



DATE ISSUED: February 12, 1998

CASE NO.: 98-JSA-1

In the Matter of

EXOTIC GRANITE & MARBLE, INC.,
Complainant,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent

Appearances:

Robin P. Kandell, Esq.
For the Complainant

Charles D. Raymond, Esq.
For the Respondent

Before:

RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING EMPLOYER'S APPEAL

This dispute is brought under the provisions of the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49, *et seq.*, and the regulations thereunder found at 20 C.F.R. Part 658, subpart E.¹ An H-1B Prevailing Wage Hearing Appeal file, in the above-styled case, was received by the Chief Administrative Judge, Department of Labor (DOL), on October 9, 1997. The Respondent had requested a hearing pursuant to 20 C.F.R. § 658.421(d). The undersigned was designated to resolve the appeal of this "prevailing wage rate" dispute, under 20 C.F.R.

¹ The Administrator's documents refer to 29 C.F.R. Part 507. The regulations governing Labor Condition Applications (LCAs) for non-immigrants on H-1B specialty visas in specialty occupations were moved to 20 C.F.R. Part 655, subparts H and I, in 1996. Since the LCA in this matter was filed in 1993, the January 13, 1992 revised rules, 57 Fed. Reg. 1316-41, apply. Where those rules differ significantly from the current regulations, the differences are noted. Those older rules can be found in the 1994 Code of Federal Regulation, Title 29, Part 507.

§ 658.424.²

Employers seeking to import temporary foreign workers in professional occupations must file a visa petition with the Immigration and Naturalization Service (INS), under Section 212(n) of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*³ The petition must be accompanied by a Labor Condition Application (LCA), approved by the Department of Labor, in which the employer assures, *inter alia*, that it will pay the alien worker the greater of the “actual wage rate” or the “prevailing wage” for the occupation for a specified period, as those terms are defined in 20 C.F.R. § 655.731(a).⁴

The Respondent stated that the DOL’s initial review of the LCA is restricted to determining if the document is “incomplete or obviously inaccurate.” In practice, according to the Respondent, the DOL apparently does not evaluate whether the offered wage rate actually satisfies the prevailing wage requirement.⁵ Such inquiries are purportedly left to enforcement proceedings instituted by the Wage and Hour Division, Employment Standards Administration, DOL, invariably initiated by aggrieved parties’ complaints.⁶

² The administrative law judge, in such matters, may render rulings appropriate to the issues in question, however does not have jurisdiction to consider the validity or constitutionality of JS regulations or the Federal statutes under which they were promulgated. 20 C.F.R. § 658.425(a)(4). The decision of the administrative law judge shall be the final decision of the Secretary of Labor. 20 C.F.R. § 658.425(c).

³ Exotic Granite & Marble, Inc., qualifies as an “employer,” under the regulations. 20 C.F.R. § 655.715. “H-1B” specialty worker visa petitions are filed with the INS by U.S. employers seeking the temporary service of aliens whose work requires a bachelors or higher degree in a specific occupational specialty, e.g., computer science jobs, social science jobs, engineering, mathematics, accounting law, theology, education, business specialties, and architecture. 8 USCA § 1184(i) and 8 C.F.R. § 214.2. Determinations of specialty occupations and of nonimmigrant qualifications are made by the INS, not the DOL. 8 C.F.R. § 214.2 and 20 C.F.R. § 655.715.

⁴ The employer prepares the LCA, on a Form ETA 9035, and must identify the occupational classification for which the LCA is sought with a three digit Dictionary of Occupational Titles (DOT) Occupational Groups code and the employer’s own title for the job. 20 C.F.R. § 655.730(c). The regulation in effect at the time was 29 C.F.R. § 730. The “actual wage” is “the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question . . .” The “prevailing wage rate” for the occupational classification in the area of intended employment is determined by the employer at the time of filing the LCA. No specific methodology is required. However, the prevailing wage rate may not be less than the “minimum wage required by Federal, State, or local law.” 20 C.F.R. § 655.715. Since it is not always possible to determine the average rate of wages, i.e. that paid workers similarly employed in the area, used to determine the prevailing rate, with exact precision, the wage set forth in the LCA shall be considered to meet the standard if within 5 % of the average rate of wages. 29 C.F.R. § 507.730(e)(1)(ii)(C). Employers must retain documentation sufficient to prove the validity of the wage statement attested to on the Form ETA 9035. 20 C.F.R. § 655.731(b).

⁵ However, 29 C.F.R. § 507.740 and 20 C.F.R. § 655.740 specify actions required of the regional ETA Certifying Officer. She must not certify it if the Form 9035 has not been properly completed, e.g., it does not state the wage rate or the prevailing wage and its source, or where it contains obvious inaccuracies, e.g., identifying a wage below the prevailing wage listed on the LCA. (These examples were added to the regulations post-1994). The DOL is not a guarantor of the accuracy, truthfulness, or adequacy of a certified LCA. 20 C.F.R. § 655.749(c). Section 507.730 (b) was in effect at the time in question.

⁶ 20 C.F.R. § 655.805. Such complaints must be filed within 12 months of the latest date on which the alleged violations were committed. 20 C.F.R. § 655.805(d)(5) and 29 C.F.R. § 507.805(c)(5). DOL’s position is that this bar ties in to the date of the employer’s wrongful actions, e.g., failure to pay the required wages. 59 FR 65456, 65657. ETA acts on LCAs and ESA is responsible for investigating and resolving complaints concerning LCAs or employment of H-1B nonimmigrants. 29 C.F.R. § 705(a)(1) & (2) and 20 C.F.R. § 655.705(a)(1) & (2).

In order to determine whether the employer has met its “prevailing wage” obligation and to resolve the complaint, the Wage and Hour Division often must determine the correct wage for the occupation at issue.⁷ It obtains that information from the Employment and Training Administration (ETA), DOL, which follows the procedures set forth in 20 C.F.R. § 656.40.⁸ The ETA may consult the appropriate State Employment Security Agency (SESA) to ascertain the proper prevailing wage.⁹ That wage rate then becomes the basis for any back pay demanded in the Wage and Hour Division enforcement proceeding. The employer may challenge all complaint allegations, including the correctness of the Wage and Hour Division’s prevailing wage determination.

An employer, who during the course of a Wage and Hour Division enforcement proceeding, wishes to challenge the Employment and Training Administration prevailing wage determination, must do so through the Wagner-Peyser complaint system. 20 C.F.R., Part 658, subpart E; see 20 C.F.R. § 655.731(d)(2). Such a challenge stays the Wage and Hour Division enforcement proceeding until the prevailing wage issue is resolved.¹⁰ The matter then reverts to the Wage and Hour Division enforcement proceeding for adjudication without further review of the prevailing wage issue.

PROCEDURAL HISTORY¹¹

In April 1993, the employer, Exotic Granite & Marble, Inc. (hereinafter “Exotic Granite”), filed an H-1B non-immigrant visa petition. It was accompanied by an LCA, dated March 23, 1993. (CX A; RX 1). The application was approved by the DOL Certifying Officer. (RX 1). The LCA was used by the employer to secure a visa from the INS for an alien employee.

The Wage and Hour Division subsequently received a complaint and, on April 8, 1996, initiated an investigation into Exotic Granite’s compliance with the terms of its LCA. (CX C).¹²

On July 12, 1996, the Wage and Hour Division submitted a request to the Employment and Training Administration (ETA) for a prevailing wage determination. (CX D). The ETA

⁷ “Occupation” means the “occupational or job classification in which the H-1B nonimmigrant is to be employed.” 20 C.F.R. § 655.715.

⁸ 20 C.F.R. § 655.731(d)(1). The Complainant submitted a “General Administration Letter (GAL) No. 4-95,” issued May 18, 1995, by Barbara Ann Farmer, DOL Administrator for Regional Management, which provides policy guidance on the interpretation of 20 C.F.R. § 656.40. (CX M).

⁹ 20 C.F.R. 655.731(d)(3) and 20 C.F.R. § 656.3.

¹⁰ 20 C.F.R. § 655.731(d)(1).

¹¹ Complainant exhibits are denoted by “CX” and Respondent exhibits by “RX.”

¹² The record contains no indication, whatsoever, that the employer ever attempted to obtain a modification of the LCA to more appropriately reflect the employee’s actual occupational duties. Under the older regulations, employers were to obtain current prevailing wage information and adjust the rate of pay upwards unless the actual pay rate exceeded the prevailing rate. 29 CFR 507.730(e)(2)(iv). That provision appears to have been subsequently deleted.

obtained a prevailing wage determination from the Georgia Department of Labor, dated July 12, 1996. On August 28, 1996, Exotic Granite appealed that prevailing wage rate to the DOL. (RX 4). On August 15, 1997, the DOL affirmed the State prevailing wage determination. (CX I). On September 5, 1997, Exotic Granite, disagreeing with the ETA's decision on its appeal of the prevailing wage determination, requested a hearing before an administrative law judge. (CX K). I was assigned the case on October 27, 1997. The parties were directed to submit briefs and evidence by January 6, 1998. On January 12, 1998, I issued an Order stating a decision on the record would be made and directed further briefs be submitted.¹³

ISSUE(S)¹⁴

- I. Does this tribunal have jurisdiction over this proceeding?
- II. Is the ETA's July 12, 1996 "prevailing wage determination" valid?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This tribunal properly exercises jurisdiction, under 20 C.F.R. § 658.424, based upon a timely filing by the Complainant of a request for hearing pursuant to Section 658.421(d).

In April 1993, the employer, Exotic Granite & Marble, Inc., filed an H-1B non-immigrant visa petition on behalf of Mahan R. Devu. It was accompanied by a LCA, dated March 23, 1993. (CX A; RX 1). The LCA listed the job title as "Project Engineer" with a DOT Occupational Group Code of "007" and a rate of pay of "\$ 2000 per month plus bonus" for employment in Atlanta, Georgia, from April 1, 1993 to March 31, 1996. It was signed by Ram Nemani, President, Exotic Granite. (CX A; RX 1). At some point prior to its certification, the term "Sales" engineer was added to the job title. The application was approved by Mr. Floyd Goodman, Certifying Officer, DOL, and found valid for the period of 4/1/93 through 3/31/96.¹⁵ (RX 1).

Exotic Granite submitted a "Notice of Filing of Labor Condition Application for H-1B Non-immigrants" along with its LCA. (CX N). That notice detailed the job duties as to

¹³ Acceptance of the Respondent's reluctant proposal for the certifying officer to resubmit the matter to the Georgia Department of Labor would only unnecessarily delay resolution of the matter and possibly result in another appeal. The briefs submitted by the parties, on January 30, 1998, were both very well considered and well written

¹⁴ Exotic Granite listed three issues in its brief: A. Whether the ETA handled the complaint in accordance with established regulatory procedures?; B. Whether the wage paid was within 5% of the prevailing wage rate for a sales promoter, in Atlanta, in 1993?; and, C. Whether the Georgia Wage Survey 1994 is clearly descriptive of the particular job classification, statistically valid, broad, and reliable?. The first issue primarily deals with a lack of proof that the initial complainant filed his complaint within 12 months of the employer's alleged violation and the ETA's failure to adhere to published regulatory time standards in processing the complaint. The complainant alleges no prejudice resulting from the ETA's non-adherence to the processing time standards. The first issue is not appropriate for consideration in this proceeding. The second issue is appropriate for the WHD enforcement action, not this proceeding. The third will be considered herein.

¹⁵ A "Certifying Officer" means a DOL official who makes determinations about whether or not to certify LCAs. "Certification" means "the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies." 20 C.F.R. § 655.715.

“promote sale of granite in construction projects” and provided the prerequisite of a bachelor’s degree in Mechanical Engineering. (CX N).

The LCA was used by the employer to secure a visa from the INS for Mr. Devu, the alien, who filled the job position.¹⁶ Additionally, the employer submitted a letter, dated April 15, 1993, to the INS expanding, in detail, on the nature of the employer’s business and the position in question. (CX L). The employer avers it would have been highly probable that the visa application would have been denied (the detail of) this letter.¹⁷ The letter, signed by the employer, stated among other matters:

Mr. Mohan Rao Devu is being offered temporary employment in our company in the position of Project/Sales Engineer. In this position with our company, Mr. Devu shall be responsible for developing business for our company for use of construction material and project management of medium and large-size housing projects, stadiums, turn-key plans . . . (CX L).

The Respondent points to other language found in the employer’s April 15, 1993 letter:

He will also conduct evaluation, selection and procurement of plant machinery and tools for manufacturing of high quality building materials like granite, marbles, and other tiles. He will also engage in the structuring and preparation of cost-effective estimates in accordance with our customers’ designs, drawings, conforming to international standards, technical specifications and industry quality requirements . . . As a person in charge as Project/Sales Engineer, Mr. Devu will coordinate the activities of other company employees with fabricators, contractors, distributors, importers . . . In order to perform the duties described above, it is necessary that the incumbent for the position of Project/Sales Engineer 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 . . .

(RX 4 at page 2). The Respondent points out that this letter by the employer (April 15, 1993) was submitted to the INS after the LCA application was approved by the DOL (March 1993), that the DOL did not have ready access to it nor was it reviewed by the Georgia DOL before the latter issued its July 1, 1996 prevailing wage determination.¹⁸

Mr. Devu worked for Exotic Granite for several years. Some three years after Mr. Devu took the position, the Wage and Hour Division received a complaint and, in April 1996, initiated

¹⁶ See Complainant’s brief, at page 14.

¹⁷ See Complainant’s brief, at page 15.

¹⁸ The Respondent states the April 15, 1993 letter was not provided by the employer as part of its August 28, 1996 appeal. (Respondent’s brief, page 5).

an investigation into Exotic Granite's compliance with the terms of its LCA. (CX C). On August 8, 1996, the ESA WHD informed Exotic Granite that it was:

determined its documentation or lack of the prevailing wage for Sr. Accountant, V.P. of Operations and Project Sales Engineer failed to conform with regulatory criteria . . . specifying legitimate sources and conditions for determination of prevailing wage. The Wage and Hour Division therefore submitted a request to Employment and Training Administration (ETA) for a prevailing wage determination . . . (CX D).

On July 12, 1996, the ETA had sought and obtained a prevailing wage determination from the Georgia Department of Labor, dated July 12, 1996, for both entry and experienced level Sales Engineers for the appropriate area and time period. (CX E). The entry level rate was \$ 19.08 per hour or \$ 39,686 per year and for the experienced level, \$ 25.60 per hour or \$ 53,248 per year. (CX E).

On August 28, 1996, the employer appealed arguing that the wage determination lacked any source justification and that it appeared to be consistent with a "technically oriented sales engineer versus the sales engineer required for the instant position."¹⁹ (CX F). Exotic Granite stated:

The description for the position is strictly for sales promotion of granite in construction projects. While the sales engineer is required to have a bachelor's degree in mechanical engineering, the main duties of the position involve sales promotion justifying a lower level of wage.

Nearly one year later, on August 15, 1997, Mr. Floyd Goodman, Certifying Officer, Employment and Training Administration, DOL, informed Exotic Granite that its appeal had been misplaced but was denied. Mr. Goodman explained:

The prevailing wage determination issued by the Georgia Department of Labor was based on the job title as listed on the labor condition application and that title is consistent with the duties as described in the subject petition with the Immigration and Naturalization Service. The fact that the alien may be employed in a different occupation, as alleged in your letter of appeal, is not a basis for overturning the prevailing wage determination issued by the Georgia Department of Labor.²⁰ (Emphasis added).

¹⁹ On October 15, 1996, the WHD, ignoring the "stay" provisions of the regulations, erroneously made findings based upon its complaint and assessed penalties. (CX G). On October 25, and November 13, 1996, the WHD informed the employer it had acted without knowledge an appeal of the prevailing wage determination had been filed staying the WHD proceeding. (CX H).

²⁰ 20 C.F.R. § 655.731(c)(6) states: "If the employee works in an occupation other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working."

(CX I). Mr. Goodman also supplied Exotic Granite with the background information used by the State, in 1996, in reaching its determination.

The Georgia Department of Labor (GDOL) had used the Georgia Wage Survey 1994, published in May 1995, to obtain the prevailing wage, in 1996. In July 1997, the GDOL stated that survey complied with the DOL's criteria for published wage surveys, i.e., "it was published within the last 24 months of the issued prevailing wage determination; the data from the survey was collected within 24 months of the survey's publication date; and the publication date was for the most current edition of the survey at the time the prevailing wage determination was issued."²¹ (CX I). The July 12, 1996 prevailing wage determination was solely based upon the job title, "Project/Sales Engineer," since the request for the determination had not included: a complete job description; education requirements; related job experience; or a 9-digit DOT code to accurately classify the intended job. (CX I). In its July 1, 1997 letter, the GDOL added:

The employer is correct in that the prevailing wage salary is in line with a technically oriented sales engineer (please see job description for sales engineers attached.) The main duties for the intended job which involves sales promotion seem more in line with our job title Sales Promoters . . . (with a) Prevailing Wage Rate- Entry Level: \$9.37 per hour/ \$19,490 per year (and) Prevailing Wage Rate- Experienced Level \$ 10.98 per hour/ \$ 22,838 per year. . . (emphasis added).²²

(CX I). "Sales Engineers" were defined as those who "Sell business goods or services that require a technical background equivalent to a baccalaureate degree in engineering. Excludes Engineers whose primary function is not marketing or sales." (CX I). The DOT defines "Sales Engineer (profess. & kin.) alternate titles: marketing engineer" "master definition"²³ as:

Sells chemical, mechanical, electromechanical, electrical, electronic equipment and supplies or services requiring knowledge of engineering and cost effectiveness: Calls on management representatives, such as engineers, architects, or other professional and technical personnel at commercial, industrial, and other establishments in attempt to convince prospective client of desirability and practicability of products or services offered. Reviews blueprints, plans, and customer documents to develop and prepare cost estimates or projected increases in production from client's use of proposed equipment or services. Draws up or proposes changes in equipment, processes, or use of materials or services which would result in cost reduction or improvement in operations. Provides technical services to clients relating to use, operation, and maintenance of equipment. May draw up sales or service contract for products or services. May provide technical

²¹ GDOL inaccurately refers to the annual prevailing wage rate for an experienced "Sales Engineer" set forth in its July 12, 1996, letter to the WHD as \$ 53,686, when it was in fact, \$ 53,248. (CX E & J).

²² The GDOL added, "I sincerely hope this information will clear any misunderstanding concerning the previously issued prevailing wage determinations." (CX I).

²³ According to the DOT, "master definitions" describe work duties that are common or potentially common to a number of jobs.

training to employees of client. Usually specializes in sale of one or more closely related group of products or type of services, such as electrical or electronic equipment or systems, industrial machinery, processing equipment or systems, air-conditioning and refrigeration equipment, electrical power equipment, or chemical goods.

A sales engineer with a mechanical engineering degree is further defined, in 007.151.010, as a person who “Sells mechanical equipment and provides technical services to clients described under SALES ENGINEER (profess. & kin.) Master Title. GOE: 05.01.05 STRENGTH: L GED: R5 M5 L5 SVP: 8 DLU: 77” (Appendix E, Complainant’s Brief).

The DOT defines “165.167-010 Sales-Service Promoter (any industry)”as:

Promotes sales and creates goodwill for firm’s products or services by preparing displays, touring country, making speeches at retail dealers conventions, and calling on individual merchants to advise on ways and means for increasing sales. May demonstrate products representing technological advances in industry. GOE; 11.09.01 STRENGTH: L GED: R5 M3 L5 SVP: 7 DLU 77²⁴

The Bureau of Labor Statistics, Occupational Employment Statistics (OES), Dictionary of Occupations, defines “Demonstrators and Promoters” as: “Demonstrates merchandise and answers questions for the purpose of creating public interest in buying the product. May sell demonstration merchandise.” (Attachment 4, Respondent’s Brief).

The DOT defines “019.167-014 Project Engineer (profess. & kin.) alternate titles: chief engineer” as:

Directs, coordinates and exercises functional authority for planning, organization, control, integration, and completion of engineering project within area of assigned responsibility: Plans and formulates engineering program and organizes project staff according to project requirements. Assigns project personnel to specific phases or aspects of project, such as technical studies, product design, preparation of specifications and technical plans, and product testing, in accordance with engineering disciplines of staff. Reviews product design for compliance with engineering principles, company standards, customer contract requirements, and related specifications. Coordinates activities concerned with technical developments, scheduling and resolving engineering, design and test problems. Directs integration of technical activities and products. Evaluates and approves

²⁴ These acronyms are defined in Appendices B-D of the Complainant’s January 30, 1998 Rebuttal Brief. “DLU” refers to the “date of last update” of the classification by an analyst, here 1977. “SVP” refers to “Specific Vocational Preparation” or the time (or experience) needed to develop the skills needed for “average” performance of the job, here between 2 and 4 years. “GED” refers to “General Educational Development” or educational prerequisites for satisfactory job performance from a basic level of “1” to the highest level “6,” here a “5.” GED levels 4 and above would appear to require at least a 4-year college degree. None of the “Sales Promotion Occupations,” under DOT classification 297, raised by the Respondent, which could be applicable to the position in question require a GED above level “3” other than possibly an “Exhibit-Display Representative (any industry)” which is level “4.” (See Respondent’s Jan. 30, 1998 Brief, attachment 2).

design changes, specifications, and drawing releases. Controls expenditures within limitations of project budget. Prepares interim and completion project reports. GOE: 05.01.08 STRENGTH: L GED: R5 M5 I5 SVP:8 DLU: 87²⁵

Although Exotic Granite raised a number of challenges to the 1996 prevailing wage survey, it only addresses one issue concerning the wage determination in its brief, that is, that the prevailing wage determination “fails to take into consideration the nature of the job.”²⁶ No evidence or argument is presented indicating it is statistically invalid, over-broad or unreliable.

The employer quotes GAL No. 4-95 guidance:

Under section 656.40, the relevant factors in arriving at a prevailing wage rate are the nature of the job and the geographic locality of the job. In determining the nature of the job, the first order of inquiry is to determine the appropriate occupational classification. In most instances, this will be the appropriate 9-digit Dictionary of Occupational Titles (DOT) code that corresponds to the employer’s offer. (Emphasis added).

(CX M, page 3). The guidance also specifies that in order for the SESAs to provide accurate prevailing wage determinations, “employer’s requests should specify the employer’s title for the job, a brief description of the job duties, and the education, training and experience requirements.”²⁷ (CX M, page 6). The employer argues that despite the relevant factors to be considered the ETA failed to consider the nature of the job in question, failed to provide the Georgia DOL with relevant information concerning the job, on July 12, 1996, and the Georgia DOL admitted such a failure in their July 1, 1997 letter indicating the job “seems more in line with our job title Sales Promoter”

GAL 4-95 sets forth the methodology SESAs must use in conducting wage surveys or using published surveys to determine prevailing wages. The methodology:

. . . must reflect the average (arithmetic mean) rate of wages, that is the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. This will, by definition of the term arithmetic mean (average) usually require computing a weighted average. Surveys which use the median or mode may not be used.

(CX M, page 2). The GAL defines “entry level” and “experienced level.” (CX M, page 5-6). Published surveys may be used to make prevailing wage determinations if: (1) they provide an arithmetic mean (weighted average) of wages for workers in the appropriate occupational category in the area of intended employment; (2) they have been published within the last 24

²⁵ An SVP “8” requires 4-10 years of vocational preparation.

²⁶ Employer’s brief at page 16-18. The employer stated the issue as: “Whether the Georgia Wage Survey 1994 is clearly descriptive of the particular job classification, statistically valid, broad, and reliable?”

²⁷ Employer’s brief at 16-17.

months; (3) the data upon which the surveys were collected within 24 months of the survey's publication date; and, (4) the publication date is for the most current edition of the survey. (CX M, page 8). GAL 4-95 reiterated the definition "area of intended employment," found in 20 C.F.R. § 656.3, as:

the area within the normal commuting distance of the place (address) of intended employment. If the place is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within the normal commuting distance of the place of intended employment.

There is no indication that the job opportunity is in an occupation subject to a union contract, or a wage determination, in the area, under the Davis-Bacon Act, 40 U.S.C. 276a, *et seq.*, or the McNamera-O'Hara Service Contract Act, 41 U.S.C. 351, *et seq.*. 20 C.F.R. § 656.40. Nor is there any evidence the determined "prevailing wage rate" is less than the minimum wage required by Federal, State, or local law.

I have carefully examined the published prevailing wage survey relied upon by the GDOL and ETA and find it meets all the criteria of 20 C.F.R. § 656.40 and GAL 4-95 and constitutes a valid prevailing wage survey. However, the crux of this case admittedly and solely revolves around the occupational classification of the job rather than the methodology used to determine prevailing wages.²⁸ That is, whether the occupation in question should be categorized as a "Sales/Project Engineer," an engineering position requiring a fairly high degree of sophistication and warranting an annual salary of about \$ 40,000, or a "Sales Promoter," a sales position with a salary of about \$ 20,000 per year.

The government argues that any statements made by the employer to the INS, concerning the job opportunity, such as the April 15, 1993 letter to the INS, must be controlling since the INS relied upon them in granting the employer's visa application and for the latter to argue otherwise would be tantamount to admitting it misrepresented the position in order to secure the visa.²⁹ Respondent's counsel points out that the employer:

went to considerable lengths to describe a job of substantial responsibility and complexity where detailed knowledge of engineering concepts and the ability to coordinate the activities of other company employees . . . a far cry from the salesman described in the August 28, 1996 letter where the engineering degree apparently is included only for the cache.

The Complainant does not adequately reconcile these seemingly conflicting positions.

²⁸ "Occupation" is defined as, "the occupational or job classification in which the H-1B non-immigrant is to be employed." "Specific employment in question" means "the set of duties and responsibilities performed or to be performed by the H-1B non-immigrant at the place of employment." 20 C.F.R. § 655.715.

²⁹ Respondent's brief, page 5.

In determining the appropriate prevailing wage, in July 1996, the GDOL apparently had no information concerning the job's description, educational requirements, required training, related experience or any 9-digit DOT code, which it could use to correctly classify the intended job other than the three-digit DOT code and job title.³⁰ (CX J). As the GDOL said, it had relied solely on the job title, "Sales Engineer," to make its determination (in 1996).³¹ In July 1997, the GDOL added the prospect that the position could more properly be classified as a "Sales Promoter" solely based upon the employer's August 28, 1996 appeal letter. It is apparent, the GDOL did not have information from the employer's April 15, 1993 letter to the INS in either 1996 or 1997.³²

I find the evidence presented shows the occupational position to be held by the employee was primarily "Sales Engineer," as previously defined by the GDOL.³³ In spite of the Complainant's argument to the contrary, I find that the job description set forth in its April 15, 1993 letter to the I.N.S. also refers to elements encompassed within the DOT definition of "Project Engineer," i.e., the required experience in "managing construction projects in coordination with other engineering staff . . ." While the position involved some elements of "sales promotion" occupations, the most appropriate classification for the position is "Sales Engineer." Despite the employer's later efforts to minimize the nature of the position in an attempt to conform with the GDOL's supposition that it might have been better classified as a "Sales Promoter," the Complainant's earlier filings and letters, particularly its initial LCA and April 15, 1993 letter, establish the position as a "Sales Engineer."³⁴ The definition provided by the GDOL for a "Sales Engineer" fits this job description like a hand in a glove. Thus, as the government argued, Mr. Devu's position was "a far cry from the salesman described in the August 28, 1996 letter where the engineering degree apparently is included only for the cache."

³⁰ The three-digit DOT code and job title were sufficient for the GDOL to ascertain the educational and experience levels needed for the position by cross-referencing that data to the DOT.

³¹ It should be noted that it is the employer who determines the prospective employee's occupational classification and the prevailing wage for the LCA. Here, the employer chose "Sales/Project Engineer" with a corresponding DOT occupational classification code of "007."

³² The July 12, 1996 letter from the ETA to the GDOL seeking a prevailing wage determination for a "Project/Sales Engineer" did not list any attachments. (RX 2). The Certifying Officer, Mr. Goodman, forwarded six pages of materials to the GDOL, on July 1, 1997, by facsimile, but unfortunately did not identify those materials. (CX I). Based on the tenor of GDOL's response, I find it must have had the employer's August 28, 1996 letter to the ETA.

³³ "Sales Engineers" were defined as those who "Sell business goods or services that require a technical background equivalent to a baccalaureate degree in engineering. Excludes Engineers whose primary function is not marketing or sales." (CX I).

³⁴ I cannot agree with the Complainant's assertion that the "SVP 8" experience level required for a "Project Engineer" or "Sales Engineer" is inconsistent with the level of experience Exotic Granite initially sought in its prospective employee. In its April 15, 1993 letter to the INS, Exotic Granite claimed the position required "substantial experience" and a B.A. in mechanical engineering plus experience "managing" construction projects.

The employer's initial description comports with its efforts to obtain a visa for the non-immigrant alien, under the H-1B program, for a "specialty occupation."³⁵ Thus, the GDOL classification of the employee as a "Sales Engineer" was appropriate and the DOL's affirmance of the prevailing wage rate for "Sales Engineer" appropriate.³⁶ Likewise, it was proper for the DOL to deny the employer's appeal of the prevailing wage rate determination.

Finally, although not necessary for the decision in this matter, I briefly address the employer's allegations concerning the government's failure to adhere to its own regulations. The proposition that, even in the short time allowed, the DOL need not more diligently evaluate whether an offered wage rate satisfies the prevailing wage requirement is somewhat distressing. The regulations require "certifying officials" of the DOL to reject LCAs only for obvious errors or irregularities, i.e., when it identifies a wage below the prevailing wage. Although the DOL is not a guarantor of the accuracy or truthfulness of an LCA, it would appear that a proposed annual wage of \$ 24,000 for an engineer should at least alert a certifying official that the offered wage might be below the prevailing rate. Certifying an LCA has far-reaching ramifications because the INS must rely on it in its decision-making process.³⁷ Likewise, although the law does not require it, employers ought to be able to rely on government officials to make proper decisions particular in extremely complex programs of the nature involved in this case. The regulations provide where the DOL advises the INS that an employer has failed to meet the required conditions, made a misrepresentation of a material fact, or willfully failed to meet the prerequisites, the INS shall not approve petitions filed by said employer. *See* 8 C.F.R. § 214.2. Had greater diligence been exercised in the present case, the DOL, the employer (and employee) would likely have been spared litigation and its attendant consequences.³⁸

The processing time periods set forth in the regulations, which the employer claims were violated, very much appear to be designed to guide the agency in its processing of LCAs and of complaints, under 20 C.F.R.³⁹ It is not apparent that the processing time goals were established for the benefit of appealing employers. Likewise, the rules concerning the certification of LCAs

³⁵ A "specialty occupation" means an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. 8 C.F.R. § 214(h)(4)(ii)(E). (Complainant's Brief, p. 4). Although it is not my function to rule whether the positions qualify as "specialty occupations," I find both "Sales Promoters" and "Sales/Project Engineers" would so qualify.

³⁶ As the Certifying Officer observed, the actual occupation the alien was employed in, subsequent to the filing of the LCA, is irrelevant.

³⁷ See 20 C.F.R. § 655.705(b).

³⁸ In its Reply Brief, the Solicitor states, "It stretches credulity to think that a job which requires an engineering degree plus significant experience, located in a major metropolitan area, could have a prevailing wage of under \$ 20,000 per year." (Page 6, n. 5). (The LCA provided for \$2,000/month plus "bonus").

³⁹ Other than the 12 month statute of limitations bar to complaints. Based on the declaration of R. Thomas Shierling, the statute of limitations was met. (Attachment 1, Respondent's Brief, Jan. 30, 1998).

appear to be designed for the protection of employees and prospective non-immigrant alien employees, not U.S. employers.

The proposition that a government agency is bound to follow its own regulations was enunciated by the Supreme Court, in *United States ex rel. Accardi v. Shaughnessy*, 447 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954). The purpose of the doctrine is “to prevent the arbitrariness which is inherently characteristic of an agency’s violations of its own regulations.” *Usery v. Board of Education of Baltimore City*, 462 F. Supp. 535, 546 (D.C. D. Md, 1978). “Departures from an agency’s procedures ‘cannot be reconciled with the fundamental principal that ours is a government of laws, not men.’” *Usery* at 546, citing *U.S. ex rel. Brooks v. Clifford*, 409 F.2d at 706. However, the rule has its limitations.

Agency rules developed primarily for the benefit of an agency are not enforceable (even if they provide some incidental protections to the regulated⁴⁰), 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. See *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 inconvenience or expense of litigation which could perhaps have been avoided has not generally been found to constitute “substantial prejudice.” See, *Brennan v. Lord & Taylor, Inc.*, 76 Lab.Cas 33,234 (S.D.N.Y. 1975) and *Usery, supra* at 550. Furthermore, the courts have been loathe to impose any remedial action for violations of enforceable regulations when no substantial prophylactic purpose would be served. *Usery, supra* at 550, and *Cf. U.S. v. Walden*, 490 F.2d 372 (4th Cir. 1974) *cited therein*.

Even were the regulations, which were not strictly adhered to by the DOL, of the enforceable variety, the employer neither alleged nor established the substantial prejudice required as a predicate for remedial action.⁴¹

CONCLUSIONS

The July 1996 GDOL classification of the employee as a “Sales Engineer” was appropriate as was the Certifying Officer’s (DOL’s) affirmation of the prevailing wage rate for “Sales Engineer.” Likewise, it was proper for the DOL to deny the employer’s appeal of the prevailing wage rate determination.⁴²

⁴⁰ *EPI Corp. v. Commissioner of Social Security*, 91 F.3d 143 (6th Cir. 1996).

⁴¹ The courts typically will not enforce remedial action against a governmental agency for its failure to adhere to processing time standards or goals. See, e.g., *The Estate of Wing Hing Tow, et al. v. INS*, 1990 WL 608204 (N.D. Cal. 1990) page 2-3 and cases cited therein. As Respondent notes, the Supreme Court, in *Brock v. Pierce County*, 476 U.S. 253 (1986), rejected the argument that the provisions of the Comprehensive Employment and Training Act which required the Secretary to issue final determinations within 120 days, deprived him of authority to act after that time.

⁴² In any subsequent enforcement proceeding, the Court’s Order in *National Association of Manufacturers v. DOL*, 1996 WL 420868 (D.D.C. July 22, 1996)(granting the plaintiff’s notice and comment challenge to 20 C.F.R. § 655.731(b)(1)) should be examined.

ORDER

The Complainant's appeal of the prevailing wage determination is DENIED. This will constitute the final decision of the Secretary of Labor concerning the prevailing wage determinations.

RICHARD A. MORGAN
Administrative Law Judge

RAM/DMR

