

DEPARTMENT OF LABOR

Employment and Training
Administration

[TA-W-52,050]

Merrill Corporation, St. Paul, MN;
Notice of Negative Determination on
Remand

On May 17, 2006, the United States Court of International Trade (USCIT) remanded *Former Employees of Merrill Corporation v. Elaine Chao, U.S. Secretary of Labor*, Court No. 03-00662, to the Department of Labor (Department) for further investigation, in light of the Department's Notice of Revised Determination on Remand for Lands' End, A Subsidiary of Sears Roebuck and Company, Business Outfitters CAD Operations, Dodgeville, Wisconsin (Lands' End), TA-W-56,688 (issued on March 24, 2006).

Plaintiffs, workers of Merrill Corporation, St. Paul, Minnesota (Merrill), created electronic documents for clients for filing with the U.S. Securities and Exchange Commission (SEC). Plaintiffs lost their jobs when Merrill shifted that work to India. The details of Merrill's business activities and the Plaintiffs' responsibilities can be found in the **Federal Register** notices cited below.

The Department's Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance for the workers of Merrill was issued on July 2, 2003 and published in the **Federal Register** on July 22, 2003 (68 FR 43373). The Notice of Negative Determination on Remand for workers of Merrill was issued on April 2, 2004 and published in the **Federal Register** on April 16, 2004 (69 FR 20645). In both determinations, the Department denied the workers eligibility to apply for Trade Adjustment Assistance (TAA) because Merrill does not produce an "article" within the meaning of the Trade Act of 1974.

On November 17, 2005, the Department issued a Notice of Negative Determination on Reconsideration on Remand for workers of Merrill. The Notice was published in the **Federal Register** on December 7, 2005 (70 FR 72857). The Department determined that the workers are not eligible to apply for TAA because Merrill does not produce an "article" since electronic creations are not "articles" unless they are embodied in a physical medium. The Department also determined that even if Merrill produced an "article," the uniqueness of each filing means that there cannot be any articles which are like or directly competitive with the

"articles" created by Merrill and, consequently, there cannot be any increased imports of such articles.

In the Department's Lands' End determination, the Department stated that "the Department has revised its policy to acknowledge that there are tangible and intangible articles and to clarify differences between intangible articles and services * * * Products that would have been considered an article if embodied in a physical medium will now be considered an article * * * Workers providing services that may result in the incidental production * * * however, are not engaged in the production of an article for the purposes of the Act." (71 FR 18357)

Applying the revised policy to the immediate case, the Department determines that Merrill provides a service, incidental to which Plaintiffs produce an intangible article. Under the revised policy, however, the incidental production of an article does not change the Department's treatment of workers who work for a firm that produces an article incidental to providing a service. Rather, the Lands' End determination reinforces this policy ("Workers providing services that may result in the incidental production * * * are not engaged in the production of an article for the purposes of the Act").

The Department has consistently held that workers who work for a firm that provides a service, such as sales and repair, are not eligible for TAA benefits. The Department's policy was recently upheld by the USCIT in *Former Employees of Gale Group, Inc.*, 403 F.Supp.2d 1299 (CIT 2005).¹ In the *Gale* opinion, the USCIT established that workers in a service firm are not eligible to apply for benefits under the Trade Act. *Id.* at 1303.

During the third remand investigation, the Department confirmed that the subject workers manipulate information into a format required for filing with the SEC and that Merrill does not generate revenue by the sale of the filings. The Department also confirmed that the filings created by the subject workers adhere to the customer's specifications and accommodate the special needs dictated by the SEC. SSAR 8, 18.

¹ The Plaintiffs in *Gale* appealed the decision to the United States Court of Appeals for the Federal Circuit. Upon further investigation, after the *Lands' End* determination, the Department concluded that *Gale Group, Inc.* produced an article, not incidental to the provision of a service. The Department sought a remand and certified the plaintiffs. See *Notice of Revised Determination on Remand for Gale Group, Inc.*, TA-W-54, 434 (July 19, 2006). The Department's decision in *Gale* was not a repudiation of the USCIT's decision in *Gale*.

As stated in the USCIT's *Gale* opinion, TAA is only available to workers in a firm engaged in production of an article. One significant factor that distinguishes a production firm from a service firm is that the former operates commercially as a manufacturing firm and generates its revenue from the sale of the manufactured articles; the manufacturer is in the business of making and selling an article. This is in contrast to a service firm that operates commercially as a service provider and generates its revenue from the provision of services. That an article is created incidental to the provision of the service does not make the service firm a production firm.

A commercial tax preparation firm that prepares and files tax forms with the Internal Revenue Service is in the business of providing tax-related services for a fee. The firm simply receives data from its client and places it into a format acceptable to the government. That the service may result in the creation of an article, a tax return, does not make it a production firm. The tax preparation firm is not selling its customers a tax return; rather, it is selling its expertise in correctly manipulating the customer's tax data into the proper form. Similarly, Merrill is in the business of providing financial document related services for a fee. It receives data from its clients and reformats it in a form acceptable to the government. The fact that its services may result in the incidental production of an article, an SEC filing, does not make Merrill a production firm.

Even if the Plaintiffs did produce an article for purposes of the Trade Act, they would not be eligible to apply for TAA because there was neither a shift of production to a qualified country nor increased imports of articles like or directly competitive with those produced at the subject facility.

Under the Department's interpretation of "like or directly competitive," (29 CFR 90.2) "like" articles are those articles which are substantially identical in inherent or intrinsic characteristics and "directly competitive" articles are those articles which are substantially equivalent for commercial purposes (essentially interchangeable and adapted to the same uses), even though the articles may not be substantially identical in their inherent or intrinsic characteristics.

