separation occurred involving an employee of the Frankenmuth, Michigan facility of DeVlieg Bullard II, Inc., Tooling Systems Division located in Houston, Texas. Mr. Frank Swanson provided support services for production of metal tooling produced at the Frankenmuth, Michigan location of the subject firm.

Based on this finding, the Department is amending this certification to include an employee of the Frankenmuth, Michigan facility of DeVlieg Bullard II, Inc., Tooling Systems Division location in Houston, Texas. Since workers of the Frankenmuth, Michigan location of the firm were certified eligible to apply for alternative trade adjustment assistance, the Department is extending this eligibility to Mr. Frank Swanson in Houston, Texas.

The intent of the Department's certification is to include all workers of DeVlieg Bullard II, Inc., Tooling Systems Division, Frankenmuth, Michigan, who were adversely affected by increased imports.

The amended notice applicable to TA–W–54,871 is hereby issued as follows:

All workers of DeVlieg Bullard II, Inc., Tooling Systems Division, Frankenmuth, Michigan (TA–W–54,871), including an employee of DeVlieg Bullard II, Inc., Tooling Systems Division, Frankenmuth, Michigan, location in Houston, Texas (TA–W–54,871A), who became totally or partially separated from employment on or after May 5, 2003, through June 21, 2006, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed in Washington, DC this 31st day of January 2005.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E5–488 Filed 2–7–05; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment And Training Administration

[TA–W–50,486]

Electronic Data Systems Corporation, I Solutions Center, Fairborn, OH; Notice of Negative Determination on Remand

The United States Court of International Trade (USCIT) remanded to the Secretary of Labor for further investigation of the negative determination in *Former Employees of Electronic Data Systems Corporation* v. *U.S. Secretary of Labor* (Court No. 03–00373).

On January 15, 2003, the Department of Labor (Department) issued a negative determination regarding the eligibility of workers at Electronic Data Systems (EDS) Corporation, I Solutions Center, Fairborn, Ohio to apply for Trade Adjustment Assistance (TAA). The determination was based on the Department's finding that the workers at the subject facility performed information technology services, and did not produce or support the production of an article. Therefore, the workers did not satisfy the eligibility criteria of section 222 of the Trade Act of 1974. 19 U.S.C. 2272. On February 6, 2003, the Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance for Electronic Data Systems Corporation, I Solutions Center, Fairborn, Ohio was published in the **Federal Register** (68 FR 6211).

In a letter dated March 4, 2003, the petitioner requested administrative reconsideration of the Department's negative determination, and included additional information indicating that all usage and copyrights of the computer programs, job control language, documentation, etc. produced at the Fairborn facility were transferred to the client upon sale. The Department determined that the information submitted did not constitute an adequate basis for reconsideration and affirmed its finding that the workers of Electronic Data Systems Corporation, I Solutions Center, Fairborn, Ohio were not eligible to apply for TAA, because they did not produce an article within the meaning of section 222 of the Trade Act. Accordingly, the Department issued a Notice of Negative Determination Regarding Application for Reconsideration on April 15, 2003. The notice was published in the **Federal Register** on April 24, 2003 (68 FR 20180). On June 9, 2003, the petitioner filed a Summons and Complaint, regarding the Department's Negative Determination Regarding Application for Reconsideration with the Court of International Trade (USCIT).

On May 28, 2004, the petitioner filed a Motion for Judgment on the Agency Record in the USCIT. The supporting memorandum for the Motion stated that the Department's findings ''are not supported by substantial evidence or in accordance with the law,'' and that the Department ''failed to sufficiently reconsider its denial of the Plaintiff's petition to apply for TAA, including determining whether certain products alleged by Plaintiffs to constitute 'articles' were subject to duty under the Harmonized Tariff Schedule of the United States (HTSUS).''

The USCIT remanded the case to the Department on December 1, 2004, and ordered the Department to proceed as follows:

On remand, Labor shall conduct a thorough investigation into plaintiffs' claims. In particular, Labor shall (1) determine whether computer programs were embodied in any medium when transferred to customers, (2) explain the significance of custom-designed software as opposed to mass produced computer programs, (3) identify what type of documentation was produced by EDS (brochures, manuals, etc.), (4) determine what was the production volume of such documentation and whether it was considered part of the product purchased by EDS's customers, and (5) with respect to each finding made in its determination, state with specificity the facts relied upon in reaching such finding, including specific references to documents in the record.

Remand Order at 18.

Accordingly, the Department conducted a remand investigation in order to determine whether the subject worker group met the criteria set forth in the Trade Act of 1974 for TAA certification as primarily-affected workers, with particular attention to the inquiries required by the remand order. Section 222(a) of the Trade Act (19 U.S.C. 2272(a)) provides:

A group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) shall be certified by the Secretary as eligible to apply for adjustment assistance under this part pursuant to a petition filed under section 2271 of this title if the Secretary determines that—

(1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and

(2)(A)(i) the sales or production, or both, of such firm or subdivision have decreased absolutely;

(ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or

(B)(i) there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

(ii)(I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

(II) the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and

Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

(III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

On December 16, 2004, the Department made initial contact with an EDS company official. On December 17, 2004, the Department issued a detailed information request to EDS seeking new information as well as clarification of previously submitted information. The overall purpose of the inquiry was to address the directives of the remand order and determine if the petitioning worker group had satisfied the statutory criteria for eligibility. In particular, the Department sought to ascertain whether the work performed by the petitioning worker group was mass replicated on a physical carrier medium, such as books, manuals, CD–Rom, or diskette, and if so, whether there was an increase in imports or shift in production of articles like or directly competitive with those produced at the Fairborn facility. On January 4, 2005, the Department received a response from EDS (SAR at 11) that has enabled the Department to evaluate petitioners' eligibility, including consideration of the factors identified by the remand order, as set forth below.

In general, the information supplied by the company on remand indicates that the EDS, I Solutions Center, Fairborn, Ohio performed information technology services supporting financial systems software for a single client. This included the design, development, and deployment of new solutions and documentation to meet the requirements of the client, as well as maintenance and troubleshooting of the existing systems. This work was performed at an EDS facility, and not on-site at a client facility.

In the course of the remand investigation, the Department contacted the petitioners by telephone on December 17, 2004; January 25, 2005; and January 26, 2005, in order to gather information on the nature of the work performed at the subject facility (SAR at 4, 17, 19, 20). Further, on January 24, 2005 the Department provided the petitioners with a copy of the EDS questionnaire response, so that petitioners would have an opportunity to review it and to provide the Department with comments for consideration. On January 28, 2005, the Department followed up with the petitioners, inquiring as to the status of their response. As of January 31, 2005, the petitioners had not commented on the EDS questionnaire response.

(1) Determine whether computer programs were embodied in any medium when transferred to customers:

The remand investigation revealed that the software and documentation designed and/or supported by the workers of the subject facility was rarely delivered to the client on a physical carrier medium, but was normally installed onto a mainframe data center from which the client could access it remotely and print it if necessary. Software on CDs was virtually never created at the Fairborn facility, except in extraordinary circumstances where a technical issue prevented normal electronic distribution to the client's data centers (Id). Further, the subject facility's client owned the intellectual property rights to the software and documentation designed and supported at the subject facility, so EDS could not have incorporated that work product into products for other clients (*Id.*).

The Department has consistently maintained that the design and development of software is a service. The Department considers software that is mass-replicated on physical media (such as CDs, tapes, or diskettes) and widely marketed and commercially available (*e.g.,* packaged ''off-the-shelf'' programs) and dutiable under the Harmonized Tariff Schedule of the United States (HTSUS) to be an ''article'' for the purposes of TAA certification requirements. Those workers designing and developing such products are considered to be engaged in services supporting the production of an article.

This policy is consistent with the classification of computer programs and software in the HTSUS depending on the media on which they are recorded. HTSUS heading 8524 encompasses pre-recorded media including those recorded on tape, disks for laser reading systems, and nesoi for sound, image, or other phenomena. Subheading 8524 31 00 HTSUS provides for ''pre-recorded discs for laser reading systems, reproducing other than sound or image,'' and subheading 8524 91 00 HTSUS provides for ''pre-recorded media, nesoi, with recordings of phenomena other than sound or images.''

Software and information systems that are not embodied in a physical carrier medium are not listed on the HTSUS, published by the United States International Trade Commission (USITC), Office of Tariff Affairs and Trade Agreements, which describes all ''articles'' imported to or exported from the United States. This codification represents an international standard maintained by most industrialized countries as established by the International Convention on the Harmonized Commodity Description and Coding (also known as the HS Convention).

The TAA program was established to help workers who produce articles and who lose their jobs as a result of increases in imports or a shift in production of articles ''like or directly competitive'' with those produced at the workers' firm. An article must have a value that makes it marketable, fungible and interchangeable for commercial purposes to be subject to a duty on a tariff schedule. Although a wide variety of products are described as articles and characterized as dutiable in the HTSUS, software and associated information technology services that are not embodied in a physical carrier medium are not listed in the HTSUS. In fact, such telecommunications transmissions (*i.e.* electronically transmitted computer code) are specifically exempted from duty as they ''are not goods subject to the provisions of the tariff schedule'' (HTSUS (2004) General Notes, 3e).

Intellectual property that is not embodied on a physical carrier medium is not provided for in the HTSUS, and is not considered an article for the purposes of TAA.

(2) Explain the significance of custom-designed software as opposed to mass produced computer programs:

In order to meet the criteria set forth in the Trade Act of 1974 for TAA certification as primarily-affected workers, there must be an increase in imports or shift in production of articles like or directly competitive with those produced by the petitioning worker group. Software that is custom designed to meet the constantly changing needs of an individual client is an inherently unique product. Therefore, it cannot be considered ''like or directly'' competitive with other custom designed software, under the definition of this term in 29 CFR 90.2. This definition applies to petitions seeking certification based on either the ''shift in production'' of an article under section 222(a)(2)(B) or ''increased imports'' of an article under section 222(a)(2)(A).

There is virtually no work activity that does not eventually result in the creation of some sort of documentation. For example, a secretary may print out a memo for a supervisor, a travel agent may create itineraries and print out tickets for a client's travel, and a lawyer may create a brief for a particular case. The information contained in each of these creations, regardless of what medium they may be embodied in, is clearly unique. If unique solutions, which happen to be contained on a

medium, are considered to be ''like or directly competitive'' with other custom services, then almost any work can be covered by the Trade Act, and the like or directly competitive requirement is effectively read out of the Act.

(3) and (4) Identify what type of documentation was produced by EDS (brochures, manuals, etc.), and determine what was the production volume of such documentation and whether it was considered part of the product purchased by EDS's customers:

As stated above, the software and documentation designed and/or supported by the workers of the subject facility was rarely delivered to the client on a physical carrier medium, but was normally installed onto a mainframe data center from which the client could access it remotely and print it. Documentation was rarely embodied in hardcopy, because the client could print such documentation on their own. On the rare occasion that the client requested hardcopies of documentation, bulk printing was carried out by a third-party copy facility (SAR at 11). In effect, EDS provided no brochures, manuals, or other physical product documentation to its client in the course of serving the client's needs. Accordingly, there is no volume to measure or value to assess for the documentation the subject facility provided to its customer.

Conclusion

The Department thoroughly investigated the petition for EDS, I Solutions Center, Fairborn, Ohio on remand and could not find any evidence that workers of the subject facility produced or supported production of any article. To the contrary, the evidence presented in the SAR supports the conclusion that the EDS workers did not produce an article. Indeed, the products designed and/or developed at the Fairborn facility were not mass-replicated to any physical carrier medium. In any event, as custom designs, the software solutions and documentation were inherently unique and, therefore, not ''like or directly competitive'' with any other products.

In the case of EDS, I Solutions Center, Fairborn, Ohio, the evidence clearly establishes that the workers of the subject facility did not produce an article, nor did they support, either directly or through an appropriate subdivision of EDS, the production of an article within the meaning of the Trade Act. Because the petitioners are employees of a firm or subdivision that does not produce or support production of an article within the meaning of the Trade Act, they are not eligible for certification.

As the result of the findings of the investigation on remand, I affirm the original notice of negative determination of eligibility to apply for adjustment assistance for workers and former workers of Electronic Data Systems Corporation, I Solutions Center, Fairborn, Ohio.

Signed in Washington, DC this 31st day of January 2005.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E5–487 Filed 2–7–05; 8:45 am]

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DEPARTMENT OF LABOR

Employment And Training Administration

[TA–W–54,434]

Gale Group, Inc., Belmont, CA; Notice of Negative Determination on Remand

The United States Court of International Trade (USCIT) granted the Department of Labor's motion for voluntary remand for further investigation in *Former Employees of Gale Group, Inc.* v. *U.S. Secretary of Labor,* Court No. 04–00374. The Court Order was issued on October 25, 2004.

On May 20, 2004, the Department of Labor (Department) issued a negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA) for the workers of Gale Group, A Division of the Thompson Corporation, Belmont, California (Gale Group). The determination was based on the investigation's finding that the workers at the subject facility performed electronic indexing services, including converting paper periodicals into an electronic format, assigning relevant index terms and occasionally writing abstracts of articles, and thus did not produce an article in accordance with section 222 of the Trade Act of 1974. The Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance for the subject firm was published in the **Federal Register** on June 17, 2004 (69 FR 33940).

In a letter dated June 16, 2004, the petitioner requested administrative reconsideration of the Department's negative determination. The Department affirmed its finding that the workers of the subject firm should not be certified as eligible to apply for TAA on the basis that the firm did not produce an article within the meaning of section 222 of the Trade Act because the application contained no new substantial information. Accordingly, the Department issued a letter (dated July 13, 2004) dismissing the petitioner's application for reconsideration. A Dismissal of Application for Reconsideration was issued on July 16, 2004 and the Notice of Dismissal of Application for Reconsideration was published in the **Federal Register** on July 23, 2004 (69 FR 44064).

By letter dated August 1, 2004, the petitioner requested judicial review by the USCIT. The petitioner asserted that because ''informational products are real commodities that are manufactured and produced for sale,'' the workers produce an article and are entitled to a new investigation to determine whether they should be certified as eligible for TAA.

In the motion for voluntary remand, the Department indicated the need to determine whether the workers were engaged in the production of an article and to resolve certain ambiguities in the record.

On October 25, 2004, the USCIT granted the Department's consent motion for voluntary remand and ordered the Department to conduct a further investigation and to make a redetermination as to whether petitioners should be certified as eligible for TAA.

In its remand investigation, the Department carefully reviewed previously submitted information, contacted the company official to obtain new and additional information regarding the work done by the subject worker group, the products and services offered by the company, and also solicited information from the petitioners. The main purpose of this extensive investigation was to ascertain whether the work performed by the petitioning worker group can be construed as production or in support of production of an article by the firm, Gale Group.

Petitioners allege that they are engaged in the production of CD-ROMS and databases which are articles under the Act. The Department has investigated each claim and has determined that the workers are not engaged in the production of any articles because no production took place at the subject firm during the relevant period and that a mere shift of service functions abroad cannot support TAA certification.

The petitioners state that members of the worker group worked on databases which were ''marketed for access by purchasers and by their licensees initially on CD–ROMS and in electronic format, and later only on electronic format—*i.e.,* through a real-time internet connection.'' Supp. A.R. 77. The