



Issue date: 25Jan2002

CASE NO: 2002-LCA-5

In The Matter of:

EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
U.S. DEPARTMENT OF LABOR

Prosecuting Party/Complainant

v.

FRONTIER CONSULTING, INC.

Respondent

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

On November 8, 2001, the Administrator issued a Determination pursuant to Regulations at 20 C.F.R. Part 655.815 involving H-1B specialty occupations. A summary of the violations and remedies indicates:

Violation No. 1 finds Respondent failed to pay wages as required plus per diem and transportation expenses to H-1B non-immigrants at places of employment outside the area of intended employment listed on the labor condition application as required inter alia by 20 C.F.R. § 655.735. A remedy of \$318,899.88 in back wages to 46 H-1B non-immigrants is sought along with future compliance. No civil money penalty was assessed.

Violation No. 2 finds Respondent failed to comply with the provisions of Subpart H or I in that it failed to cooperate with the enforcement proceedings by not making available the records needed for inspection and failed to provide names, addresses and phone numbers of all non-immigrants located throughout the U.S. The remedy was to assure future compliance with 20 C.F.R. § 655.800(c) and provide any records requested.

On January 7, 2002, Respondent filed a Motion To Dismiss the charges of violations brought against it by the Administrator, Wage and Hour Division, U.S. Department of Labor (herein DOL). Respondent argues there is no convincing legal justification for violations Nos. 1 and 2 and that DOL is attempting to enforce the 2001 federal regulations for events occurring in 1998 and 1999 because the 1995 regulations at 20 C.F.R. § 655.735(b)(3) prescribing “per diem and transportation expenses and 20 C.F.R. § 655.735(b)(4) prescribing the limitation of temporary placement of H-1B non-immigrants outside the intended area of employment specified in the Labor Condition Application have been nullified and made void by National Association of Manufacturers v. U.S. Department of Labor, 1996 WL 420868 (D.D.C.).

On January 17, 2002, the Administrator filed an Objection and Response to Respondent’s Motion To Dismiss. Attached thereto is Exhibit A, a declaration of William Ney, Compliance Officer of Complainant. The Administrator notes that essentially Respondent’s motion is in actuality a Motion for Summary Decision. I agree. The Administrator further argues that material issues of fact exist regarding wages paid to employees under Labor Condition Application for the wrong city and whether Respondent cooperated in the instant investigation.

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d)(2001). This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where “there is no genuine issue as to any material fact and . . . a party is entitled to summary decision.” 29 C.F.R. § 18.40(d). Thus, in order for Respondent’s motion to be granted, there must be no disputed material facts and Respondent must be entitled to prevail as a matter of law.

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party’s own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. Id. at 324. The determination of whether a genuine issue of material fact exists must be made viewing all evidence and factual inferences in the light most favorable to the non-moving party. Amoco Production Co. v. Horwell Energy, Inc., 969 F.2d 146, 148 (5th Cir. 1992).

In view of the pleadings before me, I find that Respondent has not shown that no genuine issues of material fact exists as a matter of law. There are clearly factual matters which cannot be resolved conclusively without a formal evidentiary hearing. Accordingly, Respondent’s Motion To Dismiss is hereby **DENIED**.

ORDERED this 25th day of January, 2002, at Metairie, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge