U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 November 2011

BALCA Case No.: 2011-PER-01338
ETA Case No.: P-100-10259-051421

In the Matter of:

CHILDREN'S HOSPITAL CORPORATION,
Employer

Center Director: William K. Rabung
National Prevailing Wage Center

Appearances: Prasant D. Desai, Esquire
Iandoli & Desai, P.C.
Boston, Massachusetts
For the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson and Vittone**
Administrative Law Judges

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER
REVERSING PREVAILING WAGE DETERMINATION

This matter arises from an appeal of the prevailing wage determination made by the Employment and Training Administration, Office of Foreign Labor Certification,

relating to the Employer's application for permanent alien labor certification under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").

BACKGROUND

On September 21, 2010, Children's Hospital Corporation ("the Employer") filed a prevailing wage request with the Office of Foreign Labor Certification National Processing Center ("NPC") for the position of "System Manager III." (AF 92-96).[1] The position corresponds to O*Net Code 15-1034.00 and Standard Occupational Classification ("SOC") occupational title of "Computer Software Engineers, Applications, Non R & D." (AF 92). The Employer stated that the position would involve the following job duties: "Implement, develop and support .NET solutions. Use vendor supplied tools to customize the product to local environment, requirement analysis, product design, small project management and Rapid Application Development. User provisioning via LDAP and ADAM, care and feeding of hospital's Active Directory implementation. Develop applications supporting infrastructure with C#, .net, sql, xmc web technologies and Agile methodologies. Adherance to formally drafted specs, project plans and testing cycles." (AF 93). The Employer stated that the position required a Bachelor's degree in engineering or related field and 60 months of employment experience with application development. (AF 94).

The CO issued a prevailing wage determination on October 14, 2010. (AF 95). The CO used the DOL Occupational Employment Statistics ("OES") survey as the wage source and determined that the position was a wage level 4 with a prevailing annual wage of $119,038.00. *Id.*

On November 12, 2010, the Employer submitted a request for redetermination, stating that it is a non-profit affiliate of Harvard Medical School and therefore is an American Competitiveness and Workforce Improvement Act ("ACWIA") employer. (AF 91). On December 6, 2010, the CO issued a *Request for Further Information*,

[1] In this decision, AF is an abbreviation for Appeal File.

requiring the Employer to provide documentation that it meets one of the definitions under Section 656.40(e)(1). (AF 89).

On December 10, 2010, the Employer responded to the *Request for Further Information*. (AF 58-88). The Employer asserted that Children's Hospital and Harvard Medical School have had a longstanding partnership focused on the advancement of pediatric medicine and research, and that the relationship is governed by the Statement of General Policies. (AF 58). The Employer argued that the Statement of General Policies, which has been in effect since 1949, demonstrates that the Employer and the University have made mutual promises of support and that the Employer is affiliated with the University. (AF 58-59). Citing 8 U.S.C. § 1101(e)(2), the Employer argued that the Immigration and Naturalization Act ("INA") defines affiliation as "the giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization." (AF 58-59). The Employer added that the majority of the Employer's researchers and clinicians are members of the Harvard Medical School faculty. (AF 59).

The Employer also included a letter from John D. Johnson, District Director of the Internal Revenue Service, dated March 7, 1983, verifying that the Employer is a tax-exempt organization pursuant to Section 501(c)(3) of the Internal Revenue Code. (AF 62). Additionally, the Employer submitted a cover memorandum from Stuart J. Novick, Esquire, Senior Vice President and General Counsel to Children's Hospital Boston, dated May 5, 2009, and titled "Relationship of Children's Hospital to Harvard Medical School." (AF 64). The letterhead on this memorandum states that Children's Hospital Boston is "A teaching affiliate of Harvard Medical School," and lists Mr. Novick's email domain name as "@childrens.harvard.edu." *Id.* The memorandum states that it is submitting a *Statement of General Policies of Harvard Medical School and of Affiliated Hospitals* ("The Statement of General Policies") and a document titled *The Relationship Between Harvard and its Teaching Hospitals* ("The Hospitals' Relationship with Harvard"), which was an appendix to an application by Harvard to build a power plant that would serve the Medical School and the Longwood area teaching hospitals, including Children's Hospital in Boston. *Id.* The memorandum states that "it has been the long-standing policy of the hospital that all physicians on staff who practice at the hospital on a geographic full-time basis must also hold full-time appointments to the

faculty of Harvard Medical School." *Id.* The memorandum also stated that "[c]urrently there are 1966 members of our medical and research staff who hold full-time and part-time academic appointments at Harvard Medical School. In addition, Children's has 909 research and clinical trainees who hold appointments at Harvard Medical School." *Id.*

