

U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)



Issue Date: 09 June 2005

CASE NO.: 2003-LCA-19

In the matter of:

U.S. DEPARTMENT OF LABOR,
CLEVELAND, OHIO
Prosecuting Party

v.

QUIKCAT.COM, INC.
Respondent

Appearances: Sandra B. Kramer, Esquire
Mary Bradley, Esquire
For the Prosecuting Party

James Chin, Esquire
For the Respondent

Before: Gerald M. Tierney
Administrative Law Judge

DECISION AND ORDER

The above-captioned matter arises under § 212(n) of the Immigration and Nationality Act of 1990 and as amended in 1991, 8 U.S.C. § 1182(n) (“the Act”) and the regulations promulgated thereunder at 20 C.F.R. § 655.800, *et seq.* The Act defines various classes of aliens who may enter the United States for prescribed periods of time and for prescribed purposes under various types of visas. 8 U.S.C. § 1101(a)(15). One such class, the “H-1B” worker, is permitted entry into the United States on a temporary basis to work in special occupations. 8 U.S.C. § 1101(a)(15)(H)(i)(B); 20 C.F.R. § 655.700. An employer seeking to hire a nonimmigrant under an H-1B visa must obtain certification from the United States Department of Labor by filing a Labor Conditions Application (“LCA”).

PROCEDURAL HISTORY

By letter dated September 9, 2002, Yuri Movchun filed a complaint with the U.S. Department of Labor Wage and Hour Division. Mr. Movchun alleged that he was employed by the Respondent as an H-1B worker and had not been paid in accordance with the LCA contract. (GX 2). The U.S. Department of Labor investigated the Respondent. On April 7, 2003, the U.S. Department of Labor Wage and Hour Division District Director issued the Administrator’s determination pursuant to 20 C.F.R. Part 655.815. An investigation was conducted of

QuikCAT.com, Inc., a/k/a Innovative Computing Group, Inc. and Lafe Technologies, under the H-1B provisions of the Immigration and Nationality Act.

The Administrator found that QuikCAT.com, Inc. committed the following violations: (1) willfully failed to pay wages as required; (2) failed to provide notice of the filing of the labor condition application; and (3) failed to maintain documentation as required. A civil money penalty in the amount of \$56,000.00 was assessed against QuikCAT.com, Inc. for willful failure to pay the required rate for work. QuikCAT.com, Inc. was ordered to pay back wages in the amount of \$357,507.26 to 14 H-1B nonimmigrant workers. The Administrator also concluded that QuikCAT.com, Inc. is denied the opportunity to sponsor any aliens for employment for a period of two years due to willfully failing to pay wages as required. No civil money penalty was assessed against QuikCAT.com, Inc. for its failure to provide notice of the LCA filing under 655.805(a)(5) and its failure to maintain documentation under 655.805(a)(14).

On April 23, 2003, the Department of Labor Office of Administrative Law Judges received the Respondent's Request for Hearing Pursuant to 20 C.F.R. § 655.820. A hearing was held by the undersigned on February 13, 2004, in Cleveland, Ohio. Government exhibits ("GX") 1 through 21 and 25 were admitted into the record. Government exhibits 22 through 24 were deposition transcripts which the undersigned admitted for impeachment purposes only. Respondent exhibits ("RX") A through R were admitted into the record. The prosecuting party seeks back wages, a civil money penalty and debarment of the Respondent from the H-1B program.

ISSUES

- I. Whether the Administrator properly computed the back wages to be paid by the Respondent.
- II. Whether the Administrator properly assessed civil money penalties against the Respondent.
- III. Whether the Administrator properly determined that Respondent violated Notice and record keeping requirements of 20 C.F.R. §§ 655.805(a)(5) and (a)(14).
- IV. Whether the Administrator properly determined debarment under 20 C.F.R. § 655.810(d)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of the Evidence

By letter dated September 9, 2002, Yuri Movchun filed a complaint with the U.S. Department of Labor Wage and Hour Division. Mr. Movchun alleged that he was employed by the Respondent as an H-1B worker and had not been paid in accordance with the LCA contract. (GX 2). The Respondent, QuikCAT.com, Inc., is a software engineer company. QuikCAT.com, Inc. has been in business since 1999. In May 2001, Respondent was having financial difficulties and reduced salaries. By the end of 2002, the Respondent was financially incapable of paying its employees. The Respondent eventually entered Chapter 11 bankruptcy proceedings.

