T]he normal requirement to enter the occupation, ... Medical Scientists, Except Epidemiologists, is a Doctoral Degree[.] [T]he ... Occupational Outlook Handbook (OOH) further states that Medical Scientists typically need a Ph.D., while some may choose to get a medical degree instead of a Ph.D. The OOH further states that those who choose to attend medical

¹ In this decision, AF is an abbreviation for Appeal File. Additional background facts concerning the lengthy history of Employer’s request for a PWD in this matter can be found in BALCA’s earlier decision and order in this case, *General Anesthesia Specialists Partnership Medical Group (GASP)*, BALCA No. 2013-PWD-00005, slip op. at 2-5 (Jan 28, 2014) (remanding matter to Center Director).

² O*NET is a database containing information on hundreds of standardized and occupation-specific descriptors. O*NET job descriptions contain several standard elements, one of which is a “Job Zone.” An O*NET Job Zone “is a group of occupations that are similar in: how much education people need to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work.” The Job Zones are split into five levels, from occupations that need little or no preparation, to occupations that need extensive preparation. 20 C.F.R. § 656.3.

school “may be required to participate in residency programs, as they will have to meet the same requirements that physicians and surgeons have to fulfill.” While the OOH also states that it is helpful for medical scientist to have both a Ph.D and a medical degree, the OOH also emphasizes that *attending medical school and participating in a residency program is optional; i.e., not required to enter the occupation as a whole.* The OOH further reiterates that the knowledge needed to perform the research can be gained through the coursework and laboratory work performed while earning a medical degree; again emphasizing that a post-graduate residency is not required to perform the work.

Center Director’s Memorandum, at 4 (emphasis added; footnote to Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2014-2015 Edition, Medical Scientists: www.bls.gov/ooh/life-physical-and-social-science/medical-scientists.htm#tab-4 omitted). In short, the Center Director’s position is that because “completion of a residency is not required to enter the occupation, ... the additional skills gained by completing a residency are beyond the skills of an entry level worker in the occupation” and thus “the assigned wage level of II is appropriate.” *Id.*

As outlined above, both the Employer and the Center Director submitted statements of their position on this appeal.

DISCUSSION

Standard of Review

The Board applies an abuse of discretion standard to the Center Director’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 Center Director’s decision in this case to determine whether it was consistent with the applicable regulations and was a reasonable exercise of that discretion. *Id.*, slip op. at 10.

Regulations and Guidelines

The PERM regulations require an employer filing an application for permanent labor certification after January 1, 2010, to request a prevailing wage determination from the National Processing Center [or National Prevailing Wage Center] (“NPC” or “NPWC”). 20 C.F.R. § 656.40(a). The regulations provide several methods by which the prevailing wage is determined. The applicable regulation provides:

If the job opportunity is not covered by a [collective bargaining agreement] CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(3) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the DOL Occupational

Employment Statistics Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (g) of this section.

20 C.F.R. § 656.40(b)(2).

The Employment and Training Administration's 2009 PWD Guidance memorandum (at AF 103-138) outlines a step-by-step, standardized approach for determining the appropriate occupational classification under SOC/O*NET and the appropriate wage level for the job opportunity. In discussing how wage levels are assigned, the 2009 PWD Guidance provides that:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. ...

Level II (qualified) wage rates are assigned to job offers for experienced employees who have attained, either through education or experience, a good understanding of the occupation. ...

2009 PWD Guidance, at 7. (AF 109). The guidance also states that "the process described above should not be implemented in an automated fashion. The NPWHC must exercise judgment when making prevailing wage determinations." 2009 PWD Guidance, at 13. (AF 115).

Analysis

In this case, the Employer's position requires 36 months of training, and, in relevant part, the following special requirement: "The three years of required training must have resulted in completion of Anesthesiology Residency." (AF 91). Employer argues that the special requirement concerning completion of a residency in anesthesiology is "a requirement which is essentially re-stating the three years of training in Anesthesiology." Employer's Request for Review, at 3.

At heart, the Employer's argument focuses on the specific requirements of its position rather than the requirements for the occupation of Medical Scientists, Except Epidemiologists. The Employer's focus on the requirements of its position is misplaced. As explained in the 2009 PWD Guidance, while "[a]ll employer applications for a prevailing wage determination shall initially be considered an entry level or Level I wage[,] [t]he employer's requirements for experience, education, training, and special skills *shall be compared to those generally required for an occupation as described in O*NET* and shall be used as indicators that the job opportunity is for an experienced ... worker ... at a higher wage level." 2009 PWD Guidance, at 8 (emphasis added). (AF 110).

Indeed, Employer's own argument supports a determination that wage level II is appropriate for its Medical Scientist Assistant position:

In this case, it is obvious that an entry-level Medical Scientist Assistant studying the effect of anesthesiology on human subjects must necessarily have had their residency in anesthesiology. Although an MD degree alone provides an overall background in medical training, *the anesthesiology residency provides the specific knowledge in anesthesiology needed* for an entry-level Medical Scientist Assistant to conduct research on the alleviation of pain in human subjects.

Employer's Legal Brief, at 2 (emphasis added). By stating that a completed anesthesiology residency is necessary for this position because a medical degree alone does not provide the requisite specific knowledge, Employer effectively concedes that its position requires "a good understanding of the occupation," which is consistent with a determination that wage level II is appropriate. In contrast, if completion of medical school alone were sufficient, it would appear that the position would require only "a basic understanding of the occupation," which would be consistent with a determination that wage level I was appropriate.

Under the facts of this case, we find that the Center Director did not abuse his discretion in affirming the prevailing wage determination at wage level II for Employer's Medical Scientist Assistant position. Pursuant to our earlier remand, he considered the occupation of Medical Scientists, Except Epidemiologists in affirming the prevailing wage determination for Employer's position. The educational requirements of this occupation include a Ph.D. or an M.D. There is nothing in the record that indicates a completed medical residency is required for this occupation, even for those who hold an M.D. instead of a Ph.D. Accordingly, the Center Director reasonably exercised his discretion in affirming a PWD for Employer's Medical Scientist Assistant Position at wage level II, or \$77,002.00 per year (AF 64), based on the Employer's special requirement of a completed residency in anesthesiology.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that Center Director's July 17, 2014 decision to affirm the Prevailing Wage Determination in this matter is **AFFIRMED**.

For the panel:

PAUL R. ALMANZA
Administrative Law Judge

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

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 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 ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.