The Statement of General Policies lists the Employer as one of the seven hospitals that are parties to the agreement with Harvard Medical School. (AF 66). Among the policies outlined in the Statement are policies regarding physical facilities, personnel, fields of work, solicitation of funds, and a standing committee. (AF 67-73). The policies regarding physical facilities provide that it is "understood that the Medical School and the several Hospitals will each give the other access to and a reasonable opportunity to use their respective physical facilities so far as practicable and advisable to carry on the instruction, research and other activities which they are conducting together, or in which they are cooperating." (AF 67-68). This section also provides that "[t]he financial support of departments or projects in which the Medical School and one or more of the Hospitals are jointly interested shall be agreed upon between the Medical School and the interested Hospital." (AF 68).

Under the heading, "Personnel," the Statement of General Policies provides that "[w]hen appointees are to receive appointments both from the Medical School and from a Hospital, such appointments shall be made after consultation between the parties interested and upon mutual agreement thereafter." (AF 69). The agreement also states that "as far as it can reasonably do so within the limitations of its budget and according to plans agreed to in advance, the Medical School will assist the Hospitals in obtaining research personnel for the Hospitals by appropriate appointments in the Medical School." (AF 71) (emphasis in original).

Under the heading, "Standing Committee," the Statement provides:

> In order to develop more definite understandings regarding matters involved in the relationship of the Medical School and the Hospitals, to study the whole situation, and to make plans and from time to time submit recommendations, a Standing Committee shall be appointed to consist of the President of the University and his delegate as representatives of the Medical School, and three representatives of the Hospitals appointed from among the Presidents, the Chairman of the Governing Boards or the Chairman of the Executive Committees of the Hospitals. Such Committee shall make its own rules of procedure and shall have power to add to its

> numbers, by unanimous consent. Such Committee shall report at least once in each year.

(AF 73). Additionally, the "Solicitation of Funds" section notes that the Standing Committee "shall study the matter of cooperative planning for the solicitation of funds and report the result of its work to the Medical School and the Hospitals." *Id.* The agreement concludes that "[t]he Medical School and the Hospitals will make such further arrangements as may be necessary or advisable to carry out the general policies outlined above, and to bring about the full cooperation which is necessary to attain maximum effectiveness in the performance of their respective functions and to render the best possible service to the community." *Id.* Harvard approved the Statement on January 3, 1949 and the Employer's President signed the Statement on January 24, 1949. (AF 73-75).

The Hospitals' Relationship with Harvard document states that Harvard "does not own or operate a hospital notwithstanding the fact that clinical training and hospital experience have always been essential to the education of physicians." (AF 79). It also provides that Harvard currently "has a teaching affiliation with 12 hospitals," and that its principal relationships exist with Massachusetts General and six teaching hospitals, including The Children's Hospital Corporation. (AF 80). The document also notes that Harvard's clinical science departments are all physically located in facilities owned by one or more "affiliated hospitals." *Id.* The document states that "[t]he Harvard Medical School could not exist without the affiliation between Harvard and its affiliated hospitals." (AF 81).

The Hospitals' Relationship with Harvard provides that "[w]ith one exception, every department in the Teaching Hospitals is a Harvard department headed by a tenured faculty member." (AF 84). The document notes that "while the 1948 General Policies represented a relatively generalized statement of the affiliation that existed at that time, the key facets of the relationship articulated in the General Policies continue to apply at the present time." (AF 85).

> Since, as described, the Medical School operates in major part through departments and faculty located at hospital facilities and frequently through a number of separate departments involving the same subject coordination of these complex activities to maintain academic standards,

> research standards and standards for appointments is a difficult task. In this respect a number of committees drawn from the hospital departments at all levels of the structure tend to provide the unity necessary to make these departments truly a part of a single academic institution insofar as teaching and research are concerned. For example, the heads of each of the multiple Harvard departments based at the different hospitals constitute an Executive Committee which meets monthly to review common problems. Standards for the appointments of interns and residents that are really both students and teachers are maintained through the fact that this hospital-based program is run by the same individuals that are the department heads of the Medical School who, in that capacity, submit their selections to the Harvard governing board for appointment as Teaching Fellows or Clinical Fellows.

(AF 86-87). The Hospitals' Relationship with Harvard concludes:

> On the basis of the facts presented, it is submitted that the relationship between Harvard and the Teaching Hospitals is such that those organizations represent an integral and essential part of the structure necessary to permit Harvard's Medical School to educate students and promote the advance of medical knowledge. The activities and objectives of the Medical School can best be understood in the context of the activities of its faculty. The majority of the faculty is located in the Teaching Hospitals, not by chance, but because it is evident that this is essential to the goal of the Medical School in educating students and advancing medical knowledge. In these circumstances, it seems clear that the relationship between the Medical School and the hospitals is such that in the absence of its affiliations with the Teaching Hospitals, the Harvard Medical School could not fulfill its exempt functions.

(AF 88).

The CO issued a Redetermination on December 16, 2010. (AF 57). The CO rejected the Employer's argument that the INA definition of affiliation governs, and instead applied the definition of affiliated or related nonprofit entity under 20 C.F.R. § 656.40(e)(1)(ii). The CO found that the documentation provided by the Employer makes a clear distinction between Harvard Medical School employees as faculty and hospital employees and includes restrictions on cross-payments. *Id.* The CO also found that the Employer does not meet the definition of affiliated or related nonprofit because Harvard and the Employer are distinct institutions and the board created to make recommendations does not bind the entities. *Id.*

On January 18, 2011, the Employer filed a request for review by the Center Director ("CD"). (AF 11-56). The Employer reiterated the arguments and legal authority cited in its request for redetermination. Additionally, the Employer cited *Matter of L-*, 9 I & N Dec. 14 (1960) for the proposition that the meaning of "affiliate" in the INA should be given its commonly understood meaning as "an organization created by or associated with another organization," in addition to the INA definition at Section 101(e). (AF 13). The Employer argued that it has an intertwined relationship and affiliation with Harvard Medical School, as evidenced by the mutual promises of support made in the Statement of General Policies. (AF 14). The Employer urged that the mutual promises of support made in the Statement of General Policies be characterized as a membership agreement. *Id.* Therefore, the Employer argued that it is attached to Harvard Medical School as a member teaching hospital and meets the definition of affiliated under 20 C.F.R. § 656.40(e)(1)(ii). (AF 15).

The CD affirmed the PWD on April 5, 2011. (AF 8-10). The CD noted that the INA definition of affiliation is not exclusive, and that when read in context, should not be isolated to demonstrate compliance with the ACWIA provisions. (AF 8). The CD further noted that the INA definition refers to an individual being affiliated with certain political groups that may deem an individual inadmissible to the United States under the INA. *Id*. The CD determined that Section 656.40(e)(1)(ii) requires a legal relationship between the entities that results in shared ownership or control, operation by the institution of higher education, or structure such that the entity is organized under an institution of higher education as a member, branch, cooperative, or subsidiary. (AF 9). The CD found that the Statement of General Policies does not state that there is a legal relationship between the Employer and Harvard Medical School. Therefore, the CD rejected the argument that the Employer is attached to Harvard Medical School as a member. *Id.* The CD also found that the Standing Committee coordinated by the two entities is not responsible for governing the entities, but rather is responsible for studying the agreement and providing recommendations. *Id.*

On May 4, 2011, the Employer requested BALCA review of the CD's determination, arguing that the CD's finding that the regulation requires a legal relationship is not supported by the plain language of the regulation. (AF 1-6). The CD

forwarded the case to the Board, and BALCA issued a Notice of Docketing on August 3, 2011. The Employer filed a brief on September 15, 2011, arguing that the CD erred by conflating six distinct types of affiliated relationships into five and that the CD should have interpreted the regulation in a manner consistent with the statutory definition of affiliation. Counsel for the CD filed a brief on September 23, 2011, arguing that the Employer is not connected or associated with Harvard through shared ownership or control; is not operated by Harvard; and is not attached to Harvard as a member, branch, cooperative or subsidiary. The CD argues that the Statement of General Policies is vague, non-binding, and shows that the Employer and Harvard Medical School are distinct entities.