The investigation involved fourteen H-1B employees of the Respondent. (GX 8 through 21). The following table includes the name of each H-1B employee and the gross amount of back wages due as calculated by Investigator Joann Lach:

Employee	Time Period Employee is Due Back wages	Gross Amount Due
Araba, Michael	11/03/2001 – 11/02/2002	\$ 14,952.90
Bettadapura, Lalitha	11/03/2001 – 8/31/2002	\$ 12,772.61
Boros, Atila	11/03/2001 – 7/20/2002	\$ 38,791.63
Borosova, Alexandra	11/03/2001 – 11/02/2002	\$ 28,831.89
Fasehun, Olurinu	11/03/2001 – 7/20/2002	\$ 28,079.31
Han, Jae Hyuk	11/03/2001 – 11/02/2002	\$ 31,964.64
Khodak, Denis	11/03/2001 – 8/31/2002	\$ 21,250.00
Movchun, Yuri	11/03/2001 – 7/20/2002	\$ 31,263.75
Olaleye, Anthony	11/03/2001 – 7/20/2002	\$ 31,116.60
Oresanya, Oludipe O	11/03/2001 – 7/20/2002	\$ 18,738.44
Radoslav, Vecera	11/03/2001 – 11/02/2002	\$ 46,162.24
Szlizs, Robert	11/03/2001 – 11/02/2002	\$ 12,772.61
Tsuryk, Valeriy V	11/03/2001 – 11/02/2002	\$ 22,664.00
Vengrenyuk, Yevgen V	11/03/2001 – 11/02/2002	\$ 18,416.64

Joann Lach is a federal investigator for the U.S. Department of Labor Wage and Hour Division. Ms. Lach performed the H-1B investigation of QuikCAT.com, Inc. (TR 16). Ms. Lach testified that, as a result of the investigation, she found back wages to be due to the H-1B employees. (TR 22). She prepared a Form WH-56 Summary of Unpaid Wages. The summary involved 14 H-1B employees. (TR 22; GX 3; GX 6). The investigation covered November 2001 through November 2002. The Respondent payroll records were used to calculate the back wages due to the H-1B employees. (GX 5). Ms. Lach testified that, based on her review of the evidence, the Respondent reduced employees pay by fifteen percent in May 2001. In September 2002, the Respondent could no longer meet payroll. Ms. Lach explained that the employer's responsibility to pay an H-1B employee ceases at the time that the employer or employee actually terminates employment. As such, she calculated back wages from November 3, 2001 to either the date employment terminated or November 2, 2002, whichever occurred first. (TR 32).

Dr. Olurinde Lafe is the president and chief executive officer of QuikCAT.com, Inc. Dr. Lafe testified that the Respondent started having financial problems in "2000, 2001." Dr. Lafe stated that a fifteen percent salary reduction occurred in May 2001. The fifteen percent reduction applied to all employees and persons in management. By the end of 2002, the Respondent could not meet payroll. Dr. Lafe testified that it was not his intent to break any laws when decreasing the salaries of employees. At the time of the hearing, the Respondent was in chapter 11 bankruptcy. The Respondent sponsored four H-1B employees for permanent residence status. (TR 80-100).

James P. Sacher is the Respondent's acting chief financial officer. Mr. Sacher testified that a fifteen percent salary reduction was applied to all employees in May 2001. He asserted that the Respondent did not intend to break the law when employees were not being paid; there simply were no funds available to pay anyone. (TR 103 – 113).

Ms. Lach explained her interpretation of 20 C.F.R. § 655.731 as she applied it to her investigation of the Respondent. Ms. Lach testified that the respondent was required to pay H-1B workers the higher of the prevailing wage or the actual wage. Ms. Lach defined the actual wage as what is paid to other similar and qualified workers at the establishment. (TR 62). At the time of the investigation, the Respondent had no “U.S. workers in the same category as the H-1B workers.” (TR 75).

The Administrator assessed a \$56,000.00 civil money penalty against the Respondent. The maximum possible penalty is \$5,000.00 per violation per employee. The Administrator gave the Respondent a twenty percent reduction. Thus, making the penalty \$4,000.00 per violation per 14 H-1B employees. (TR 47; GX 1). The Respondent had no previous history of H-1B violations. Ms. Lach testified that the Respondent was not paying the H-1B workers, but the employees were still working. The Respondent was not in compliance with the Act at the conclusion of the investigation. Ms. Lach stated that the Respondent made compliance with the Act contingent on the Respondent receiving funds. (TR 49).

Ms. Lach testified that the Respondent violated 20 C.F.R. § 655.805(a)(5). This regulation requires employers to post a notice of the LCA filing for 10 days in two conspicuous locations at the establishment. Ms. Lach stated that she did not see any posting when she was on-site performing the investigation and she questioned employees regarding the posting. The employees questioned did not recall seeing any posting. No penalty was assessed for this violation. (TR 51).

Ms. Lach concluded that the Respondent also failed to maintain documentation required by the regulations. Ms. Lach stated that when she asked the Respondent for the public access binder and all the supporting documents, she was informed that one did not exist. (TR 53).

Ms. Lach concluded that the violations by the Respondent were willful based on the Respondent signing the LCA stating that these were the wages to be paid to the individuals, as well as their failure to agree to compliance going forward. Ms. Lach recommended debarment from the H-1B worker program. (TR 54).

Discussion

I. The Amount of Back Wages Owed to H-1B Employees by the Respondent.

The Administrator determined that the Respondent owes \$357,777.26 in back wages for the period of November 3, 2001 through November 2, 2002 for willfully failing to pay H-1B workers. (GX 3). The Respondent does not dispute that back wages are owed to H-1B employees. It disputes the calculation used by the Administrator in determining the amount of back wages owed. The Respondent admitted liability for back wages in the amount of \$ 42,581.97. (RX R).

Under the Immigration and Nationality Act, an employer of an H-1B worker must pay the H-1B worker the higher of the actual wage or the locally prevailing wage. The intent of the

act is to protect U.S. workers and to regulate an economic incentive for hiring temporary foreign workers. 20 C.F.R. § 655.731(a).

“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.” This regulation goes on to clarify “[w]here no such other employees exist [similar experience and qualifications] at this place of employment, the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer.” 20 C.F.R. § 655.731(a)(1). The regulations provide for pay “adjustments” for the period of the LCA. The regulation provides a few examples of what defines “adjustment”: “cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation.” *Id.* The example statement does not appear to be all-inclusive in terms of adjustments that are permitted. The statement, however, provides no examples of decreases in salary, only increases.

The prevailing wage is the local wage for the occupational classification in the area of intended employment and must be determined as of the time of filing the application. 20 C.F.R. § 655.731(a)(2). Back wages due to H-1B workers are equal to the difference between the amount that should have been paid and the amount that actually was paid. 20 C.F.R. § 655.810(a).

The Respondent argues that there is no willful violation of Section 212(n)(1)(A) of the Immigration and Nationality Act if the H-1B employees are paid at least 95% of the prevailing wage. The Respondent asserts that “it has always paid at least 95% of the prevailing wage to its H-1B employees except when it was unable to make payroll and pay any of its employees, including all H-1B, U.S. employees, and management.” (Respondent’s Post-Trial Brief, dated May 20, 2004). Thus, the Respondent argues that no back wages are due for the time period when employees were paid 85% of their normal salary. The Respondent concedes that back wages are due for the time period when the employees were not paid anything.

The Prosecuting Party argues that the actual wage is the amount paid to the H-1B employee as noted on the payroll records plus the 15% paid prior to May 2001. The actual wage paid prior to the 15% salary reduction is greater than the prevailing wage. Thus, the Prosecuting Party argues that the actual wage is the required wage.

Based on the Prosecuting Party’s assertion that the required wage is the actual wage, the prosecuting party argues that the Respondent’s view that there is no willful violation if at least 95% of the prevailing wage is paid is without merit. The Prosecuting Party interprets § 655.731(d)(4)¹ as only applying to employer’s paying the prevailing wage, as opposed to the actual wage. Section 655.731(d)(4) only discusses the prevailing wage, not the actual wage. I find that the required wage to be paid by the Respondent was the actual wage. I further find that § 655.731(d)(4) only applies to employer’s paying the prevailing wage as the required wage. Thus, the Respondent is incorrect in stating that there is no willful violation because they paid within 95% of the prevailing wage.

¹ Section 655.731(d)(4) states: “No prevailing wage violation will be found if the employer paid a wage that is equal to, or more than 95 percent of, the prevailing wage as required by paragraph (a)(2)(iii) of this section. If the employer paid a wage that is less than 95 percent of the prevailing wage, the employer will be required to pay 100 percent of the prevailing wage.”

The Respondent further argues that § 655.731(a)(1) allows for downward adjustments in pay. The Respondent argues that back wages are not due for the time period that employees were paid 15% less than when they were hired because § 655.731(a)(1) permits the employer to adjust salaries. The regulation clearly only discusses increases in salary. The Respondent argues that reductions in pay should also be permitted. The Prosecuting Party disagrees. The Respondent makes a reasonable common sense argument that U.S. workers do not have the benefit of an implied contract that their wages will never decrease and, thus, why should such protection be accorded to nonimmigrant workers. Although the Respondent's fairness argument sounds reasonable, the H-1B regulations are protecting the U.S. worker by having stringent regulations on the hiring of nonimmigrant workers. I find that § 655.731(a)(1) was implemented to ensure that H-1B workers receive the same benefits of employment as U.S. workers. Thus, I interpret § 655.731(a)(1) as only permitting increases in pay, not decreases. The Respondent was not permitted to decrease salaries pursuant to § 655.731(a)(1).

The Respondent asserts that the calculation for back wages is incorrect because several of the 14 H-1B workers left employment with the Respondent during the period of November 2001 through November 2002. The Respondent did not provide any termination dates, nor did the Respondent notify the INS of any H-1B employee terminations. An H-1B employer does not need to pay an H-1B worker if there has been a bona fide termination and the INS has been notified of such termination. I find that the Respondent did not submit adequate documentation regarding the alleged terminations. Thus, there is no decrease in back wages due for termination of the employment relationship.

The Respondent further argues that four of the fourteen named H-1B workers applied for permanent resident status in the United States and, therefore, back wages should not be calculated for such employees. The four employees who applied for permanent residence are Atila Boros, Alexandra Borosova, Denis V. Khodak and Valeriy Tsuryk. (RX I-L). Mere application for permanent resident status does not terminate the employees' status as an H-1B worker. Approval of an application terminates the employees' status as an H-1B worker. Denis V. Khodak's application was approved on October 23, 2002. Valeriy Tsuryk's application was approved on March 19, 2003. The administrator did not compute back wages for such employees after the date of approval of permanent resident status. (GX 3).

I find that the actual wage the Respondent was paying the H-1B workers was greater than the prevailing wage. Thus, I find that the required wage is the actual wage paid to the fourteen H-1B workers prior to the time the 15% salary reduction was enacted. I further find that the regulations do not provide for a reduction in the actual wage. Thus, the Respondent owes back wages to the H-1B workers for the 15% salary reduction and for the time the workers were not paid.

II. Civil Money Penalties.

The Administrator assessed \$56,000.00 in civil money penalties against the Respondent. The Respondent asserts that no civil money penalty should be assessed because the violations were not willful.

Under 20 C.F.R. § 655.810(b)(2), an Administrator may assess civil money penalties, in an amount not to exceed \$5,000.00 per violation for "[a] willful failure pertaining to

wages/working conditions (§§ 655.731, 655.732), strike/lockout, notification, labor condition application specificity, displacement (including placement of an H-1B nonimmigrant at a worksite where the other/secondary employer displaces a U.S. worker), or recruitment.” Willful failure is defined as “a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section 212(n)(1)(A)(i) or (ii) of the INA, or §§ 655.731 or 655.732.” 20 C.F.R. § 655.805(c). *McLaughlin v. Richland Shoe Company*, 486 U.S. 128 (1988).

In determining the amount of the civil money penalty, the Administrator shall consider the type of violation committed and factors such as: previous violations by the employer under the INA; the number of workers affected by the violation; the gravity of the violation; efforts made by the employer in good faith to comply with the Act; the employer’s explanation of the violation; the employer’s commitment to future compliance; and the extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties. 20 C.F.R. § 655.810(c).

The Respondent filed Labor Condition Applications for fourteen employees. An agent for the Respondent signed each LCA. The signature on the LCA is a contractual agreement to comply with the H-1B program regulations. The Respondent knowingly decreased salaries by 15% and, thereafter, knowingly failed to pay the H-1B workers.

After consideration of the 655.810(c) factors, the Administrator applied a 20% reduction to the maximum penalty permitted under 20 C.F.R. § 655.810(b)(2), thus, resulting in a \$56,000.00 civil money penalty.

I find that the failure to pay the H-1B employees the required wage was a willful violation of 20 C.F.R. § 655.731. I further find that the \$56,000.00 civil money penalty assessed against the Respondent is reasonable.

III. Violation of Notice and Record-Keeping Requirements.

The Administrator found that the Respondent violated the notice requirement under 20 C.F.R. § 655.805(a)(5) and the record keeping requirement under 20 C.F.R. § 655.805(a)(14). No penalty was assessed against the Respondent for such violations.

Under 20 C.F.R. § 655.805(a)(5), an H-1B employer must provide notice of the filing of a labor condition application. The employer is to post notice of filings in two or more conspicuous locations in the employer’s establishment in the area of intended employment. The notice shall indicate that H-1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the locations at which the H-1B nonimmigrants will be employed; and that the LCA is available for public inspection at the H-1B employer’s principal place of business in the U.S. or at the worksite. 20 C.F.R. § 655.734.

Under 20 C.F.R. § 655.805(a)(14), an H-1B employer must make available for public examination the application and necessary documents at the employer’s principal place of business or worksite. The labor condition application must be available for public examination within one working day after the date on which the labor condition application is filed with the Department of Labor. The following documentation is necessary to have available for public

examination: (1) a copy of the certified labor condition application; (2) documentation which provides the wage rate to be paid the H-1B nonimmigrant; (3) a full, clear explanation of the system that the employer used to set the actual wage paid to the H-1B nonimmigrant; (4) a copy of the documentation the employer used to establish the prevailing wage for the occupation for which the H-1B nonimmigrant is sought; (5) a copy of the documents with which the employer has satisfied the notification requirements of Section 655.734; (6) a summary of the benefits offered to U.S. workers in the same occupational classifications as H-1B nonimmigrants; (7) statements accepting H-1B obligations in the event of a change in corporate structure; (8) a list of any entities included as part of the single employer in making the determination as to its H-1B dependency status; (9) where the employer is H-1B dependent and/or a willful violator, and indicates on the LCA that only exempt H-1B nonimmigrants will be employed, a list of such exempt H-1B nonimmigrants; and (10) where the employer is H-1B dependent or a willful violator, a summary of the recruitment methods used and the time frames of recruitment of U.S. workers. 20 C.F.R. § 655.760.

The Investigator testified that the Respondent admitted to the notice and record keeping violations during her investigation. At the hearing, the Respondent denied admitting the violations. The Respondent did not provide the investigator with a public access binder.

Aside from denying admission of the violation, the Respondent has produced no evidence to rebut the Investigator's finding that the notice and record keeping regulations were violated. Thus, I find that the Respondent violated Sections 655.805(a)(5) and 655.805(a)(14).

IV. Debarment of the Respondent from H-1B Program.

The Administrator recommended that the Respondent should be debarred from participating in the H-1B program for two years.

Under 20 C.F.R. § 655.810(d), an employer shall be disqualified from approval of any petitions filed by, or on behalf of, the employer pursuant to section 204 or section 214(c) of the INA for *at least two years* for a willful failure pertaining to wages/working conditions, strike/lockout, notification, labor condition application specificity, displacement, or recruitment.

Based on the regulation and the Respondent's willful failure to pay wages, the Prosecuting Party argues that the Respondent should be debarred. As noted above, I find that the Respondent willfully failed to pay wages to 14 H-1B workers. Pursuant to 20 C.F.R. § 655.810(d), the Respondent is debarred from the H-1B program for a period of two years.

Relief

The Prosecuting Party requests the following relief, as determined by the Administrator: (1) \$357,777.26 in back wages² due to 14 H-1B workers; (2) civil money penalty in the amount of \$56,000.00; and (3) debarment from the H-1B program for a period of two years due to willfully failing to pay wages as required by the regulations. I find that the Respondent willfully

² The back wages ordered by the Administrator totaled \$357,507.26. This amount was corrected at the hearing and in the closing arguments.

failed to pay wages to 14 H-1B workers. I further find that the relief requested by the Prosecuting Party is a reasonable request based on such violations by the Respondent.

ORDER

Accordingly, the Administrator's decision is **AFFIRMED**, and the Respondent's appeal is **DENIED**.

A

GERALD M. TIERNEY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.