Given the nature of the SEC filings, there are no articles which are "like" or "directly competitive" to any single "article" created by Merrill because each electronic file is a unique document. Thus, there are no articles which are essentially interchangeable or

can be adapted to the same use as a Merrill document, and there are no articles "like or directly competitive" with any Merrill "article." Because there are no articles which are like or directly competitive with those produced by the subject company, there cannot be any imports, much less increased imports. Therefore, neither Section 222(a)(2)(A) nor Section 222(a)(2)(B) of the Trade Act, as amended, has been satisfied.

The Department determines that the revised policy articulated in Lands' End does not affect Plaintiffs' claim and determines that the subject workers are not eligible to apply for TAA.

Conclusion

After reconsideration on remand, I affirm the original notice of negative determination of eligibility to apply for adjustment assistance for workers and former workers of Merrill Corporation, St. Paul, Minnesota.

Signed at Washington, DC, this 24th day of August 2006.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (06-063)]

National Environmental Policy Act; Mars Science Laboratory Mission

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of availability of draft environmental impact statement (DEIS) for implementation of the Mars Science Laboratory (MSL) mission.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, as amended, (NEPA) (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR Parts 1500-1508), and NASA policy and procedures (14 CFR Part 1216 subpart 1216.3), NASA has prepared and issued a DEIS for the proposed MSL mission. The DEIS addresses the potential environmental impacts associated with implementing the mission. The purpose of this proposal is to explore the surface of Mars with a mobile science laboratory (rover). This environmental impact statement (EIS) is a tiered document (Tier 2 EIS) under NASA's Programmatic EIS for the Mars

Exploration Program (MEP). The DEIS presents descriptions of the proposed MSL mission, spacecraft, and candidate launch vehicle; an overview of the affected environment at and near the launch site; and the potential environmental consequences associated with the Proposed Action and alternatives, including the No Action Alternative.

The MSL mission is planned for launch during the September–November 2009 time period from Cape Canaveral Air Force Station (CCAFS), Florida, on an expendable launch vehicle. The arrival date at Mars would range from mid-July 2010 to not later than mid-October 2010, depending on the exact launch date and selected landing site, yet to be determined, on the surface of Mars. Using advanced instrumentation, the MSL rover would acquire significant, detailed information regarding the habitability of Mars from a scientifically promising location on the surface. The mission would also fulfill NASA's strategic technology goals of increasing the mass of science payloads delivered to the surface of Mars, expanding access to higher and lower latitudes, increasing precision landing capability, and increasing traverse capability (mobility) to distances on the order of several kilometers.

The DEIS evaluates two alternatives in addition to the No Action Alternative. Under the Proposed Action (Alternative 1), the proposed MSL rover would utilize a radioisotope power system, a Multi-Mission Radioisotope Thermoelectric Generator (MMRTG), as its primary source of electrical power to operate and conduct science on the surface of Mars. Under Alternative 2, an MSL rover would utilize solar energy as its primary source of electrical power to operate and conduct science on the surface of Mars.

DATES: Written comments on the DEIS must be received by NASA no later than October 23, 2006, or 45 days from the date of publication in the **Federal Register** of the U.S. Environmental Protection Agency's notice of availability of the MSL DEIS, whichever is later.

ADDRESSES: Comments submitted via first class, registered, or certified mail should be addressed to Mark R. Dahl, Mail Suite 3X63, Planetary Science Division, Science Mission Directorate, NASA Headquarters, 300 E Street SW., Washington, DC 20546-0001. Comments submitted via express mail, a commercial deliverer, or courier service should be addressed to Mark R. Dahl, Mail Suite 3X63, Planetary Science

Division, Science Mission Directorate, Attn: Receiving & Inspection (Rear of Building), NASA Headquarters, 300 E Street SW., Washington, DC 20024-3210. While hard copy comments are preferred, comments may be sent by electronic mail to mep.nepa@hq.nasa.gov.

The DEIS may be reviewed at the following locations:

(a) NASA Headquarters, Library, Room 1J20, 300 E Street, SW., Washington, DC 20546;

(b) Jet Propulsion Laboratory, Visitors Lobby, Building 249, 4800 Oak Grove Drive, Pasadena, CA 91109.

Hard copies of the DEIS also may be examined at other NASA Centers (see **SUPPLEMENTARY INFORMATION** below).

Limited hard copies of the DEIS are available, on a first request basis, by contacting Mark R. Dahl at the address, telephone number, or electronic mail address indicated herein. The DEIS is also available in Adobe® portable document format at <http://spacescience.nasa.gov/admin/pubs/msl/index.htm>.

FOR FURTHER INFORMATION CONTACT:

Mark R. Dahl, Planetary Science Division, Science Mission Directorate, NASA Headquarters, Washington, DC 20546-0001, telephone 202-358-4800, or electronic mail mep.nepa@hq.nasa.gov.

SUPPLEMENTARY INFORMATION: The MEP is currently being implemented as a sustained series of flight missions to Mars, each of which will provide important, focused scientific return. The MEP is fundamentally a science driven program whose focus is on understanding and characterizing Mars as a dynamic system and ultimately addressing whether life is or was ever a part of that system. The core MEP addresses the highest priority scientific investigations directly related to the Program goals and objectives. MSL investigations would be a means of addressing several of the high-priority scientific investigations recommended to NASA by the planetary science community.

The overall scientific goals of the MSL mission can be divided into four areas: (1) Assess the biological potential of at least one selected site on Mars, (2) characterize the geology and geochemistry of the landing region at all appropriate spatial scales, (3) investigate planetary processes of relevance to past habitability, and (4) characterize the broad spectrum of the Martian surface radiation environment. The following specific objectives are planned for the mission to address these goals: