U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 15 April 2005

CASE NO.: 2005-JSW-1

IN THE MATTER OF:

ILANI ENGINEERING, INC.
d/b/a MICROAGE COMPUTER MART

Appellant/Employer

V.

EMPLOYMENT AND TRAINING ADMINISTRATION,
U.S. DEPARTMENT OF LABOR

Appellee/Respondent

APPEARANCES:

Syed N. Izfar, ESQ.

For The Appellant/Employer

Frank P. Buckley, ESQ.

For The Appellee

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This action arises from an appeal by Ilahi Engineering, Inc., d/b/a Microage Computer Mart (Employer) of a prevailing wage determination made by the California Employment Development Division (EDD). The prevailing wage determination was requested by the Administrator of the Wage and Hour Division pursuant to 20 C.F.R. §655.731(d), during the course of an investigation into Employer's H-1B Labor Condition Application (LCA) for the position of Programmer Analyst.

On October 28, 2004, the Certifying Officer of the Employment and Training Administration (ETA), Region 6, U.S. Department of Labor (DOL), transmitted an authenticated copy of Employer's Request for Hearing consisting of an index of six attached exhibits, Bates-paginated as pages 1-54, herein referred to as the appeal file (AF).

Pursuant to 20 C.F.R. §658.424(b), the parties submitted legal arguments and supporting documentation in this matter. After such submissions, a determination must be made whether to schedule a hearing as requested by Employer or make a determination on the record as urged by Respondent. Having reviewed the appeal file and the parties' submissions, I find and conclude that an adequate evidentiary record has been produced upon which Employer's appeal can be resolved and there is no need to conduct a formal hearing in this matter. Thus, the following analysis and determination is required.

BACKGROUND AND PROCEDURAL HISTORY

On July 18, 2001, Employer submitted its "Petition for a Nonimmigrant Worker" for Vinod Mallikarjuna (Employee) to the Immigration and Naturalization Service. (AF, pp. 15-17). Employer also submitted a Labor Condition Application (LCA) for Employee signed by Employer on July 5, 2001 and certified by the DOL on July 18, 2001. The LCA identified the rate of pay as $45,000.00 per year for a full-time position as a "Programmer Analyst" and identified the "prevailing wage" as $43,000.00 per year for Diamond Bar, California, as determined by a State Employment Security Agency (SESA). In the LCA, Employer agreed to pay Employee "at least the local prevailing wage or the employer's actual wage, whichever is higher."[1] (AF, pp. 24-26).

On July 19, 2001, Employer filed a "petition for the transfer of H-1B Visa" for Employee. In the petition, Employer indicated that it offered Employee the position of "Programmer Analyst," at an annual salary of $45,000.00. Generally, the position required "evaluating users request for new or modified programs" and "analyzing, reviewing, and altering programs to increase operating efficiency or adapt to new requirements." Additionally, the position entailed entry of program codes, running and testing programs, and modifying or deleting codes to correct errors. The petition further indicated Employee was "uniquely qualified" for the position due to his Bachelor's and

[1] The record is devoid of any evidence reflecting the Employer's wages of any similarly employed workers in comparable job classifications, skill levels, and qualifications.

Master's degrees in Computer Science, his overall computer skills, and his previous work experience. (AF, pp. 21-23).

On July 30, 2002, the Employment Standards Administration Wage and Hour Division (ESA) notified Employer of an investigation of its firm pursuant to and under authority of the Immigration and Nationality Act, 8 U.S.C. §1101, et seq. (1991), (INA or Act) and its implementing regulations at 20 C.F.R. part 655, Subparts H and I. (EX-B to Employer's Submission and Argument).

On March 25, 2004, the ESA determined Employer committed several violations, which included the willful failure to pay wages as required and the failure to comply with Subparts H or I of the regulations, as required. Employer was assessed a "civil money penalty" of $3,000.00 and determined to owe back wages totaling $31,346.37 to Employee. Employer was also notified that it could appeal the determination within 15 days of the date of the determination. (EX-C to Employer's Submission and Argument).

Although Employer's motion for an appeal of the ESA's determination of March 25, 2004, is not included in the appeal file, Employer's exhibits included a Notice of Trial set before Administrative Law Judge Paul Mapes on May 24, 2004. (EX-D to Employer's Submission and Argument).

On April 21, 2004, the ESA requested an "H-1B prevailing wage determination" to be made by the EDD. On May 3, 2004, the EDD issued a prevailing wage determination of $46.13 per hour, or $95,950.00 annually based on a review of the job description and Employee's qualifications. The EDD identified the position as "level 2 wage Computer Software Engineer, Applications" with a Standard Occupational Classification code 15-1031. The wage determination was based on the 2001 Occupational Employment Statistics Survey. The EDD also suggested a prevailing wage of $25.04 per hour, or $52,083.00 annually, for a Level I Computer Software Engineer, although it ultimately determined a Level II classification was appropriate for Employee, since he was fully competent and could work independently. (AF, p. 52). On May 3, 2004, Employer was also notified that an appeal of the determination was to be made within 10 days of receipt, pursuant to 20 C.F.R. §655.731(d)(2), and should be initiated with the ETA regional office having jurisdiction over the "geographic worksite." (AF, pp. 53-54).

On May 6, 2004, prior to the scheduled formal hearing before Judge Mapes, the parties filed a joint motion for dismissal and the matter was dismissed without prejudice.[2] (EX-E to Employer's Submission and Argument).

On May 13, 2004, Employer submitted an appeal from and request for hearing on the prevailing wage determination to the DOL Regional Administrator for Region VI in San Francisco, California. Employer appealed based on the following two points: (1) the prevailing wage determination was made at the request of the ESA, rather than the ETA; and (2) the prevailing wage determination was based on a Level II "Computer Software Engineers, Applications" category, rather than "Programmer Analyst." (AF, pp. 50-51).

On June 7, 2004, ETA notified Employer that the appeal could not be processed without additional information regarding its precise objections. The ETA informed Employer that it could "take issue with the EDD determination" in the following three potential areas: (1) it could object to the Dictionary of Occupational Titles (DOT) classification assigned to the job in question; (2) it could disagree with the determination of the appropriate skill level; and (3) it could propose a different prevailing wage survey based on a wage survey secured by Employer. (AF, p. 35).

On August 16, 2004, Employer submitted clarified objections to the ETA. (AF, pp. 8-10). Specifically, Employer disagreed with the assignment of Level II as the position skill level. Employer contended the position met the requirements of skill Level I, as no experience was required and Employee was offered the job in 2001 before he had any experience. (AF, p. 8). Employer also submitted a prevailing wage determination based on an "OES/SOC" wage search. The search identified annual earnings of $50,253.00, or $24.16 hourly, for "Computer Software Engineers, Applications" at Level I for the year 2004. It also identified yearly earnings of $73,944.00, or $35.55 hourly, for the same position at Level II in the year 2004. Employer based its search in "Area 5945." (AF, pp. 9-10).

On September 14, 2004, the ETA decided the prevailing wage and skill level determined by the EDD was appropriate. The Regional Administrator concluded the prevailing wage determination was not affected by the fact that the ESA

[2] According to Employer's opposition to the prevailing wage determination, the dismissal was requested after the "USDOL Attorney" decided to obtain a prevailing wage determination prior to trial.

requested the determination directly from the EDD. According to the Regional Administrator, wage determination requests are routinely forwarded by the ESA to the ETA, which then forwards the requests to the EDD. The EDD makes a prevailing wage determination that is reviewed by a Certifying Officer and forwarded to the ESA upon its approval. Consequently, the Regional Administrator reasoned that the outcome was the same whether the ESA submitted the request directly to the EDD or whether the ESA first submitted the request to the ETA. (AF, pp. 3-4).

The ETA considered the job descriptions for "Computer Systems Analysts" and "Computer Software Engineers, Applications" contained in the "Occupational Employment Statistics-Standard Occupational Classification (OES-SOC) code. The job descriptions were compared to the job requirements provided by Employer. The Regional Administrator found the position described by Employer more closely resembled that of "Computer Software Engineers, Applications" and concluded that the EDD provided a wage determination for the correct job classification. (AF, pp. 4-5).

The ETA also concluded that Employer was not offering an entry level position to Employee. In making such a determination, it considered the job description provided by Employer, as well as the computer skills and work experience of Employee. Thus, the Regional Administrator concluded that skill Level II was appropriate for the prevailing wage determination. The decision also indicated that Employer provided its own wage determination using the wrong work area, noting Employer used "Area 5945," the Orange County identifier. According to the Regional Administrator, Diamond Bar, California falls within Area 4480, the identifier for Los Angeles-Long Beach, California. (AF, pp. 5-6).

On October 1, 2004, Employer appealed the September 14, 2004 determination and requested a hearing before an Administrative Law Judge, pursuant to 20 C.F.R. §658.421(d). On October 29, 2004, an appeal file was forwarded to the Office of Administrative Law Judges. (AF, p. 2).

THE CONTENTIONS OF THE PARTIES

Employer contends Respondent is illegally "forum shopping" because it dismissed this matter in California and subsequently reinstated it after receiving a new prevailing wage determination. Employer further contends the prevailing wage

determination was statutorily required to be completed by August 30, 2002, thirty days after the commencement of the July 30, 2002 investigation. Consequently, Employer argues Respondent was time-barred from initiating a prevailing wage determination and continuing its investigation of Employer. Employer also argues the prevailing wage determination is procedurally barred because it was completed by the EDD at the request of the ESA. According to Employer, the ETA is the proper authority to determine the prevailing wage and the ETA did not make the determination in the present case. Finally, Employer contends the prevailing wage determination is "substantively inaccurate," arguing that the offered position required Level I skills and was not a "computer software engineer" position.

Respondent contends the prevailing wage in this matter is $95,950.00 annually, as determined on May 3, 2004. Respondent contends that the ETA routinely requests wage determinations from the EDD and, thus, the wage determination in this matter is appropriate despite the ESA's direct request to the EDD. Respondent further contends the job requirements submitted by Employer place the offered position within the classification of a Level II "Computer Software Engineers, Applications." Finally, Respondent contends the wage determination submitted by Employer is improper because Employer used an incorrect area identifier. Consequently, the prevailing wage identified by Employer applies to an area that does not encompass Diamond Bar, California.

ISSUES

(1) Whether Respondent is illegally forum shopping in violation of Employer's due process rights;

(2) Whether the May 3, 2004 prevailing wage determination is untimely;

(3) Whether the May 3, 2004 prevailing wage determination is valid;

(4) Whether the May 3, 2004 prevailing wage determination utilized the correct job description and skill level for the offered position.

STATUTORY FRAMEWORK

The H-1B visa program permits employers to temporarily employ non-immigrants to fill specialized jobs in the United

States. The Act requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage, in order to protect U.S. workers and their wages. Under the Act, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must receive permission from the DOL before the alien may obtain an H-1B visa.

The Act defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. § 1184(i)(1). To receive permission from the DOL, the Act requires an employer seeking permission to employ an H-1B worker to submit a Labor Condition Application ("LCA") to the DOL. See 8 U.S.C. §1182(n)(1); In the Matter of Eva Kolbusz-Kline v. Technical Career Institute, Case No. 93-LCA-004, @ 3-4 (Sec'y, July 18, 1994). Only after the employer receives the DOL's certification of its LCA may the INS approve an alien's H-1B visa petition. 8 U.S.C. § 1101(a)(15)(H)(1)(B); 20 C.F.R. § 655.700.

The Act provides that the LCA filed by the employer with the DOL must include a statement to the effect that the employer is offering, to an alien provided status as an H-1B non-immigrant, wages that are at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is higher, based on the best information available at the time of filing the application. See 8 U.S.C. § 1182(n)(1)(A).

The Act directs DOL to review the LCA only for completeness or obvious inaccuracies. Unless DOL finds that the application is incomplete or obviously inaccurate, the Department shall provide the certification described by the Act within seven days of the date of the filing of the application. 8 U.S.C. § 1182(n)(1) and 20 C.F.R. § 655.740.

DOL has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation of the required wages. See 20 C.F.R. Part 655, Subpart H. The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid, debarment of the employer from future employment of aliens, civil money penalties, and other relief that the Department deems appropriate. 20 C.F.R. § 655.810 and § 655.855.