DISCUSSION

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). The sole issue on appeal is whether the Employer is a nonprofit entity that is affiliated or related with Harvard Medical School, and therefore eligible for a prevailing wage determination that takes into account the wage levels of employees only at such institutions and organizations, also known as the American Competitiveness and Workforce Improvement Act ("ACWIA") wage. ETA's implementing regulation at 20 C.F.R. § 656.40(e) provides:

> (e) *Institutions of higher education and research entities*. In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment for an employee of an institution of

[2] Subsection (n)(1)(A)(i)(II) refers to the H-1B program, and (a)(5)(A) refers to the permanent labor certification program.

> 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.

The PERM regulations define "affiliated or related nonprofit entity" as follows:

> (1)(ii) *Affiliated or related nonprofit entity* means a nonprofit entity (including but not limited to a hospital and a medical or research institution) connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

The Employer argues that the definition at Section 656.40(e) should be applied in a manner consistent with the INA definition. The INA provides that "[t]he giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation." 8 U.S.C. § 1101(e)(2). The United States Citizenship and Immigration Services ("USCIS") Administrative Appeals Office ("AAO") declined to apply this definition of "affiliation" to the meaning of "affiliated or related nonprofit entity" in the context of ACWIA. The AAO explained that the INA definition of "affiliation" was not useful in defining "affiliated nonprofit entity," as the use of affiliation in the Act was limited to provisions making aliens associated with communist, anarchist, or totalitarian parties or organizations inadmissible or ineligible for other benefits under the Act. *In Re: [Identifying Information Redacted]*, 2008 WL 2742219 (Feb. 21, 2008).[3] We agree with the AAO and find that the INA definition of "affiliation" is inapposite to the meaning of "affiliated nonprofit entity" under the ACWIA.

In rulemaking, ETA explained that it worked with Legacy Immigration and Naturalization Service (now USCIS) to develop the definitions of the entities covered by ACWIA. Interim Final Rule, *Labor Condition Applications and Requirements for*

[3] We note that AAO decisions that have not been designated as precedential have all identifying information redacted prior to publication. *See* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=dfe316685e1e6210VgnVCM100000082ca60aRCRD&vgnextchannel=dfe316685e1e6210VgnVCM100000082ca60aRCRD (last visited Nov. 10, 2011).

Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80110, 80181-2 (Dec. 20, 2000). Therefore, USCIS's decisions regarding the meaning of "affiliated or related nonprofit entities" are instructive.[4] The AAO has explained that an employer may demonstrate that it is an affiliated or related nonprofit entity by showing one or more of the following:

(1) The petitioner is connected or associated with an institution of higher education through shared ownership or control by the same board or federation;
(2) The petitioner is operated by an institution of higher education; or
(3) The petitioner is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

In Re: [Identifying Information Redacted], 2010 WL 6526054 (Aug. 9, 2010)(noting that this interpretation is consistent with 20 C.F.R. § 656.40(e)(ii)); *In Re: [Identifying Information Redacted]*, 2008 WL 2742219 (Feb. 21, 2008).

In *In Re: [Identifying Information Redacted]*, 2008 WL 2742219 (Feb. 21, 2008), the petitioner argued that it had a cooperative relationship with Columbia University because it provided scholarships to Tibetan students to study at Columbia University; collaborated and provided financial and logistical support to Columbia University for joint programs; and provided advice, guidance, Tibetan interpreters, and assistance to Columbia University. The AAO considered whether the petitioner met any of the three prongs and determined that the petitioner had not established shared ownership by the same board or federation and did not establish that the petitioner is operated by Columbia University. The AAO also found that the petitioner could not establish that it was a related or affiliated nonprofit entity pursuant to the third prong. The AAO found that petitioner was not "attached" because it did not submit any documentation of an established program between the petitioner and Columbia University and did not submit a contractual agreement or any other documentation to present a consistent collaboration between the two entities. Moreover, the petitioner did not submit any evidence to

[4] Nonprofit organizations or entities related to or affiliated with an institution of higher education are exempt from the fee required for petitions filed on behalf of H-1B nonimmigrants. 8 C.F.R. § 214.2(h)(19)(iii)(B). Additionally, nonprofit organizations or entities related to or affiliated with an institution of higher education are exempt from the annual H-1B numerical cap under section 214(g)(5) of the INA. 8 U.S.C. § 1184(g)(5)(A), (B).

corroborate the petitioner's argument that it provided scholarships to Tibetan students to study at Columbia University. Additionally, the AAO reviewed the petitioner's website and found that it did not identify a program with Columbia University.

We find that weight of the evidence in the record demonstrates that the Employer is attached to Harvard Medical School as a member, and therefore, is an affiliated or related nonprofit entity under 20 C.F.R. § 656.40(e)(1)(ii).[5] The Statement of General Policies establishes that a program has existed between the two entities since 1949 and demonstrates a consistent collaboration between the two entities. The Statement shows that Harvard and Children's Hospital work together to share physical space, personnel, and to collaborate on research initiatives. Harvard Medical School relies on the Employer, among other hospitals, to house its clinical science departments. (AF 81).

Additionally, the Statement establishes a standing committee consisting of representatives of Harvard University and the teaching hospitals, which is responsible for making plans and recommendations to Harvard Medical School. Moreover, an Executive Committee, consisting of the heads of each of the multiple Harvard Medical School departments at the teaching hospitals, meets monthly to review common problems. (AF 86). The establishment of these committees reflects a consistent collaboration between the Employer and Harvard Medical School. As the evidence in the record demonstrates that there is an established program, consistent collaboration, and shared physical space between the Employer and Harvard Medical School, we find that the Employer is "attached" to Harvard Medical School within the meaning of Section 656.40(e)(1)(ii).

The Statement of General Policies demonstrates that the Employer is a member of Harvard Medical School's consortium of teaching hospitals. The Statement consists of guidelines of the entities' relationship and is an agreement that was signed by the Employer and Harvard. (AF 73-75). We find that the mutual duties and obligations in the Statement are analogous to a membership agreement. Moreover, Harvard Medical School clearly views the Employer as a member of its institution. The Hospitals' Relationship with Harvard provides that Harvard Medical School operates "through

[5] We reject the CD's determination that the Employer is not an affiliated or related nonprofit entity to Harvard Medical School because the two entities have no legal relationship. Neither the INA nor the regulations require a legal relationship between the two entities. Therefore, it is not necessary to determine whether the Statement of General Policies creates a legal relationship between the two entities.

departments and faculty located at hospital facilities," and states that these departments are "a part of a single academic institution insofar as teaching and research are concerned." (AF 86). Additionally, Harvard Medical School states that the relationship between it and the teaching hospitals, including the Employer, "is such that [the teaching hospitals] are an integral and essential part of the structure necessary to permit Harvard's Medical School to educate students and promote the advance of medical knowledge." (AF 88).

Finally, we note that ETA considered its definition of "affiliated or related" nonprofit entity to be consistent with the ordinary meaning of the phrase. *See* 65 Fed. Reg. 80110, 80183 (Dec. 20, 2000). Accordingly, we cannot ignore the fact that both the Employer and Harvard Medical School consistently refer to the Employer's relationship with Harvard as that of an affiliate. The Hospitals' Relationship with Harvard stresses that Harvard "could not exist without the affiliation between Harvard and its affiliated hospitals." (AF 81). The evidence in the record shows that the Employer both holds itself out, and is considered by Harvard, to be an affiliate and member of Harvard Medical School's consortium of teaching hospitals. The Employer's letterhead provides that the Employer is "A teaching affiliate of Harvard Medical School" and the domain name of the Employer's Senior Vice President and General Counsel's email address is "@childrens.harvard.edu." (AF 25). The domain name, which, given the ".edu" suffix, appears to have been provided by Harvard, provides further evidence that the Employer is a member of Harvard Medical School's consortium of teaching hospitals. Accordingly, we find that the Employer is an affiliated or related nonprofit entity under 20 C.F.R. § 656.40(e)(1)(ii) because it is attached to Harvard Medical School as a member hospital.

Based on the foregoing, we reverse the CD's determination and remand for the CO to issue a prevailing wage determination using the ACWIA as the applicable wage source.

ORDER

IT IS ORDERED that the prevailing wage determination made by the Certifying Officer is hereby **REVERSED**.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board 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 full Board 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.