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Issue Date: 21 November 2005

Case No. 2005-JSW-00003

In the Matter of:

SPACEAGE CONSULTING CORPORATION,
Appellant/Employer,

v.

EMPLOYMENT AND TRAINING ADMINISTRATION,
Appellee.

Before: JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER

This action arises from an appeal by SpaceAge Consulting Corporation ("SpaceAge", "Appellant") of a prevailing wage determination made by the New York and New Jersey Departments of Labor and the United States Department of Labor. The wage determination was based upon a job description provided by SpaceAge in its application for H-1B visas for two unidentified beneficiaries. The prevailing wage determinations were requested by the Employment Standards Administration, Wage and Hour Division, ("ESA") pursuant to 20 C.F.R. § 655.731(d), during the course of an investigation into two of Employer's H-1B Labor Condition Applications filed in White Plains, New York, and Jersey City, New Jersey.

I. INTRODUCTION

A. Statutory and Regulatory Background

The Immigration and Nationality Act's ("INA") H-1B visa program permits American employers to temporarily employ non-immigrant aliens to perform specialized jobs in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). In order to protect U.S. workers and their wages from an influx of foreign workers and lowered wages, an employer must file a labor condition application (LCA) with the Department of Labor ("DOL") before a nonimmigrant alien will be admitted to the United States as an H-1B nonimmigrant worker. 8 U.S.C. § 1182(n)(1). As part of that LCA, the employer must attest that it:

(i) Is offering and will offer during the period of authorized employment to [H-1B employees] wages that are at least –

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment,

whichever is greater, based on the best information available as of the time of filing the application…

Id. at §§ 1182(n)(1)(A)(i)(I)&(II). This wage requirement restricts American employers from paying foreign workers less than their American counterparts. The requirement thus acts as a disincentive to hiring nonimmigrant workers over equally qualified American workers in specific occupations.

When preparing an LCA, the employer must identify the occupational classification for which the LCA is sought and the employer's own title for the job. 20 C.F.R. § 655.730(c). The employer must also attest that it will pay the H-1B nonimmigrant the wage rate required under §§ 1182(n)(1)(A)(i)(I)&(II). The required wage rate is the greater of the actual wage rate or the prevailing wage rate and includes the employer's obligation to offer benefits and eligibility for benefits in accordance with the same criteria as the employer offers to U.S. workers. 20 C.F.R. § 655.731(a). The *actual wage* is defined as the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. 20 C.F.R. § 655.731(a)(1). The *prevailing wage* is the average rate of wages paid to workers similarly employed in the area of intended employment. 20 C.F.R. § 655.731(a)(2)(iii).

In the event of an investigation concerning a failure to meet the prevailing wage requirement, the Employment Standards Administration ("ESA"), Wage and Hour Division, shall determine whether the employer has the required documentation to support the wage set by the employer. 20 C.F.R. § 655.731(d)(1). Where the documentation is either nonexistent or insufficient to determine the prevailing wage, ESA may contact the Employment and Training Administration ("ETA") to provide a prevailing wage determination. Id.

B. Standard of Review

An employer can appeal a prevailing wage rate determination by ETA to an Administrative Law Judge ("ALJ") pursuant to 20 C.F.R. § 658.421(d). The matter is handled by procedures set forth in 20 C.F.R. § 658.424, which provides discretion to the ALJ to schedule a formal hearing or make a determination on the record. Id. at § 658.424(b).

The ALJ, in such matters, may render such rulings as are appropriate to the issues in question. However, the ALJ does not have jurisdiction to consider the validity or constitutionality of applicable regulations or of the federal statutes under which they are promulgated. 20 C.F.R. § 658.425(a)(4). The decision of the ALJ shall be the final decision of the Secretary of Labor. 20 C.F.R. § 658.425.

C. Procedural History

SpaceAge filed two H-1B Labor Condition Applications ("LCAs") on October 17, 2003[1], and February 7, 2004[2], for the Employer-titled position of "Programmer Analyst" in Jersey City, New Jersey, and White Plains, New York, respectively. On October 19, 2004, ESA Wage and Hour Investigator requested a determination from the ETA of the prevailing wages for the job listed in Employer's LCAs. After contacting the Prevailing Wage Specialists of the New York and New Jersey State Workforce Agencies ("SWA"), the Certifying Officer of ETA responded that the described positions were consistent with the Occupational Employment Statistics' ("OES") occupation of "Computer Software Engineer, Applications," code 15-1031, at the level one rate. From wage information pertinent to the OES job classification, ETA concluded that the effective prevailing wages for SpaceAge's positions were $54,246 in Jersey City, New Jersey, and $53,810 in White Plains, New York.

On December 2, 2004, ETA notified Employer of its prevailing wage determinations and further advised that it had determined that Employer's documentation of the prevailing wages of the two relevant positions failed to conform with regulatory criteria at 20 C.F.R. § 655.731(b)(3) and/or 20 C.F.R. § 655.731(a)(2), which specify legitimate sources and conditions for determining prevailing wages. Employer notified ETA of its intent to appeal ETA's prevailing wage determinations in a letter dated December 2, 2004.[3] On March 3, 2005, ETA notified Employer that an employer who wishes to challenge a prevailing wage determination must state its rate of pay and document that the prevailing wage determination provided by ETA was in error and that Employer's wage equals or exceeds the correct prevailing wage. Employer responded with its prevailing wage determination on March 29, 2005. Subsequently, on April 20, 2005, ETA notified Employer that its countervailing evidence of the prevailing wage determinations was deficient.

As a result of the foregoing, on May 9, 2005, Employer challenged ETA's H-1B prevailing wage rate determinations and requested a hearing before the United States Department of Labor's Office of Administrative Law Judges ("OALJ") pursuant to 20 C.F.R. § 658.421(d). By Notice and Order dated July 27, 2005, I directed the parties to submit written argument together with any supporting documentation of their respective positions by August 23, 2005, so that I may determine whether it would be appropriate to issue a decision on the record.

On August 17, 2005, Employer moved for an extension of time to file written submissions and Appellee objected. I overruled Appellee's objection and granted Employer's motion. Appellee then submitted its written pre-hearing brief on August 23, 2005 (the appeal

[1] LCA #I-03290-766099
[2] LCA #I-04038-0941317
[3] The letter dated December 2, 2004, was the first correspondence sent by Employer communicating its intent to appeal the ETA's determinations. "Appeal" is defined in the context of JSW complaints as, "any letter or other writing requesting review if it is received by the regional office and signed by a party to the complaint." 20 C.F.R. § 658.421(b). I note this because Appellee's brief asserts that Employer appealed by letter dated December 14, 2004. AB. at 3.

file was submitted to the OALJ on June 24, 2005). On September 15, 2005[4] Employer submitted seven exhibits attached to its written brief. At my direction, Employer provided more detail about the sources upon which it relied to set the wage. I have identified those additional documents as exhibits EX-G and H. Appellee Department of Labor did not address Employer's documentation.

Having reviewed the parties' submissions, I find that an adequate evidentiary record has been produced and there is no need to conduct a hearing. This Decision and Order, therefore, is made upon the merits of the case on the record.

D. Contentions of the Parties

1. Employer/Appellant

Employer appeals the prevailing wage determinations made in this case by ETA concerning the job descriptions that SpaceAge filed on October 17, 2003, and February 7, 2004. First, Employer contends that its use of the Watson Wyatt Data Services Wage Survey was an appropriate and adequate source for determining its own prevailing wage. Second, Employer argues in the alternative, that ETA's occupational classification under the OES survey was improper and that the correct OES classification should be "Computer Programmer," code 15-1021. Third, Employer argues that its $40,000 wage offer is justified even though it falls below the prevailing wage.

2. Appellee

Appellee contends that the methodology and evidence used by Employer to determine the prevailing wages in this matter was not acceptable under the federal regulations. Appellee therefore argues that its prevailing wage determinations were proper. Specifically, Appellee contends that the appropriate OES occupational classification for the positions in question is "Computer Software Engineer, Applications," occupation code 15-1031. Under the OES survey, this classification provides a prevailing wage of $53,810 per year in White Plains, New York, and $54,246 per year in Jersey, City, New Jersey.

E. Issues

The issues presented in this case for resolution are:

1. Is Employer's submitted evidence adequate to sustain its own prevailing wage determinations as calculated by the Watson Wyatt Wage Survey?
2. Alternatively, even if Employer's evidence was not an adequate source for determining its own prevailing wage, was ETA's occupational classification of Employer's job descriptions proper under the OES survey?
3. Has Employer justified wage offers below the proper prevailing wages?

[4] The following citations are used herein: "AB. at -" denotes Appellee's brief; "AF.-1" through "AF.-40" denotes exhibits submitted by the ETA in the appeal file; "EB. at -" denotes Employer's brief; and "EX.-A" through "EX.-H" denotes Employer's exhibits.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

The job descriptions for the two LCAs filed by Employer in White Plains, New York, and Jersey City, New Jersey, described identical positions. AF. at 37-40. The Employer titled the position "Programmer Analyst" in the Jersey City application and gave a lengthy description of the duties and responsibilities of the position. The following is a list excerpted from Employer's beneficiary request form to summarize the position in question:

1. "Beneficiary will be spending 100% of his time doing software application design, coding, testing and maintenance."
2. "As part of beneficiary's responsibilities, beneficiary will plan, develop, test and document computer programs…"
3. "Beneficiary will evaluate requests for new programs or enhancements to current applications and determine compatibility with current systems and computer capabilities."
4. "Beneficiary will write manuals and technical reports that meet user requirements."
5. "Beneficiary will formulate plans and various design documents required to develop programs…Beneficiary will submit plans to management for approval."
6. "Beneficiary will prepare program design documents…to illustrate static and dynamic aspects of the system being designed and developed."
7. "Beneficiary will identify problems and analyze specific output and input requirements, such as forms of data input, how data is to be summarized, and formats for reports…"
8. "Beneficiary will interact with user groups to understand and comprehend their business requirements."
9. "Beneficiary will be required to convert project specifications, project design documents and design diagrams into program source code…"
10. "Beneficiary will be applying knowledge of computer programming languages and programming techniques."
11. "Beneficiary will enter program source code into computer systems and enter commands to compile, deploy, run and test programs…"
12. "Beneficiary will replace, delete or modify program code to correct errors."
13. "…beneficiary will be required to write manuals for users, analyze user requirements, provide technical support, solve problems and troubleshoot systems."
14. "Beneficiary will be involved in systems integration, debugging, troubleshooting and installation. Beneficiary may also be required to train users in using the software."
15. "Beneficiary will utilize knowledge and experience in computer programming, analysis and applications for the purpose of developing various customized software business applications."

16. "Beneficiary will study existing systems to evaluate effectiveness and develop new systems to improve production or work flow."
17. "Beneficiary will write a detailed description of user needs, program functions, and steps required to develop or modify computer programs."

AF. at 37-38; 39-40.

In response to a request by ETA, the New York State Department of Labor ("NYSDOL"), by letter dated November 1, 2004, found that the appropriate SOC category for the position described by Employer was "Computer Software Engineer, Applications," SOC code 15-1031, because the beneficiary will be doing 'software application design.'" AF. at 25 (quoting Employer). The NYSDOL also noted that the beneficiary would interact with user groups to understand business requirements, which was consistent with the classification's definition of "analyze user needs and develop software solutions." Id. Within its report, the NYSDOL also discussed the possible applicability of SOC categories "Computer Systems Analysts," code 15-1051, and "Computer Programmers," code 15-1021, but eventually determined that "Computer Software Engineer, Applications", was the appropriate category. As to the classification, "Computer Programmers," code 15-1021, the NYSDOL noted:

> Part of the work done by the beneficiary falls under the category of Computer Programmers, SOC code 15-1021. The beneficiary will enter program source code into computer systems and enter commands to compile, deploy, run and test programs. However, he will use his knowledge and experience in computer programming "for the purpose of developing various customized software business solutions."
>
> Thus, even though computer programming is part of the position, the essential role of the beneficiary is to be a Computer Software Engineer, Applications.

AF. at 26 (quoting Employer). This distinction by the NYSDOL is important because Employer now argues that the position he employs is properly classified under the OES system as "Computer Programmer." See EB. at 4-10.

In its response to the request by ETA, the New Jersey Department of Labor and Workforce Development (NJDOL) also classified the job description offered by Employer as "Computer Software Engineer, Applications." AF. at 22. The NJDOL, however, did not give a detailed explanation for why it selected that classification as appropriate. Rather, the NJDOL's report focused on the difference between a skill level II job as opposed to a skill level I job. The NJDOL recommended that the job description offered by Employer was more appropriately classified as a skill level II job, which would have increased the prevailing wage determination for the Jersey City position from $54,246.40/yr. (level I) to $89,356.80/yr. (level II). AF. at 22. ETA and ESA, however, eventually determined that the job position was more appropriately classified as a level I position and so the lower prevailing wage determination was made. AF. at 21.

ESA notified Employer of these findings by letter dated December 2, 2004. AF. at 19. It also notified Employer that Employer's documentation of its own prevailing wage determination did not conform to federal regulations and that it had the right to appeal ESA's findings. Employer appealed ESA's decision on December 2, 2004. On March 29, 2005, Employer submitted its own prevailing wage determination. Employer reported that its prevailing wage determination is "derived from established wage surveys after applying intelligent analysis, logic, careful thought, and keeping in mind the freedom enshrined in the Constitution of the Unites States of America." AF. at 7. Employer disclosed that it used the Watson Wyatt Data Services Wage Survey ("Survey") to determine that the average salary of a level-1 programmer is $41,000 per year. It is unclear from the record whether that was the figure that it submitted to ESA as its wage offer for the positions in question.[5]

On April 20, 2005, ETA notified Employer of its final determination that the appropriate occupational classifications for Employer's job descriptions are "Computer Software Engineer, Applications," code 15-1031, assigned at level I rates. AF. at 3. These classifications led to prevailing wage determinations of $53,810 per year in White Plains, New York, and $54,246 per year in Jersey City, New Jersey. ETA also notified Employer that its countervailing evidence supporting its own prevailing wage rate determination was deficient for numerous reasons. First, ETA notified Employer that its prevailing wage rate submission of $41,000 per year as calculated by the Survey failed to reflect the area of intended employment and failed to include survey definitions. Specifically, the Survey calculation was based on the position of level I "General Programmer/Analyst" for the entire United States. ETA informed Employer that the State of New York, alone, would have been too large an area on which to calculate a prevailing wage. Further, Employer submitted no evidence showing a determination for the Jersey City, New Jersey request. Second, ETA informed Employer that it erroneously factored in the following items which are not to be used in determining a prevailing wage rate: fringe benefits, nature of the employer, and the ability and intellect of the employee. Because of this, ETA found that Employer's countervailing evidence was deficient and its wage offer was below both of the prevailing wage rates for the respective areas of employment. AF. at 3-5.

The record before me is now much more extensive than the information that ETA had when it made its prevailing wage determinations. Specifically, the two pages of vague charts from the Survey that Employer submitted to ETA, have been replaced with the software program for the Watson Wyatt Data Services Wage Survey, in the form of a compact disc ("CD"). EB. at 11; EX.-G. This software program purportedly contains extensive wage survey data and explanations of methodology for the time period labeled 2003/2004; however, I was unable to "upload" it for full inspection.[6] In response to my request, Employer printed hard copies of information from that program that it feels are most relevant to this case.

[5] It is unclear because Employer attempts to justify a salary of $40,000 in its brief. EB. at 13.

[6] A search of the company's website at www.watsonwyatt.com confirmed that such information is available in this format for employers who subscribe to the service.

B. Legal Analysis

1. Determination of a Proper Prevailing Wage Under 20 C.F.R. § 656.40 – The Regulatory Framework

In determining prevailing wages for the H-1B visa program, the regulatory scheme at 20 C.F.R. § 656.40 must be followed. See General Administration Letter (GAL) No.2-98 (found at http://wdr.doleta.gov/directives). The relevant provision states, "…the prevailing wage for labor certification purposes shall be: (i) the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers." 20 C.F.R. § 656.40(a)(2)(i). The provision defines "similarly employed" as "having substantially comparable jobs in the occupational category in the area of intended employment." 20 C.F.R § 656.40(b). Thus, under § 656.40, the relevant factors in arriving at a prevailing wage rate are a) the nature of the job and b) the geographic locality of the job. See GAL No.2-98.

a) The Nature of the Job

The nature of the job at issue is a relevant factor in determining prevailing wages because the regulations command that prevailing wages be computed by using the average rate of wages "paid to workers similarly employed." 20 C.F.R. § 656.40(a)(2)(i) [emphasis added]. "Similarly employed" means "having substantially comparable jobs in [an] occupational category." C.F.R § 656.40(b). In determining the nature of the job, the first order of inquiry is to determine the appropriate occupational classification. The Dictionary of Occupational Titles ("DOT") job description that corresponds to the employer's job offer will normally be used to assign to the job the relevant 9-digit DOT code. The relevant DOT code will then be cross referenced to an OES occupational code. See GAL No. 2-98, Attach. § II.D.

b) The Geographic Locality of the Job

The geographic locality of the job is a relevant factor in determining prevailing wages because the regulations command that prevailing wages are computed using the average rate of wages "paid to workers similarly employed in the area of intended employment." 20 C.F.R. § 656.40(a)(2)(i) [emphasis added]. "Area of intended employment" is defined as "the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Metropolitan Statistical Area ("MSA") or a Primary Metropolitan Statistical Area ("PMSA"), any place within the MSA or PMSA is deemed to be within the normal commuting distance of the place of intended employment." 20 C.F.R. §§ 655.715; 656.3.

2. Employer's Evidence is not Acceptable to Determine the Prevailing Wages in this Case

Employer's first contention of appeal of ETA's prevailing wage determination is that it has used its own legitimate source of wage data to determine a prevailing wage lower than that of ETA. ETA counters that Employer's evidence is not acceptable on two grounds: 1) Employer has not provided enough information about the Watson Wyatt Survey methodology to allow the

SESA to make a determination regarding its validity; and 2) the Survey charts do not properly reflect the area of intended employment.

The federal regulations declare that an employer's prevailing wage determination must be based on the best available information at the time of filing the LCA. The employer is not required to use any specific methodology and may use other sources in lieu of a SESA determination. 20 C.F.R. § 655.731(a)(2). Specifically, the employer may rely on other legitimate sources of wage data to obtain the prevailing wage. 20 C.F.R. § 655.731(a)(2)(iii)(C). If the employer chooses to do so, the other legitimate source survey must meet the following criteria:

> (1) Reflects the weighted average wage paid to workers similarly employed in the area of intended employment;
> (2) Is based on the most recent and accurate information available; and
> (3) Is reasonable and consistent with recognized standards and principles in producing a prevailing wage.

20 C.F.R. § 655.731(b)(3)(iii)(C).

These DOL regulations are supplemented by guidelines issued by ETA. General Administration Letter ("GAL") No. 2-98 sets out ETA's prevailing wage policy. Under GAL No. 2-98, Attachment 1, Section II, Subsection J, ETA sets out specific criteria that an employer must meet to use employer-provided published wage surveys. This section reads:

> In determining prevailing wage rates…the SESA shall consider wage data that has been furnished by the employer, i.e., wage data contained in a published wage survey that has been provided by the employer…The use of such employer-provided wage data is an employer option. However, if an employer wishes to use alternative wage data, it will be incumbent upon the employer to make a showing that the survey or other wage data meet the criteria outlined below. In all cases where an employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the SESA with enough information about the survey methodology (e.g., sample frame size and source, sample selection procedures, survey job descriptions) to allow the SESA to make a determination with regard to the adequacy of the data provided and its adherence to these criteria.

GAL No.2-98 Attach. § II.J. This section then lists seven criteria that must be met:

> (3) The survey or other wage data must reflect the area of intended employment. A valid arithmetic mean for an area larger than an OES wage area, whether an MSA, PMSA or an OES Balance of State area, may only be used if there are not sufficient workers in the specific occupational classification relevant to the employer's job opportunity in the area of intended employment. However, the area of intended employment should not be expanded beyond that which is necessary to produce a representative sample. In all cases where an area that is

> larger than an OES wage area is used, the employer must establish that there were not sufficient workers in the area of intended employment, thus necessitating the expansion of the area surveyed.

and

> (7) In all cases where an employer provides the SESA with a survey or other wage data for which it seeks acceptance, the employer must include the methodology used for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage (e.g,. contains a representative sample), including its adherence to these standards for the acceptability of employer-provided wage data.

GAL No.2-98 Attach. §§ II.J.(3), (7).

I am satisfied that Employer has remedied Appellee's first contention regarding its use of the Watson Wyatt Survey. Although Employer only furnished ETA with wage data from two charts of the Survey that were unaccompanied by any significant explanations of the methodology used, it has since submitted to the record the Survey software program and hard copies of specific information. The information that was submitted contains definitions and explanations that adequately explain the Survey's methodology, including: an explanation of the difference between the terms "weighted average," and "average" as they are used on the Survey charts; a Level Guide explaining what each level encompasses on the Survey charts; a geographical analysis defining the geographic areas surveyed; a definition of the "General Programmer/Analyst" position; definitions of other positions; explanations on how to use the Survey charts; and explanations of how the data was computed. EX.-D-G. Accordingly, I find that Employer has remedied the deficiency of its survey methodology submissions.

Employer has failed, however, to establish that the Watson Wyatt Survey adequately reflects the area of intended employment. Employer originally submitted to ETA two charts that listed average annual salaries of "General Programmer/Analysts" by four geographic areas: the United States as a whole; the Northeast Region; the Middle Atlantic States; and the State of New York. No information was submitted concerning average wages in only New Jersey.

In its next submission to the record, Employer provided two Survey charts that supply average annual salaries for five levels of the position of "General Programmer/Analyst." EX.-C. The first chart corresponds to the White Plains, New York job description, and is broken down into the following geographical areas: Northeast, Middle Atlantic States, New York, and a Consolidated Metropolitan Statistical Area ("CMSA") defined as "New York-Northern NJ-Long Island, NY-NJ-CT-PA." EX.-C at 1. The second chart corresponds to the Jersey City job description, and is broken down into the following geographical areas: Northeast, Middle Atlantic States, New Jersey, and the CMSA. EX.-C at 2. Although a MSA for Jersey City, New Jersey is identified, there is no wage information provided, and the five levels of the job that are shown in the State and CMSA areas are not included.

Upon inspection of the Watson Wyatt Data Services Guide to Finding and Using the Compensation Data in the Report (EX.-D), I discovered that the Survey provided wage data for specific "Metropolitan Areas," including White Plains, New York and Jersey City, New Jersey. I then offered Employer the opportunity to submit average wage data for those specific metropolitan areas[7] for my consideration. In response, Employer submitted two more Survey charts, neither of which included average wage data for Level 1 or Level 2 general programmer/analysts as those levels are defined in the Survey. The chart of the 2003/2004 Geographic Report on Professional Personnel Compensation for the job General Programmer/Analyst in New York breaks the wage information into three categories: the State of New York, the CMSA comprised of New York-Northern NJ-Long Island, NY-NJ-CT-PA and the MSA of New York, NY. The chart consists of a grid that displays five levels of salary for this position. In New York State, the average annual salary at Level 1 is 44.3 (thousands of dollars) and at Level 2, the annual salary is 57.4. The same job in the CMSA yielded an average annual salary of 46.5 at Level 1 and 58.6 at Level 2. The grids corresponding to the MSA of New York, New York have no information at Level 1 or 2, but reflect annual average wages of 68.5 at Level 3, 86.4 at Level 4 and 101.4 at Level 5.[8] As I have noted, there is a designation for Jersey City, New Jersey, but no wage information on the chart identified as applicable to Employer's prospective job in that location.

The record thus reflects that Employer's average wage rates are based upon the average annual salaries that correspond with the geographic grouping that constitutes a geographical grouping of "CMSA" in the Survey. I find that Employer's use of the Survey's "CMSA: New York-Northern NJ-Long Island, NY-NJ-CT-PA" is not proper for determining a prevailing wage under 20 C.F.R. § 656.40. Employer has not established the necessity for expanding the area surveyed into such a large geographic component. As previously stated, the regulations define "area of intended employment" as "the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed" 20 C.F.R. §§ 655.715. This definition, found in § 655.715, goes on to state:

> If the place of employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distance.

20 C.F.R. §§ 655.715 (emphasis added). Thus, the regulations directly address the geographical grouping of a CMSA such as that used by Employer in this case. As the regulation clearly states, a CMSA *could be* used to determine prevailing wages but, unlike a MSA or PMSA, it is not a *per se* valid statistical grouping for determining prevailing wages. Discretion is left to the trier

[7] I offered Employer the opportunity to submit this information to complete the record in consideration of Employer's *pro se* status.

[8] Although the chart for the New York, New York metropolitan area lists average annual salaries of Level 3 through Level 5 general programmer/analysts, I find that as those levels are defined in the Survey, none is applicable to the job descriptions in this case.

of fact to determine whether the proffered CMSA is an adequate statistical measure in the case at hand.

I find that the CMSA that Employer used to determine prevailing wages expands the geographic area unnecessarily. As the Watson Wyatt data demonstrates, the occupation for which Employer has set a wage is commonly found in and was expected to be performed near the largest metropolitan center in the United States[9]. An adequate wage survey should be able to determine average wage rates for most occupations in and around New York City. The Watson Wyatt Survey actually does group data into MSAs, including a New York, New York MSA and a Jersey City, New Jersey MSA. Although the charts submitted by Employer do not include average wage rates for level 1 general programmer/analysts in either of those two MSAs, the State agencies do have specific wage rates for each of those defined areas.[10] Employer submitted average wage rates computed for that position in a CMSA that includes parts of New York, New Jersey, Connecticut, and Pennsylvania rather than the geographic areas that would specifically apply to the prospective jobs. In so doing, Employer failed to meet the regulatory standard for determining a prevailing wage.

The ETA guidelines explicitly state that when an employer uses other legitimate sources of wage data and the data utilizes an area larger than an OES wage area, the "employer must establish that there were not sufficient workers in the area of intended employment, thus necessitating the expansion of the area surveyed." GAL No.2-98 Attach. § II.J.(3). In this case, the OES survey, which is used by ETA, classifies Jersey City, New Jersey as comprising its own PMSA. See www.flcdatacenter.com. White Plains, New York is included in the New York, New York PMSA, which is separate and distinct from the Jersey City PMSA under the OES survey. Id. It is thus clear that Employer's submission of data was computed using a CMSA which was substantially larger than the OES PMSAs upon which ETA relied to make its determinations. Therefore, in order to validly use the Survey's CMSA, Employer has to establish that it was necessary to expand the area surveyed because of a lack of workers in the area of intended employment. Employer has submitted no justification for relying upon a CMSA despite the existence of data for PMSA prevailing wages for the jobs at issue. Because the States identified areas as discrete PMSA's, and provided wage rates for entry level computer programmers in those cities, I find it unlikely that Employer could justify its use of a PMSA.

I do not conclude here that a geographic area such as a CMSA could never be used to determine prevailing wages. Rather, I find that in the case at hand, Employer has not offered any evidence justifying the use of this CMSA.

Because Employer's submission of data from the Watson Wyatt Survey does not adequately reflect the area of intended employment for prevailing wage determinations and Employer has not supplied adequate justification, I find that use of the Survey for prevailing wage determinations in this case is improper. I find that Employer has failed to comply with prevailing regulations and ETA guidelines that require justification for its wage determination. Accordingly, Employer's determination of a prevailing wage using an employer-furnished wage survey was not adequate.

[9] I take official notice that White Plains and Jersey City fall within the metropolitan area of New York, New York.
[10] It is unclear from the record whether Employer did so by deliberate design.

3. ETA's OES Occupational Classification is Supported By Employer's Job Descriptions

Employer argues in the alternative that its job descriptions should be classified as SOC code 15-1021, "Computer Programmers", under the OES survey rather than SOC code 15-1031, "Computer Software Engineers, Applications." If Employer were to succeed under this argument, the prevailing wage rates for the Jersey City, New Jersey job description would be reduced from $54,246 per year to $51,667 per year and the White Plains, New York job description from $53,810 to $46,956 a year.[11]

In this case, after conferring with NYSDOL and NJDOL, ETA determined that Employer's job description properly corresponded to OES occupational code 15-1031, titled "Computer Software Engineers, Applications ('Software Engineers')," even though the NYSDOL report acknowledged that "computer programming is part of the position." AF. at 26. Appellee argues in its brief that this determination was proper and supported by the record because Employer's job descriptions "dovetail quite easily with the tasks" of that occupation. AB. at 5, 7. The crucial problem in this case lies in the fact that Employer's job description is lengthy and ambiguous.[12] Employer's description corresponds to, and even cites, language that defines either, and at times, both occupations. The NYSDOL report even suggested the possible applicability of a third occupational classification. AF. at 25.

After a through review of the record, I am not persuaded that Employer has established that ETA made an improper determination. ETA based its determination that Employer's job descriptions described the position of software engineers on the conclusions of two separate and independent entities, the NYSDOL and the NJDOL. The NYSDOL's report actually distinguished the position of software engineer from that of computer programmer. That agency based its conclusion that software engineer was the proper classification on the fact that Employer represented that "the beneficiary will be doing software application design." AF. at 25. The NYSDOL directly quoted from the very first sentence of Employer's job descriptions which read in full, "Beneficiary will be spending 100% of his time doing software application design, coding, testing, and maintenance." AF. at 39. The NYSDOL distinguished a classification of software engineer from that of computer programmer by stating that although part of the work done by the beneficiary falls under the category of computer programmer, the beneficiaries in this case would use their knowledge and experience in computer programming "for the purpose of developing various customized software business solutions." AF. at 26 (quoting Employer AF. at 40). The NJDOL did not support its independent conclusion that the job descriptions pertained to software engineers but instead argued that the positions were level 2 jobs which would have substantially increased the prevailing wage determination. In consideration of that finding, ETA's classification of the jobs as corresponding to the level 1 description reflects some deference to Employer's arguments.

[11] Employer did not furnish this information. I calculated these figures using the DOL database found at www.flcdatacenter.com.

[12] In fact, in a memo dated October 19, 2004, from Mary Dodds, ESA's Wage and Hour Investigator, to Dolores DeHaan, ETA's Certifying Officer, Ms. Dodds actually apologizes to Ms. DeHaan for the length of the job description. AF. at 36.

I find that Employer's arguments supporting an OES classification of "Computer Programmer" classification are unconvincing. First, Employer responds to NYSDOL's primary rationale for the software engineer classification by stating:

> When I wrote "software application design, coding, testing and maintenance," I meant – para (g) from core duties of a computer programmer, i.e. Write, analyze, review, and rewrite programs, using workflow chart and diagram, and applying knowledge of computer capabilities, subject matter, and symbolic logic.

EB. at 7. Next, Employer lists the core duties of a "Computer Programmer" and the core duties of a "Software Engineer" as they are described at the DOL website: http://online.onecenter.org. Then, Employer argues almost entirely verbatim that the prospective employee will not perform the duties listed under "Software Engineer" and will perform the duties listed under "Computer Programmers." For example, pages seven through ten of Employer's brief follow this pattern:

> Please see comments on the following CORE Duties of a Software Engineer
>
> (d) Consult with customers about software system design and maintenance.
> COMMENT: Employee did not consult with customers about software design and maintenance.

EB. at 7.

> Please see comments on the following Core Duties of a Computer Programmer
>
> (b) Conduct trial runs of programs and software applications to be sure they will produce the desired information and that the instructions are correct
> COMMENT: Employee was assigned this responsibility – for the modules that the individual programmed.

EB. at 9.

As the above illustrates, Employer's brief contains no more than after-the-fact, self-serving statements made by the President of SpaceAge. Employer originally had the opportunity to tailor the language of the job descriptions to fit the definition of a "Computer Programmer" if it chose. Instead, Employer's language corresponds to the definition of "Software Engineers." Now, with an incentive to fit the job descriptions into the definition of "Computer Programmers," Employer essentially asks me to allow a de facto amendment of its job description to correspond with an OES classification with a lower prevailing wage. Employer is asking for a second bite at the apple with no legitimate rationale for why it should be given one.

Employer's job description clearly states that the employee will be "doing software application design." In addition, "beneficiary will utilize knowledge and experience in computer programming, analysis and applications for the purpose of developing various customized software business applications." EB. at 40. This statement mandates that the beneficiary have

knowledge of computer applications that will be used to develop software applications. The summary report for the position of "Computer Software Engineers, Applications" reads:

> Develop, create, and modify general computer applications software or specialized utility programs. Analyze user needs and develop software solutions. Design software or customize software for client use with the aim of optimizing operational efficiency. May analyze and design databases within an application area, working individually or coordinating database development as part of a team.

See, http://online.onetcenter.org/link/summary/15-1031.00. I am satisfied that this summary of the occupational classification of a "software engineer" fits Employer's job description "like a hand in a glove." Exotic Granite & Marble, Inc. v. U.S. Dept. of Labor, 98-JSA-00001 at 11 (ALJ Feb. 12, 1998). Since Employer has not submitted legitimate evidence to oppose ETA's classification, I find that ETA's classification was proper.

Accordingly, I find that ETA's OES occupational classification is supported by the record and thus proper and controlling in the determination of the prevailing wages in this case.

4. Employer Has Not Justified a $40,000.00 Wage Offer

Employer's final contention is that its $40,000.00 wage offer is justified even though it is below the prevailing wage. EB. at 13. Employer argues the following:

1. Employer's beneficiaries are assigned less than 30% of the core duties of computer programmers. EB. at 13-16.
2. Employer offers its beneficiaries pre-employment training that is worth over $20,000. EB. at 16-17.
3. "The value of services rendered by [Employer] to its employees in cash and kind, is far greater than the value of services rendered by the employee to the [Employer]." EB. at 18.
4. Almost all of its employees are given a $5,000 raise in salary in the first year after they finish six months of employment. EB. at 21.
5. Employer provides its employees with paid vacation and health insurance. EB. at 21.

I am satisfied that none of these arguments constitute proper factors for consideration when determining prevailing wages. The regulations state:

> Benefits provided as compensation for services may be credited toward the satisfaction of the employer's required wage obligation only if the requirements of paragraph (c)(2) of this section are met (e.g., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

20 C.F.R. § 655.731(c)(3)(iv). Employer has not submitted any evidence that shows that the "fringe benefits" that it offers to its employees fall within this regulation's requirements.

Employer has therefore failed to justify a wage offer below the prevailing wages that were determined by ETA. I find that Employer's wage offer must meet the prevailing wage determinations made by ETA.

III. CONCLUSION

Based on the forgoing, I find and conclude that Employer's appeal of the prevailing wage determinations in this case must fail. Employer has not submitted sufficient evidence to adequately support its own prevailing wage determination and Appellee's prevailing wage determination was based on a proper occupational classification of Employer's job descriptions. As such, Employer's wage offer for the two H-1B LCAs must meet the prevailing wage determinations made by ETA.

ORDER

SpaceAge Consulting Corporation's appeal of the prevailing wage determination is DENIED.

The notice of determination of the Regional Administrator dated December 2, 2004 is AFFIRMED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE: The administrative law judge's decision constitutes the final decision of the Secretary of Labor pursuant to 20 C.F.R. § 658.425(c), as made applicable to this matter by 20 C.F.R. § 655.731(d)(2).