In the Matter of

U.S. DEPARTMENT OF LABOR, ADMINISTRATOR, WAGE & HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION,	**ARB CASE NOS. 01-077, 01-081**
	ALJ CASE NO. 98-LCA-3
PETITIONER,	**DATE: October 30, 2003**

v.

DALLAS VA MEDICAL CENTER,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:
Steven J. Mandel, Esq., Paul L. Frieden, Esq., Carol B. Feinberg, Esq.,
U. S. Department of Labor, Washington, D.C.

***For the Respondent*:**
Catherine A. Rich, Esq., ***Department of Veterans' Affairs, Dallas, Texas***

FINAL DECISION AND ORDER

This case concerns the obligations of an employer to a nonimmigrant employee working in the United States under the H-1B visa program authorized by the Immigration and Nationality Act of 1952, as amended in 1990 and 1991 ("INA"), 8 U.S.C.A. §§1101, 1182, and 1184 (West 1998 & Supp. 2003). The Administrator of the Wage and Hour Division ("Administrator") determined that the Dallas Veterans' Administration Medical Center ("DVAMC"), in violation of the applicable regulations, failed to establish the prevailing wage and failed to pay the required wage to Dr. Mirza Hassan ("Hassan"), its H-1B employee.[1] After a Department of

[1] The spelling of Hassan's first and last names varies in the record. Here we use the spelling which DVAMC set out in its January 30, 1998 request for a hearing. See Attachment 7 to Administrator's Brief in Support of Summary Judgment ("Adm. Initial S. J. Mot.").

Labor Administrative Law Judge was assigned to the case, both parties filed motions for Summary Judgment.[2] The Administrative Law Judge ("ALJ") remanded the matter to the Administrator to determine whether DVAMC had violated the H-1B wage requirement. We reverse.

BACKGROUND

A. Statutory and Regulatory Framework

H-1B workers constitute one class of nonimmigrant aliens who enter the United States for prescribed periods of time and for prescribed purposes. *See* 8 U.S.C.A. § 1101(a). Workers issued H-1B visas enter the United States on a temporary basis to work in "specialty occupations." *See* 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700(c)(1) (2001).

An employer seeking to hire an alien in a specialty occupation on an H-1B visa must first obtain certification from the U.S. Department of Labor ("Department") by filing a Labor Condition Application ("LCA"). 20 C.F.R. § 655.730(a). Only after the employer receives Department certification will the Secretary of Homeland Security issue the petition for a visa.[3] To complete the LCA, the employer must provide specific information including the number of aliens to be hired, the occupational classification, the required wage rate to be paid, the prevailing wage, the source of such wage data, the date of need and the period of employment. 20 C.F.R. § 655.731.

The employer is required to pay an H-1B worker a wage rate which is at least the higher of its actual wage rate and the locally prevailing wage for the occupation. *See* 8 U.S.C.A. § 1182(n)(1)(A); 20 C.F.R. § 655.731(a). The "wage rate" is the remuneration (exclusive of fringe benefits) to be paid to the H-1B employee, stated in terms of amount per hour, day, month, or year. *Id.* at 655.715. The Department has issued detailed guidance on how the employer is to determine and document the required wage rate to be paid to the H-1B worker. *Id.* at 655.731.

Thus, to ascertain the "required wage rate," the employer must determine both the "actual wage" and the "prevailing wage" for the occupation in which the alien is to be employed. *Id*. The "actual wage" is the wage rate the employer pays to all other individuals with similar experience and qualifications for the specific employment in question. *Id*. at 655.731(a)(1). The

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[2] We deem these to be motions for "summary decision" as that term is used in the rules of practice for administrative hearings at 29 C.F.R. § 18.40 (2001).

[3] At the time of DVAMC's application for Hassan, the Immigration and Naturalization Service ("INS") was the agency which issued visa petitions. 20 C.F.R. § 655.740. On March 1, 2003, however, the INS ceased to exist as an independent agency under the umbrella of the U.S. Department of Justice and its functions were transferred to the newly formed Department of Homeland Security. *See Ahmed v. Department of Homeland Sec.*, 328 F.3d 383, 384 n.1 (7th Cir. 2003); Homeland Security Act of 2002, Pub. L. No. 107- 296, 116 Stat. 2135 (Nov. 25, 2002). As before, the State Department still issues H-1B visas. 8 U.S.C.A. § 1201.

"prevailing wage" is the wage rate for the occupational classification in the area of intended employment at the time the LCA is filed. *Id*. at 655.731(a)(2). The employer may obtain prevailing wage information from any of a variety of sources such as the state employment security agency ("SESA"), an independent authoritative source, or some other legitimate source. *Id*.

B. Procedural History

The DVAMC, part of the U. S. Department of Veterans' Affairs, provides medical treatment and care to veterans in Dallas, Texas. ALJ's Decision and Order ("D. & O.") at 2; Acting Administrator's Brief in Support of Petition for Review ("Adm. Br.") at 3. On August 30, 1996, the DVAMC signed and submitted an LCA to obtain an H-1B visa for Dr. Hassan. Adm. Initial S.J. Mot. at 2, 4-5. On the LCA, DVAMC indicated that the required wage rate for Hassan's occupational classification was $87,420 annually, that the prevailing wage for the job was also $87,420 annually, and that the source of the prevailing wage data was "VA Form 10-5379e."[4] *Id.* at 2, 5.

The Department rejected the LCA because, among other things, the source of the prevailing wage data was unacceptable. *Id*. at 5. DVAMC resubmitted the LCA, restated the required wage rate and the prevailing wage as $87,420, but changed the source of the prevailing wage data to "USA VA survey." *Id*. The Department approved the resubmitted LCA, Hassan was subsequently issued a visa, and he began working as an H-1B employee at the Dallas VA Medical Center in December 1996. D. & O. at 2.

By letter dated January 15, 1998, the Administrator notified DVAMC that it had conducted an investigation and had determined that DVAMC had violated 20 C.F.R. §§ 655.731 and 655.805(a) by failing to pay Hassan the "required wage rate" and also by failing to determine properly the "prevailing wage" for the job. Adm. Br. at 6. To remedy the matter, the Administrator ordered DVAMC to pay back wages to Hassan in the amount of $17,842.18. *Id.* In a January 30, 1998 letter to the Administrator, DVAMC argued that the wages paid were appropriate and requested a hearing before a Department Administrative Law Judge. *Id.*

Each party moved for summary judgment. D. & O. at 2. In ruling on the motions, the ALJ determined that the Department had issued a proposed rule discussing the effect on the H-1B program of recent INA amendments, and that, based on his reading of the rule, the INA amendments applied to the case. ALJ's June 22, 1999 Order Denying Motions for Summary Judgment at 2. Consequently, the ALJ denied both motions and stayed the matter until the proposed rule was finalized. D. & O. at 2; Adm. Br. at 9.

After the final rule was published on December 20, 2000, the parties renewed their motions for summary judgment. *See* 65 Fed. Reg. 80110 (Dec. 20, 2000). On June 19, 2001, the

[4] DVAMC stated that the prevailing wage rate was $87,420 even though the Texas Workforce Commission, the State's SESA, had previously informed DVAMC's law firm that the prevailing rate for Hassan's job was $106,300. Adm. Initial S.J. Mot. at 2 and Att. 1 at Admission 12.

ALJ granted summary judgment to DVAMC. He ruled that DVAMC is an "employer" and a "Government research organization," and therefore entitled to the special prevailing wage provisions set out in the INA amendments. Both DVAMC and the Administrator petitioned this Board to review the ALJ's decision.

DISCUSSION

A. Jurisdiction and Standard of Review

This Board has jurisdiction to review ALJ decisions in H-1B cases. *See* 20 C.F.R. § 655.845.

We review summary decisions de novo. That is, the Board's review is governed by the same standard that the ALJ used. *Administrator v. Alden Mgmt. Serv., Inc*., ARB Nos. 00-020, 00-021, ALJ No. 96-ARN-3, slip op. at 3 (ARB Aug. 30, 2002). Summary decision may be entered "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact in dispute, and whether the ALJ correctly applied the relevant substantive law. *Anderson v. Metro Wastewater Reclamation Dist*., ARB No. 98-807, ALJ No. 97-SDW-7, slip op. at 3 (ARB, March 30, 2000) citing *Whitaker v. CTI- Alaska, Inc*., ARB No. 98-036, ALJ No. 97-CAA-15, slip op. at 3 (ARB May 28, 1999).

B. Analysis of Issues

1. DVAMC's Status as an Employer. The relevant H-1B regulations define "employer" as "a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship" with H-1B nonimmigrant aliens. 20 C.F.R. § 655.715. The Administrator argues that DVAMC is an employer within the meaning of the H-1B regulations. Although conceding that it is Hassan's employer, DVAMC nevertheless contends that it does not fall within the regulatory definition of employer because it is "an executive department of [the] federal government and [is] not a person, firm, corporation, contractor or other organization." DVAMC's Pet. for Review at 2-3. According to DVAMC, because it is not an employer under the H-1B definition, it is therefore not subject to the wage requirements of the H-1B program. *See* D. & O. at 3.

The ALJ found that, contrary to DVAMC's position, a government agency is not precluded from being an employer as defined in the regulations because neither the statute nor the regulations prohibit a government agency from being an employer. D. & O. at 3. Furthermore, because DVAMC voluntarily subjected itself to the requirements of the H-1B program by submitting an LCA on behalf of Hassan and declaring itself his employer, the ALJ ruled that DVAMC cannot now contest its status as an employer. He granted summary judgment on this issue to the Administrator. *Id*.

We agree. The record indicates that no genuine issue of material fact exists as to whether DVAMC is an employer under the H-1B definition. Furthermore, we find that DVAMC, an entity which has secured all the benefits available to an employer under the H-1B program, namely, the ability to employ nonimmigrant aliens, is estopped from subsequently denying that it is an employer. *See also Administrator v. Alden,* slip op. 9 (having received the benefits available to a "facility," company is estopped from later denying that it is a "facility").

2. DVAMC Status as a Governmental Research Organization. The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of P. L. 105-277, amended the INA by, inter alia, creating a modified process for computing prevailing wage rates. 8 U.S.C.A. § 1182(p). The ACWIA amendment permits specific employers (higher education institutions, nonprofit research organizations, and Governmental research organizations) to use a special method for calculating the prevailing wage level for H-1B employees. 20 C.F.R. § 655.731(a)(2)(viii); *see also* 65 Fed. Reg. 80110, 80117 (Dec. 20, 2000). The ALJ determined that DVAMC is entitled to use this less onerous method of calculating prevailing wage levels because it is a "Governmental research organization" as defined in the ACWIA amendments.[5] D. & O. at 4-5. We disagree.

The regulations implementing ACWIA state that, in computing the prevailing wage for a job opportunity in the case of 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 shall **only** take into account employees at such institutions and organizations in the area of intended employment." (Emphasis added). 20 C.F.R. § 655.731(a)(2)(viii).

A "Governmental research organization" is defined as follows:

> (iii) Nonprofit research organization or Governmental research organization. A research organization that is either a nonprofit organization or entity that is primarily engaged in basic research and/or applied research, or **a U. S. Government entity whose primary mission is the performance or promotion of basic and/or applied research . . . .**

20 C.F.R. § 656.40(c)(1)(iii) (emphasis added).

Therefore, to meet this definition, a Government entity's primary mission must be research. The ALJ found two undisputed facts: (1) DVAMC engages in research as part of its provision of services to patients, and (2) two to five percent of its funds received from the

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5 The ALJ also found that the ACWIA amendments retroactively applied to this case. D. & O. at 3-4. Because we have determined that the ALJ erred in finding that DVAMC met the regulatory definition of a Government research organization, we need not address his decision regarding the retroactivity issue.

Department of Veterans' Affairs is allocated solely for research purposes. D. & O. at 5. Based on these facts, the ALJ concluded that DVAMC is a Government research organization. *Id*.

The ALJ erred in so concluding because he ignored the uncontroverted fact that DVAMC's primary mission is not research but rather the provision of medical care and treatment to veterans. The record is replete with evidence of DVAMC's mission. For example, the DVAMC itself asserts that it engages in medical research in connection with "the primary function of the VHA which is the provision of medical care and treatment to veterans."[6] Furthermore, the enabling statute for the Department of Veterans' Affairs reads: "The primary function of the [Veterans' Health] Administration is to provide a complete medical and hospital service for the medical care and treatment of veterans." 38 U.S.C.A. § 7301 (West 2002). Finally, in response to discovery requests, DVAMC admitted that its "primary mission is not performance or promotion of research," but is "the provision of medical care and treatment to veterans."[7]

Having viewed the evidence in the light most favorable to DVAMC, we nevertheless find that the record indisputably demonstrates that DVAMC's primary mission is not research. Therefore, it is not a Government research organization according to 20 C.F.R. § 656.40(c). Thus, we reverse the ALJ and award summary judgment to the Administrator on this issue.

CONCLUSION

We find that no genuine issue of material fact exists as to whether DVAMC is an employer or a research organization. The record demonstrates that DVAMC is an employer as defined in the H-1B regulations, and that it is not a Government research organization entitled to the ACWIA special prevailing wage provisions. Accordingly, we affirm the Wage and Hour Division's January 15, 1999 determination that DVAMC violated the H-1B regulations and that Dr. Hassan is entitled to $17,842.18 in back wages.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

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[6] Respondent's Counter Motion in Response to Administrator's Motion for Summary Judgment at 8.

[7] Respondent's Response to the Administrator's Second Request for Admissions at Response 18 and Response 16.