A. Did Respondent engage in forum shopping?

Employer contends Respondent engaged in "forum shopping" and argues the Office of Administrative Law Judges in California is the proper venue for this matter. I disagree with Employer's contentions.

I find Employer offered no support for its allegations of forum shopping; rather, it simply alleges Respondent sought dismissal of the matter and later re-filed the claim in a "different jurisdiction" because it "became apparent that the respondent would not prevail in front of the Administrative Law Judge in California." I find Employer's allegations are conclusory and further find that the documents submitted by the parties do not support such allegations.

The Order Granting Dismissal Without Prejudice issued by Judge Mapes stated that the parties filed a **joint** motion for dismissal on May 6, 2004. Prior to filing the joint motion for dismissal, Employer was informed of the "new prevailing wage determination" that was issued on May 3, 2004. In the letter communicating the May 3, 2004 prevailing wage determination, Employer was notified that it had 10 days to seek an appeal of the wage determination with the ETA regional office having jurisdiction over the worksite. On September 14, 2004, the Regional Administrator upheld Respondent's wage determination.

Based on the foregoing, I find and conclude Employer has not set forth factual support for its allegations. I find that both parties sought dismissal of this matter through Judge Mapes. Further, I find no support for the contention that Respondent "re-filed" the claim. Rather, the present matter was assigned to the undersigned in accordance with the procedural steps set forth by the governing regulations.

The undersigned became involved with the present matter following Employer's appeal of the Regional Administrator's September 14, 2004 decision. Employer appealed pursuant to 20 C.F.R. § 658.421(d). In accordance with the regulation, the Regional Administrator submitted an appeal file to the Chief Administrative Law Judge, who then designated the undersigned as the presiding ALJ in the matter.

The procedure for appointment of Administrative Law Judges is set forth in 5 U.S.C. §3105, which states in part that

"[a]dministrative law judges shall be assigned to cases in rotation so far as practicable . . .." Consequently, the jurisdiction of DOL ALJs is not limited by geographical lines. Therefore, I find and conclude the assignment of a case involving California parties to an ALJ based in a different part of the country is not improper for jurisdictional reasons and, therefore, does not constitute "forum shopping."

Accordingly, I find and conclude that Respondent has not engaged in forum shopping.

B. Was the Prevailing Wage Determination Untimely?

20 C.F.R. §655.806(a) states the following regarding the filing and processing of a complaint against an Employer:

> (3) If the Administrator determines that an investigation on a complaint is warranted . . . an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing. The time frame for the investigation may be increased with the consent of the employer and the complainant, or if, for reasons outside of the control of the Administrator, the Administrator needs additional time to obtain information needed from the employer or other sources to determine whether a violation has occurred . . . .

If the Administrator seeks a prevailing wage determination from the ETA pursuant to 20 C.F.R. §655.731(d), the 30-day investigatory period shall be suspended while the ETA makes the prevailing wage determination. 20 C.F.R. §655.731(d)(1); 20 C.F.R. §655.806(a)(4). If the employer timely challenges the prevailing wage determination through the Employment Service complaint system, the 30-day investigatory period shall be suspended until the employer obtains a final ruling. 20 C.F.R. §655.731(d)(2)(i).

Employer contends Respondent violated Employer's due process rights by failing to follow the complaint handling procedures set forth in the regulations. Specifically, Employer argues that the May 3, 2004 prevailing wage determination was untimely because it was not completed within 30 days of the initiation of the investigation on July 30, 2002.

While the regulations state that "an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing," I find and conclude Respondent is not

barred from issuing a prevailing wage determination and continuing its investigation after the 30 day deadline. It is noted that the regulations specifically allow for extended investigation time if, for reasons out of his control, the Administrator needs additional time to obtain necessary information. Although Respondent has not addressed its reasons for requiring additional time, I find that the regulations themselves do not mandate strict adherence to the 30 day time frame.

Agency rules developed primarily for the benefit of an agency are not enforceable (even if they provide some incidental protections to the regulated), whereas rules promulgated for the protection of those who deal with an agency (i.e., not the general public) may be enforced, but only upon a showing of substantial prejudice. Exotic Granite & Marble Inc. v. USDOL, 1998-JSA-1 @ 11-12 (ALJ Feb. 12, 1998), citing, American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 538-539 (1970)(for the former proposition) and Morton v. Ruiz, 415 U.S. 199, 235 (1974) (for the latter). The courts have been loathe to impose any remedial action for violations of enforceable regulations when no substantial prophylactic purpose would be served. Exotic Granite & Marble Inc., supra, citing, Usery v. Board of Education of Baltimore City, 462 F.Supp. 535, 550 (D.C.D. Md, 1978), and Cf. U.S. v. Walden, 490 F.2d 372 (4th Cir. 1974) cited therein.

Although not a binding decision, Exotic Granite & Marble Inc, supra, briefly addressed the "processing time periods set forth in the regulations." The ALJ reasoned that the "processing time periods" were designed to "guide the agency in its processing of LCAs and of complaints" and thus, were not established to benefit appealing employers. Thus, DOL was not required to strictly adhere to the regulations, since the time periods were not regulations of the "enforceable variety." The ALJ further concluded that the employer did not establish substantial prejudice which would be "a predicate for remedial action" if the regulations had been considered enforceable. Id. @ 11.

Like the time periods in Exotic Granite & Marble, Inc., I find and conclude the 30-day investigatory period set forth in the regulations is not established for the benefit of Employer. Rather, the period is a guideline for the agency's actions. Although the Administrator in the present case allowed a significant and arguably inexcusable delay of almost two years between the initiation of the investigation and the request for

a prevailing wage determination, Employer has not alleged or established that it suffered any substantial prejudice as a result of the Administrator's failure to act in a more timely fashion. Consequently, I find and conclude Respondent was not time-barred from issuing a prevailing wage determination and continuing its investigation of Employer.

C. Is the May 3, 2004 prevailing wage determination valid?

In an investigation concerning an employer's failure to met the "prevailing wage" condition, the regulations provide that the Administrator **may** contact the ETA to obtain a prevailing wage determination which shall be the basis of determining violations and computing back wages. 20 C.F.R. §655.731(d)(1). The regulations further provide that the ETA **may** consult with the appropriate SESA to ascertain the applicable prevailing wage for the complaint. 20 C.F.R. §655.731(d)(3).

Employer contends that the ETA, rather than the ESA, is the proper authority to make a prevailing wage determination. According to Employer, the ETA may request a wage determination from the SESA. However, Employer argues that the wage determination in the present matter is invalid because the ETA was not involved in the wage determination at any point. Rather, the ESA sought a wage determination directly from the SESA, or the EDD in this matter. Consequently, Employer argues the prevailing wage determination is invalid because it was not made by the ETA.

Respondent concedes that the ETA is the proper authority for determining prevailing wages, citing 20 C.F.R. §655.731(a)(2)(iii)(A).[3] However, Respondent notes that the ETA routinely requests prevailing wage determinations from the SESA, which are then reviewed by an ETA Certifying Officer prior to submission to the Wage and Hour Division (ESA). Respondent also indicates that the ETA did not review the prevailing wage determination in this matter prior to its submission to the Wage and Hour Division; rather, ETA subsequently concluded that the determination "was appropriate and accurately reflected the wages for the job application described in the request." Consequently, Respondent argues the prevailing wage determination would have been the same if it had been requested by or routed through the ETA.

[3] Respondent cited "20 C.F.R. §655.731(a)(2)(ii)(A)." However, that specific cite does not exist and 20 C.F.R. §655.731(a)(2)(ii) discusses union contracts. A discussion of prevailing wage determinations and SESA is found at 20 C.F.R. §655.731(a)(2)(iii)(A).

Employer makes a persuasive argument that Respondent failed to follow the procedural requirements for a prevailing wage determination. Further, I find Respondent makes a weak argument that its failure is excusable, especially in light of its concession that the ETA is the proper authority to provide a wage determination. Respondent's position is not aided by its indication that the prevailing wage determination was not approved by an ETA Certifying Officer until **after** the determination was submitted to the Wage and Hour Division. Given the arguments of both parties, I would be inclined to conclude that approval of a prevailing wage determination by the ETA after its submission to the Wage and Hour Division does not equate to a prevailing wage determination made by the ETA, notwithstanding the fact that the wage determination would have been provided by the same source.

However, review of the regulations leads to a different conclusion. 20 C.F.R. §655.731(d)(1) provides that the Administrator **may** seek a prevailing wage determination from the ETA. Because the regulations use the word "may," rather than "shall," I find the provision to be permissive rather than mandatory. See Administrator, Wage and Hour Div., U.S. DOL v. Drazin, 2001-JSA-3 @ 2 (ALJ May 30, 2001)(ALJ did not differentiate a request made directly to the EDD from a request made through the ETA). Further, I disagree that the ETA is solely responsible for a prevailing wage determination. The regulation cited by Respondent discusses the employer's responsibility to establish a prevailing wage as the first requirement for the LCA. In doing so, the employer may seek an SESA determination of the prevailing wage. Where the prevailing wage is not "immediately determinable," the SESA will make a prevailing wage determination using the regulations issued by the ETA, along with "other administrative guidelines." 20 C.F.R. §655.731(a)(2)(iii)(A).

Based on the foregoing, I find no support for the contention that the ETA is the only proper authority to make a wage determination. Accordingly, I find and conclude Employer has not established the invalidity of the May 3, 2004 prevailing wage determination in the present case.

D. Did the May 3, 2004 prevailing wage determination utilize the correct job description and skill level for the offered position?

1. The job description

Respondent identified two job classifications within the OES-SOC code that were similar to the job description provided in Employer's petition. The first option was "Computer Systems Analysts" under OES-SOC code 15-1051. The job description for "Computer Systems Analysts" included analysis of data processing problems for application to data processing systems; analysis of user requirements, procedures, and problems for improvement of existing systems; analysis and recommendation of commercially available software. The job description also included supervision of computer programmers.

The second job classification identified by Respondent was identified by OES-SOC code 15-1031 and was titled "Computer Software Engineers, Applications." The job description included the following: development and modification of general applications software or of specialized utility programs; analysis of user needs to develop software solutions; designing software for client use; and analysis and design of databases.

The job described by Employer requires Employee to "evaluate users request for new or modified programs . . ." Code 15-1031 specifically sets forth the task of analyzing user needs and developing software solutions. Additionally, the position described by Employer required Employee to analyze, review, and alter programs to "increase operating efficiency or adapt to new requirements." I find such a task to be similar to the task of "designing or customizing software with the aim of optimizing operational efficiency," as set forth in the provided description of OES-SOC code 1031.

Additionally, the description for "Computer Software Engineers, Applications" specifically identifies tasks requiring modification of software to correct errors, as well as the development and directing of system testing. Employer's offered position required Employee to enter program codes and to enter commands into the computer that would run and test programs. Employee would replace, delete, or modify codes as needed to correct errors. I find Employer's job description and the "Computer Software Engineers, Applications" job description identify similar tasks.

Employer merely alleges the prevailing wage determination for "Computer Software Engineers, Applications" was the incorrect job classification for the offered position. Employer

provides no factual support for its allegation that the position is properly classified as "Programmer Analyst" and simply relies on the job title provided in its petition for Employee's H-1B visa. Employer does not address the position's duties and responsibilities. Further, Employer offers no explanation of the differences between a "Programmer Analyst" and a "Computer Software Engineer, Applications" position. Without more, I find Employer provided no basis for consideration of whether the prevailing wage determination was based on the wrong job description. Consequently, I find and conclude Employer's allegation that the prevailing wage determination used an incorrect job description is without merit.

I have reviewed three job descriptions set forth in the parties' arguments. I have also reviewed the information provided at http://online.onetcenter.org, the website cited by Respondent from which it derived the job descriptions for the two OES-SOC codes. I find the job description provided for "Computer Systems Analysts" includes duties and responsibilities primarily centered around "analysis." I further find Employer described a position that required "analysis," but not to the extent of the "Computer Systems Analysts" position. Rather, I find Employer set forth a job description that allowed for and expected a greater variety of tasks, which were similar in nature to the responsibilities of the "Computer Software Engineer, Applications." Based on the foregoing, I find and conclude OES-SOC code 15-1031, "Computer Software Engineers, Applications," is the appropriate job classification for the offered position.

2. The appropriate skill level

Employer further contends the prevailing wage determination was substantively inaccurate because it utilized skill Level II for the offered position. According to Employer, the offered position required skills at Level I. Respondent maintains that skill Level II was appropriate because of the job description and Employee's qualifications as stated in the petition for the H-1B visa. Respondent argues Employer should not be allowed to now "diminish the responsibilities and requirements of the jobs at issue," citing Exotic Granite & Marble, Inc., supra, as support for its argument.

In Exotic Granite & Marble, Inc., supra, the employer submitted a letter to the INS detailing the nature of its business and the offered position. The letter described the position of "Project/Sales Engineer" and set forth the expected

job duties, which included the development of business and coordination of the activities of other company employees. The letter further stated that the employee must "have educational background and work experience in the area of mechanical engineering aspects of the use of construction materials, as well as experience in managing construction projects . . . ." The letter specifically stated that such education and experience was necessary to perform the job duties. The ALJ did not allow the employer to later "minimize the nature of the position" to a lesser paying classification because the job description provided in the earlier filings and letters established the position as a higher paying "Sales Engineer."

In the present case, Respondent provided descriptions of the two skill levels as set forth in "GAL No. 2-98." Skill Level I is a beginning level that requires a "basic understanding of the occupation through education or experience." The tasks require "limited exercise of judgment" and a Level I employee works under close supervision. The employee's work is "monitored and previewed for accuracy."

Skill Level II is assigned to employees who are "fully competent" with sufficient experience within the occupation to exercise independent judgment. Level II employees supervise other employees, receive "only technical guidance," and undergo review of their work for "application of sound judgment and effectiveness in meeting the established procedures and expectations."

It is apparent that the skill levels are differentiated by the level of supervision received by or exercised by the employee, as well as the amount of independent judgment an employee is allowed to utilize. The July 19, 2001 petition for Employee's visa does not address either of these aspects. It is unclear from the position description whether the position requires close supervision or whether the position itself is "supervisory."

Although Employer, in its brief, argues that the offered position is a "Level I position and not a Level II position because no experience is required of the applicant," the record before me is completely devoid of any evidence that experience was not a requirement for the position. The EDD concluded that, based on Employee's academic credentials and past work experience, the proper skill level should be classified as a Level II since those factors "uniquely qualify" Employee for the position, according to Employer. Moreover, Employee was deemed

an excellent candidate by Employer to fulfill the position requirements because he had a Masters' degree in Computer Science, specific computer skills, and relevant work experience; thus, Employer equated qualifications to job requirements. Based on the foregoing, the Regional Administrator determined that Skill Level II was appropriate for the job position offered by Employer.

The Administrative Procedure Act, 5 U.S.C. 556(d), provides that the proponent of a rule or theory has the burden of proof to present evidence in support of its theory and to meet a preponderance of the evidence standard. In the instant case, Employer has the burden of proof to establish that the Administrator's determination of the Skill Level II for the offered position is inappropriate. Based on the foregoing discussion, I find and conclude that the Employee had both the education and experience necessary to support a determination that he is a skill Level II Computer Software Engineer. Accordingly, I further find and conclude that Employer has failed to sustain its burden of production and, thus, its burden of persuasion in this matter.

CONCLUSION

Based on the foregoing, I find and conclude that (1) Respondent did not engage in "forum shopping" in violation of Employer's due process rights; (2) that the May 3, 2004 prevailing wage determination was timely requested and valid; and (3) that the prevailing wage determination utilized the correct job description and appropriate skill level for the offered position.

ORDER

Accordingly, Employer's appeal of the prevailing wage determination is **DENIED.**

Therefore, the Notice of Determination of the Regional Administrator dated September 14, 2004, is hereby **AFFIRMED.** This Order constitutes the final decision of the Secretary of Labor.

ORDERED this 15th day of April, 2005, at Metairie, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge