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CASE NO: 2004-JSA-00002

In the Matter of

INTERNATIONAL CONSULTING RESOURCES GROUP,
Complainant,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Appearances:

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For the Complainant

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For the United States Department of Labor

Before:

Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER

This matter arises under section 212 of the Immigration and Nationality Act, as amended ("INA"), 8 U.S.C. §1182, and implementing regulations set forth at 20 C.F.R. Part 655 and 20 C.F.R. Part 658. Among other things, these provisions impose various requirements on employers who wish to hire citizens of foreign countries to temporarily perform certain types of specialty jobs in the United States. One of these requirements directs such employers to submit

to the United States Department of Labor ("DOL") Labor Condition Applications (LCA) that set forth the "prevailing wage" earned by domestic workers in similar jobs in the area where the alien workers are to be employed. 8 U.S.C. §1182(n), 20 C.F.R. §§655.730 to 655.732. This "area of intended employment" is defined as the area within a normal commuting distance from the place of intended employment.¹ 20 C.F.R. §656.3. If the DOL certifies an LCA and approval is also received from the United States Citizenship and Immigration Service (USCIS), an alien worker identified in the LCA can be issued a so-called "H-1B" visa to work in the United States.² 20 C.F.R. §655.705(b).

Regulations setting forth the various methods that may be used to determine a "prevailing wage" for LCA purposes are published at 20 C.F.R. §655.731(a). Among other things, these regulations direct employers to use wage rates prescribed under the Davis-Bacon Act, the McNamara-O'Hara Service Contract Act, or collective bargaining agreements, if there are such wage rates for the occupation listed in the LCA. 20 C.F.R. §655.731(a)(2)(i)-(ii). If not, an employer can obtain a prevailing wage rate from the State Employment Security Agency (SESA) in the state of the intended H-1B employment and the DOL will not later challenge the validity of that wage rate. 20 C.F.R. §655.731(a)(2)(iii)(A). However, the regulations also provide that if an employer chooses not to request a prevailing wage from a SESA, it may rely on other sources of wage information, including wage surveys conducted by "independent alternative sources" if such alternative sources satisfy certain criteria set forth in the regulations. 20 C.F.R. §655.731(a)(2)(iii)(C). Those criteria require, among other things, that the alternative sources must have collected the wage data within the preceding 24 months and that the data must reflect the average wage paid to workers similarly employed in the area of intended employment. 20 C.F.R. §655.731(b)(3)(iii)(B)-(C). There is no guarantee, however, that prevailing wage data obtained from such alternative sources will not be challenged by the DOL if it later appears that such data may be inaccurate.

The DOL regulations also set forth procedures to be followed when the DOL receives a complaint alleging that the prevailing wage set forth in an employer's LCA is not correct. In particular, the regulations provide that if the DOL's Wage and Hour Division (WHD) receives a complaint alleging that the prevailing wage set forth in an employer's LCA is inaccurate, the WHD may seek the assistance of the DOL's Employment and Training Administration (ETA), which in turn may ask the SESA in the state where the affected H-1B workers are employed to determine the appropriate prevailing wage. 20 C.F.R. §655.731(d) and §655.805(d)(4). The ETA can then provide the WHD with a prevailing wage determination, which the WHD can use as the basis for determining if an employer has violated its obligation to pay H-1B employees no less than the prevailing wage for domestic workers in the same occupation and area of employment. 20 C.F.R. §655.731(d) and §655.805(d)(4).

¹ However, if the place of employment is within a Metropolitan Statistical Area (MSA), the area of intended employment is considered to be the area within normal commuting distance of the MSA. 20 C.F.R. §656.3.

² The USCIS was formerly known as the Immigration and Naturalization Service (INS).

If an employer disagrees with a SESA's prevailing wage determination, the provisions of 20 C.F.R. §655.731(d) allow the determination to be appealed under the procedures governing the Job Service Complaint System, which are set forth at 20 C.F.R. §658.420-26. Although these provisions usually require parties to disputes to exhaust state agency administrative remedies before seeking review by an ETA regional office, the regulations explicitly permit appeals concerning prevailing wage determinations for H-1B workers may be initiated at the ETA regional office level. 20 C.F.R. §655.731(d). Once such an appeal is filed with an ETA regional office, the Regional Administrator considers the appeal. 20 C.F.R. §658.420-423. Thereafter, the parties may be given an opportunity to appeal the Regional Administrator's decision to the Office of Administrative Law Judges. 20 C.F.R. § 658.421(d)-(h). Thereafter, an Administrative Law Judge issues a decision that becomes the final decision of the Secretary of Labor. 20 C.F.R. §658.425(c).

In this case, the Complainant, International Consulting Resources Group (ICRG), is invoking the provisions of 20 C.F.R. §655.731(d) to seek review of a finding by the ETA's Pacific-Western Region that the prevailing wage amounts that ICRG set forth in the LCAs for 21 information technology workers were too low. In addition, ICRG is challenging the conclusions of the ETA that ICRG's LCAs inaccurately described the job classifications and skill levels for the jobs performed by several of ICRG's H-1B workers. The Department of Labor, which is the Respondent in this proceeding, contends that all of the findings of the ETA and EDD are correct and should be sustained.

BACKGROUND

According to ICRG's submissions, ICRG is a firm that recruits foreign "information technology consultants" for domestic employers and, as part of its services, helps the recruited consultants obtain H-1B visas to work in the United States. ICRG's income is derived from premiums that it charges its domestic-employer clients for each hour worked by the foreign consultants.

In 1998, 1999 and 2000, ICRG filed a series LCAs seeking H-1B visas for at least 21 alien workers with various types of information technology skills who were ultimately employed in the vicinity of San Francisco, California. In each of these LCAs, the prevailing wage information provided by ICRG was purportedly based on data that ICRG obtained from Employers Group Professional and Technical Survey (Employers Group), which is a commercial entity that collects and publishes surveys concerning wage levels for specific occupations. According to documents submitted by ICRG, Employers Group is one of at least seven wage-survey firms that California's Economic Development Department (EDD) has listed as using methodologies that "generally" meet the wage-surveying criteria found in ETA's "General Administration Letter No. 2-98" (GAL 2-98) (emphasis in original). The evidence further indicates that the Employers Group survey does not provide average wage data for specific metropolitan areas, but instead contains only state-wide averages that must be multiplied by certain "index" figures to determine wages in particular cities and counties. For example, the Information Technology Compensation Survey that Employers Group published in 1999 indicates that estimated salaries for information technology workers in the County of San

Francisco should be determined by multiplying the California average wage for a particular type of information technology job by an “index” of 104.4 percent.

In March of 2001, the WHD received a complaint from one of ICRG’s H-1B workers. As a result, the WHD conducted an investigation into the accuracy of the prevailing wage amounts set forth in LCAs filed by ICRG for various H-1B workers who were employed in the San Francisco Bay Area in 1998, 1999 and 2000. During the course of the investigation, the WHD concluded that the documentation supporting the prevailing wage amounts in ICRG’s LCAs did not conform to the criteria at 20 C.F.R. §655.731(a)(2) or §655.731(b)(3). Accordingly, WHD asked the ETA to obtain wage data for the relevant occupations and areas of employment from the EDD, which is the State of California’s SESA. In a letter dated December 14, 2001, ICRG was provided with copies of EDD’s prevailing wage determinations and informed that it could appeal the wage determinations to ETA’s Pacific-Western Region. Thereafter, ICRG appealed all of the EDD determinations. According to an August 8, 2002 letter from ICRG’s counsel, use of the EDD determinations to calculate wages owed to ICRG’s H-1B employees would be improper because ICRG had based the wage amounts in its LCAs on data obtained from an “acceptable alternative wage source” and because the EDD used the Dictionary of Occupational Titles (DOT) instead of the system of job classification used by Employers Group. In addition, ICRG argued that in some cases the EDD has erroneously classified H-1B workers as having Level II skill levels instead of Level I skill levels.

In a letter dated February 2, 2004, a designee of the ETA’s Regional Administrator informed ICRG that ETA had found no merit in any of the arguments raised in its appeal. In explaining this conclusion, the letter pointed out that the Employers Group wage data used by ICRG was “statewide” data that did not specifically cover the local area in which the H-1B workers were employed. In addition, the ETA’s letter concluded that ICRG’s assertions that all of its H-1B workers required “close supervision” was inconsistent with the job descriptions ICRG set forth in the LCA’s it had submitted for the workers that EDD had classified as having Level II occupational skills. Thereafter, ICRG filed a timely request asking that the ETA decision be reviewed by an Administrative Law Judge. Attorneys for both parties later filed briefs addressing each of the three foregoing issues.

ANALYSIS

The provisions of 20 C.F.R. §658.424(b) specify that when the findings of a SESA have been appealed to the Office of Administrative Law Judges, the presiding Administrative Law Judge must initially determine whether there should be an evidentiary hearing. If it is determined that such a hearing is necessary, the Administrative Law Judge is required to schedule a hearing at a location convenient to all the parties. Alternatively, if the Administrative Law Judge determines that a hearing is not necessary, the appeal can be decided solely on the written record. In this case, neither ICRG nor DOL has requested a hearing. Moreover, it does not appear that it will be necessary to hold such an evidentiary hearing in order to properly resolve the issues in this case. Accordingly, ICRG’s appeal will be resolved solely on the basis of the written evidentiary record.

As previously noted, this case arises out of disputes between ICRG and the ETA concerning the following three issues: (1) the acceptability of ICRG's use of data from Employers Group to calculate the prevailing wages set forth in the LCAs filed by ICRG, (2) the propriety of EDD's use of the Dictionary of Occupational Titles to classify the jobs of ICRG's H1-B workers instead of relying on the job classifications used by Employers Group, and (3) the appropriateness of the skill levels that EDD assigned to some of ICRG's H1-B workers. Findings concerning each of these issues are as follows:

1. EDD's Prevailing Wage Determinations

The ICRG's primary argument in this proceeding is the contention that the WHD erred when it concluded that the wage data ICRG obtained from Employers Group does not conform to the criteria set forth at 20 C.F.R. §655.731(a)(2) or §655.731(b)(3). In particular, ICRG argues that WHD's rejection of the Employers Group wage data was improper because Employers Group is included on EDD's list of acceptable independent authoritative sources of wage data and because WHD allegedly erred in concluding that Employers Group surveys do not provide wage data for specific areas of intended employment. In response, the DOL's brief points out that even though EDD did in fact include Employers Group on a list of wage-survey providers, the EDD list explicitly states that the methodologies used by the listed survey providers only "generally" (emphasis original) meet GAL 2-98 criteria and that particular wage surveys must still meet certain specific criteria, including the criteria requiring that any wage survey cover geographic regions that correspond to the relevant areas of intended employment. Moreover, the DOL brief contends, the amounts set forth in the prevailing wage sections of the LCAs filed by ICRG do not in fact correspond to the wage figures that would be generated by using the Employers Group "index" factors for San Francisco and adjoining areas.

After considering the parties' contentions, it has been concluded that ICRG's challenge to the Regional Administrator's findings concerning the Employers Group wage data must be rejected. There are four reasons for this conclusion. First, although the provisions of 20 C.F.R. §655.731(d)(2) authorize employers to appeal ETA's prevailing wage determinations to ETA Regional Administrators and then to the Office of Administrative Law Judges, nothing in this regulation authorizes appeals concerning the WHD's determinations to seek prevailing wage information from the ETA. Hence, there is no jurisdiction in this forum to determine if the WHD erred in concluding that the wage data ICRG obtained from Employers Group did not conform to the criteria at 20 C.F.R. §655.731(a)(2) or §655.731(b)(3). Second, even if the regulations did confer such jurisdiction, there has still not been a convincing showing that the "index" figures published by the Employers Group provide an acceptable means of calculating prevailing wage data for specific areas of intended employment. In particular, there has been no showing that the Employers Group "index" figures are based on data that has been gathered for all types of information technology jobs within the past 24 months in all of the geographic areas for which Employers Group publishes information technology "index" figures, as would be necessary to comply with 20 C.F.R. §655.731(a)(2) or §655.731(b)(3). Indeed, the "index" figures could be based solely on data gathered many years ago or on data concerning only certain types of information technology jobs. Third, as the DOL has pointed out, it appears that ICRG did not in fact use the Employers Group index system for calculating the prevailing wages that it

set forth in the LCAs at issue in this proceeding. Rather, examination of ICRG's LCAs indicates that ICRG often relied on unadjusted state-wide wage data, national wage data, or on other undisclosed criteria. Finally, even if it could be said that the Employers Group's prevailing wage data does comply with the applicable regulations and that ICRG actually used that data in preparing its LCAs, ICRG has not met its burden of showing that the prevailing wage data provided by EDD is in some way deficient or less reliable than the Employers Group data. Indeed, ICRG has offered no evidence whatsoever that could support such a conclusion.

2. EDD's Job Classification Determinations

ICRG also contends that the EDD's use of job classifications from the DOL's Dictionary of Occupational Titles should be found inapplicable to the work performed by ICRG's H-1B employees and that Employers Group's job classifications should be used instead. As support for this contention, ICRG asserts that the Employers Group definition of "Application Systems Analyst/Programmer" more closely corresponds to the Foreign Labor Certification's definition of "computer programmer" than the definition of "computer systems analyst" used by the State of California's EDD. As the Complainant in this proceeding, ICRG has the burden of showing that EDD has made some kind of error. However, in contending that EDD has used inaccurate job classifications when computing prevailing wages, ICRG has presented no evidence of any sort to support either its general contention that EDD's job classifications are inaccurate or its specific example involving computer programmers. Indeed, ICRG has done nothing more than simply assert that the EDD classifications are invalid. Accordingly, the EDD job classification findings must be affirmed.

3. EDD's Determinations Concerning Skills Levels

Finally, ICRG contends that EDD erred in concluding that some of its H-1B employees should be compensated at Level II skill levels, instead of being paid at Level I skill levels. As support for this contention, ICRG relies in part on the DOL's Bureau of Labor Statistics definitions of Level I and Level II skill levels. According to these definitions, a Level I worker is someone who is closely supervised and given very little independent responsibility, while a Level II worker is an employee who has more experience, needs less supervision, and usually has some form of advanced degree. In this regard, ICRG also asserts that none of its employees who were rated as Level II workers by the EDD had advanced degrees and contends that all of these employees were supervised by a team leader or department manager. However, as DOL's reply brief points out, nearly all of the LCAs in dispute in this proceeding represent that ICRG's H-1B job applicants had advanced knowledge and experience in their occupations. After considering these arguments, it has been determined that EDD's skill-level determinations are in fact correct. Although ICRG's H-1B workers may well receive some type of supervision from team leaders or department managers, there has been no showing that such supervision is so close that these workers have little independent responsibility. Moreover, ICRG's own representations in its LCAs make it clear that ICRG's H-1B workers all had advanced skills and lengthy experience that would put them into the category of Level II employees.

ORDER

The Notice of Determination of the Regional Administrator for ETA's Pacific-Western Region is hereby affirmed.

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Paul A. Mapes
Administrative Law Judge