



Issue Date: 22 August 2003

BALCA Case No. 2002-INA-241
ETA Case No. P2002-VA-03372804

In the Matter of:

TECHNOSOFT,
Employer,

on behalf of

SREERAMA AMANAGANTI,
Alien.

Certifying Officer: Richard E. Panati
Philadelphia, PA

Appearance: Maria Baker
For Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Sreerama Amanaganti (“Alien”) filed by Technosoft (“Employer”) pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A) (the “Act”) and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) of the United States Department of Labor denied the application, and Employer requested review pursuant to 20 C.F.R. §656.26. The following decision is based on the record upon which the CO denied certification and Employer’s request for review, as contained in the Appeal File (“AF”) and any written arguments of the parties.

STATEMENT OF THE CASE

On January 3, 2002, Employer filed an application for labor certification on behalf of the Alien for the position of Programmer/Analyst. (AF 22-23).

On April 15, 2002, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the ground that Employer's wage offer of \$47,757 a year was below the prevailing wage of \$60,237 a year. The CO noted that the prevailing wage was determined by the 2002 Occupational Employment Statistic wage survey for an experienced Programmer/Analyst in Scott Depot, West Virginia. To remedy the deficiency, the CO suggested that Employer could increase the wage offer to match the prevailing wage determination and indicate willingness to readvertise the opportunity, or challenge the prevailing wage determination by submitting alternative wage data. (AF 18-19).

On April 30, 2002, Employer submitted its Rebuttal. (AF 15-17). Employer indicated that it was increasing the wage offer to \$52,291 a year. The increase was based on what the Foreign Labor Certification On Line Wage Library Report indicated was the annual salary for the area. A copy of the report was attached.

On May 21, 2002, the CO issued a Final Determination (FD) denying certification (AF 12-14). The CO found that Employer's increase in salary to \$52,291 a year was still below the prevailing wage determination. The CO noted that the Online Wage Library report submitted by Employer was for the position of Programmer, which was not the same position offered in the ETA 750A. In the ETA 750A Employer showed the position offered to be that of Programmer/Analyst. Since the prevailing wage determination for a Programmer/Analyst was \$60,237 a year, the increased wage offer of \$52,291 remained below the prevailing rate of pay. Consequently, Employer remained in violation of 20 C.F.R. § 656.20(c), § 656.20(g), § 656.21(g)(4) and § 656.40 and the application was denied.

On June 17, 2002, Employer filed its Request for Review. (AF 01-02). In its Request for Review, Employer asserted that the reference number of the case showed VA and not WV. Therefore, it was evident that the case was erroneously processed under the State of Virginia and not in West Virginia. Employer also reasserted that its wage offer was above the normal wage rate for the area and submitted three different surveys in support of its argument.

On June 26, 2002 the CO issued a denial of Employer's Motion for Reconsideration¹ on the ground that the motion did not raise matters that could not have been raised in the Rebuttal. The CO noted that although the reference number reflected VA, this was a typographical error and did not affect the prevailing wage determination. The prevailing wage determination used Putman County, West Virginia as the location of employment. The CO added that the surveys used by Employer reflected the wrong salary because they incorrectly used the position of Programmer and not Programmer/Analyst in the wage determination.

The AF does not reflect that brief was filed.

DISCUSSION

Under 20 C.F.R. § 656.20(c)(2), an employer is required to offer a wage that equals or exceeds the prevailing wage determined under 20 C.F.R. § 656.40. That regulation states that the prevailing wage for occupations not subject to the Davis-Bacon Act, as in the instant case, must be determined by the average wage paid to workers similarly employed in the area of intended employment. Where the employer is notified that its job offer is below the prevailing wage, but fails to either raise the wage to the prevailing wage or to justify the lower wage it is offering, certification is properly denied. *Editions Ereboundi*, 1990-INA-283 (Dec. 20, 1991). The purpose of establishing a

¹ It is unclear why Employer's filing of May 21, 2002 was construed by the CO as a Motion for Reconsideration, as it was not titled as such, nor did Employer request reconsideration.

prevailing wage is to keep wages for U.S. workers from being depressed by alien labor in a particular geographic area. *Hathaway Children's Services*, 1991-INA-388 (Feb. 4, 1994) (*en banc*).

When challenging the CO's prevailing wage determination the employer's burden is to establish both (1) that the CO's determination is in error and (2) that the employer's wage offer is at or above the correct prevailing wage. *PPX Enterprises, Inc.*, 1988-INA-025 (May 31, 1989)(*en banc*).

When an employer challenges the CO's prevailing wage determination it must state a basis for believing that the wage it offers represents the actual prevailing wage. *Altra Filter, Inc.*, 1990-INA-015 (Dec. 7, 1990). What constitutes a persuasive survey depends on many facts. For example, a survey which relies on salaries paid by competitors, but does not provide documentation by the competitors, may not be persuasive. *Crest Aviation*, 1988-INA-365 (June 23, 1989); see *Victoria Mihich*, 1992-INA-200 (Apr. 12, 1993) (rejection of an employer's survey was affirmed where the state agency's survey was much larger and was a more statistically valid determination of the prevailing wage for workers similarly employed in the area of intended employment). The employer's independent wage survey must be shown to be relevant and accurate. *L. F. Tarantino & Sons Quakertown Memorials*, 1990-INA-231 (June 13, 1991). The employer must provide sufficient background information about its survey to allow a test of adequacy of the sample. A survey that is too narrow or provides insufficient information is not persuasive. *Zenith Manufacturing and Chemical Corp.*, 1990-INA-211 (May 31, 1991).

In this matter, Employer in its Rebuttal tacitly challenged the prevailing wage determination by increasing its wage offer to match a wage determination based on the Online Wage Library report. The issue then is whether Employer's evidence sufficiently demonstrates: (1) that the CO's determination is in error and (2) that the Employer's wage offer is at or above the correct prevailing wage. *PPX Enterprises, Inc.* Employer's evidence consists of a printout of the Online Wage Library report for the position of

Computer Programmer, showing an annual salary of \$52,291. The CO found, and we agree, that the results of the survey presented by Employer were not helpful because Employer should have used the same position as that in ETA 750A, that of Programmer/Analyst (*see* AF 22), and not Computer Programmer. We note that Employer never challenged or indicated disagreement with that particular finding by the CO. Additionally, in reviewing the Dictionary of Occupational Titles², we find that the

² The following are the definitions found in the Dictionary of Occupational Titles for both professions:

030.162-010 COMPUTER PROGRAMMER (profess. & kin.) alternate titles: applications programmer; programmer, business

Converts data from project specifications and statements of problems and procedures to create or modify computer programs: Prepares, or receives from SYSTEMS ANALYST (profess. & kin.) 030.167-014, detailed workflow chart and diagram to illustrate sequence of steps that program must follow and to describe input, output, and logical operations involved. Analyzes workflow chart and diagram, applying knowledge of computer capabilities, subject matter, and symbolic logic. Confers with supervisor and representatives of departments concerned with program to resolve questions of program intent, data input, output requirements, and inclusion of internal checks and controls. Converts detailed logical flow chart to language processable by computer. Enters program codes into computer system. Inputs test data into computer. Observes computer monitor screen to interpret program operating codes. Corrects program errors, using methods such as modifying program or altering sequence of program steps. Writes instructions to guide operating personnel during production runs. Analyzes, reviews, and rewrites programs to increase operating efficiency or to adapt program to new requirements. Compiles and writes documentation of program development and subsequent revisions. May train workers to use program. May assist COMPUTER OPERATOR (clerical) 213.362-010 to resolve problems in running computer program. May work with SYSTEMS ANALYST (profess. & kin.) to obtain and analyze project specifications and flow charts. May direct and coordinate work of others to write, test, and modify computer programs. GOE: 11.01.01 STRENGTH: S GED: R5 M4 L5 SVP: 7 DLU: 90

030.162-014 PROGRAMMER-ANALYST (profess. & kin.) alternate titles: applications programmer-analyst

Plans, develops, tests, and documents computer programs, applying knowledge of programming techniques and computer systems: Evaluates user request for new or modified program, such as for financial or human resource management system, clinical research trial results, statistical study of traffic patterns, or analyzing and developing specifications for bridge design, to determine feasibility, cost and time required, compatibility with current system, and computer capabilities. Consults with user to identify current operating procedures and clarify program objectives. Reads manuals, periodicals, and technical reports to learn ways to develop programs that meet user requirements. Formulates plan outlining steps required to develop program, using structured analysis and design. Submits plans to user for approval. Prepares flowcharts and diagrams to illustrate sequence of steps program must follow and to describe logical operations involved. Designs computer terminal screen displays to accomplish goals of user request. Converts project specifications, using flowcharts and diagrams, into sequence of detailed instructions and logical steps for coding into language processable by computer, applying knowledge of computer programming techniques and computer languages. Enters program codes into computer system. Enters commands into computer to run and test program. Reads computer printouts or observes display screen to detect syntax or logic errors during program test, or uses diagnostic software to detect errors. Replaces, deletes, or modifies codes to correct errors. Analyzes, reviews, and alters program to increase operating efficiency or adapt to new requirements. Writes documentation to describe program development, logic, coding, and corrections. Writes manual for users to describe installation and operating procedures. Assists users to solve operating problems. Recreates steps taken by user to locate source of problem and rewrites program to correct errors. May use computer-aided software tools, such as flowchart design and code generation, in each stage of system development. May train users to use program. May oversee installation

professions of Computer Programmer and Programmer-Analyst have different responsibilities, which justifies the difference in salaries. Therefore, we find that Employer did not demonstrate that the CO's determination is in error as required by *PPX Enterprises, Inc.*

As Employer failed to establish that the CO's determination is in error and that its own wage offer was at or above the correct prevailing wage, it has failed to sustain its burden of proof.³ Accordingly, as the record is sufficient to support the CO's denial of alien labor certification and for the above stated reasons, the following order will issue⁴:

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor

of hardware and software. May provide technical assistance to program users. May install and test program at user site. May monitor performance of program after implementation. May specialize in developing programs for business or technical applications.

GOE: 11.01.01 STRENGTH: S GED: R5 M5 L5 SVP: 7 DLU: 90

³ We also note that Employer asserted that the CO used the State of Virginia instead of West Virginia in finding the prevailing wage determination. We agree with the CO that that assertion is not correct. In AF 20-21, the state agency of West Virginia indicates its finding that the local prevailing wage is \$60,237 a year.

⁴ Employer in its Request for Review submitted two additional surveys. That evidence could not be considered by this Panel because our review must be based on the record upon which the CO reached his decision. Evidence first submitted with the Request for Review cannot be weighed. *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *Cappricio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Additionally, under the regulatory scheme of 20 C.F.R. §656.24, the Rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.