U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 24 August 2010

In the Matter of

ADMINISTRATOR,
WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

EDGE SOCCER CORPORATION, INC.,
Respondent.

Case No.: 2009-LCA-00033

DECISION AND ORDER GRANTING ADMINISTRATOR'S MOTION FOR SUMMARY DECISION AND DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

This matter arises under the Immigration and Nationality Act ("INA"), 8 U.S.C. §1101, as amended by the American Competitiveness and Workforce Improvement Act of 1998, 8 U.S.C. §§1101(a)(15)(H)(i)(b), 1182(n), and 1184(c), and the implementing regulations found at 20 C.F.R. 655, subparts H and I ("H-1B program"). The INA and the regulations establish an H-1B Labor Condition Application ("LCA") program for aliens who come to the United States temporarily to perform services in a "specialty occupation," as defined in section 214(I)(1) of the INA. *See* 8 U.S.C. §1101(a)(15)(H)(i)(b). On April 4, 2008 Ian McMahon filed a complaint against Respondent Edge Soccer Corporation, Inc. ("Respondent"), alleging that Respondent failed to pay required wages under the H1-B Program. The Administrator of the Wage and Hour Division (the "Administrator") conducted an investigation, and on August 13, 2009, issued a Determination finding that Respondents violated the H-1B provisions of the INA by:

1. Failing to pay wages as required, in violation of 20 C.F.R. §655.731; and
2. Failing to make certain documents available for public examination at Respondent's principal place of business, as required by 20 C.F.R. § 655.760(a)

The Administrator ordered Respondent to pay back wages in the amount of $35,000.00 to McMahon, ordered Respondent to comply with the pertinent regulations in the future, and assessed no civil money penalty.

On August 28, 2009, Respondent timely requested a hearing on the matter, disputing that it owed back wages to McMahon based on its belief that it had properly terminated his employment.

A hearing was scheduled for November 16, 2009, but was continued to allow the parties additional time to prepare and to allow McMahon time to find counsel. The hearing was later re-scheduled for January 27, 2010, and subsequently continued to May 18, 2010. On March 18, 2010, the matter was re-assigned to me, and the parties requested that the hearing be cancelled and that they be given leave to file cross-motions for summary decision. The hearing was cancelled. On June 16, 2010, Respondent and the Administrator filed their motions for summary decision. On June 30, 2010, the Administrator filed his opposition to Respondent's motion and on July 1, 2010, Respondent filed its opposition to the Administrator's motion for summary decision.

In deciding this matter, I have fully read and considered the parties' motions and opposition briefs, and the arguments raised therein and exhibits attached thereto.

Material Undisputed Facts

Respondent is a nonprofit corporation organized in April 2004 under the laws of Michigan, to promote the sport of soccer in the western part of that state. [Articles of Incorporation, Exhibit 1 to Respondent's Motion; Affidavit of Brock West, Exhibit 2 to Respondent's Motion, ¶ 1.] Respondent operates with a volunteer board and a workforce of coaches and staff that is largely composed of volunteers. [West affidavit, ¶ 2.]

Respondent hired McMahon as its Executive Director in July of 2004, having obtained an H-1B nonimmigrant worker visa on his behalf. [West affidavit, ¶¶ 3-6; Exhibits 4 and 5 to Respondent's Motion.] The initial visa was valid for three years, ending in April of 2006. Respondent obtained a second H-1B visa for McMahon covering the period from March 3, 2006 to January 23, 2007. [Exhibit B attached to Exhibit 4 of Respondent's Motion.] On January 19, 2007, the Chief of the Division of Foreign Labor Certification certified an LCA submitted electronically by Respondent. The LCA was valid for the period from January 23, 2007 through January 23, 2010. [Exhibit 3 to Respondent's Motion.] By submitting the LCA electronically, Respondent, *inter alia*, attested that it would maintain a hardcopy of the LCA in its public access file and that it undertook to pay McMahon an annual salary of $60,000-$90,000. [*Id.*; West affidavit, ¶ 5.] After the LCA was certified, Respondent obtained a new H-1B visa for the certification period. [Exhibit 4 to Respondent's Motion.]

As Executive Director/Head Coach of Respondent's soccer league, McMahon's duties included (1) fundraising, (2) marketing, (3) community outreach, (4) facilities development, (5) negotiating contracts with players, coaches, and staff, (6) conducting coaching clinics, (7) developing coaching programs, (8) managing player relations and training programs, (9) maintaining the office, (109) supervising the day-to-day operations of all interns, part-time staff, and volunteer staff and coaches, (11) developing and implementing a comprehensive plan for the league including annual budget and future development of both the business and soccer sides of the organization, (12) coaching youth soccer teams, and (13) conducting merger and sale discussions with other youth soccer teams. [Respondent's responses to Administrator's Interrogatories, Exhibit 6 to Administrator's Motion, p. 3; Declaration of Ian McMahon, Exhibit 13 to Administrator's Motion, ¶ 2; Declaration of Wage and Hour Investigator Brooke Avello, Exhibit 7 to Administrator's Motion, ¶ 8; West Affidavit, ¶ 10.]

Beginning in the spring of 2007, McMahon's performance, which previously had been deficient, took a turn for the worse. [West affidavit, ¶ 14.] He did not perform any of the duties of his position other than coaching a few youth soccer teams on a part-time basis. [*Ibid.*] An investigation into reports that McMahon was not working in the organization's office led to the discovery that he had worked only 20 hours in the office in a four-month period in the spring and summer of 2007. [*Id.*, ¶ 15.] When he did report to the office, McMahon did little substantive work, spending most of his time watching soccer games on the Internet or visiting websites of other soccer clubs. [Affidavit of Linda Cooper, Exhibit 8 to Respondent's Motion, ¶ 4.] The other two office employees, Linda Cooper and Courtney Nash, threatened to resign because of McMahon's refusal to work. [West Affidavit, ¶ 16; Cooper Affidavit, ¶ 7; Affidavit of Courtney Nash, Exhibit 9 to Respondent's Motion, ¶ 2.] Accordingly, Brock West, Respondent's president, met with McMahon and informed him that he would be fired unless he started performing all of his job duties. [West Affidavit, ¶ 16.]

After meeting with West, McMahon's performance did not improve. He was absent without leave for two weeks in September of 2007, without contacting his employer. [West Affidavit, ¶ 17.] He was again absent without leave a month later, this time for about three weeks. [*Id.*, ¶ 18.] West contacted McMahon, who told him that he would return to the office on October 23, 2007; however, he did not return until about two weeks after that date. [*Ibid.*]

In addition to failing to report to the office, McMahon neglected to supervise the coaches during the spring and summer of 2007 and used Respondent's credit card for personal purchases. [West Affidavit, ¶¶ 19-20.] Because of McMahon's abuse of the organization's credit card, West physically removed it from McMahon's possession. [*Id.*, ¶ 20.]

By November of 2007, Respondent did not have enough money to pay its employees, and laid off all its office employees, who were paid through October 26, 2007. [West Affidavit, ¶ 21.[1]] Respondent's board of directors suspected at that time that McMahon was going to resign, but started to take steps to terminate him if he did not. [*Id.*, ¶ 22.] Those steps included withdrawal of McMahon's name from club literature, blocking McMahon's online access, holding discussions with other people to take over McMahon's role with Respondent, and making financial decisions without consulting with Complainant. [*Ibid.*; Exhibit 19 to Administrator's Motion.] On January 23, 2008, after consulting with counsel, West sent an email to Complainant, advising him that his employment with Respondent was terminated effective immediately. [*Id.*, ¶ 23; Exhibit 17 to Respondent's Motion.] West believed that it was unnecessary to inform the U.S. Customs and Immigration Services of McMahon's termination, because counsel had not advised him that Respondent was obligated to do so, and because McMahon had advised West that it was unnecessary to do so as long as McMahon was seeking employment in the same field. [*Id.*, ¶ 24.] On May 5, 2008, five days after being informed by Wage and Hour Investigator Avello that he was obligated to inform the U.S. Citizenship and

[1] West's affidavit indicates that the layoff occurred in November 2008, with the final paychecks issued on October 26, ***2008***; however, the dates appear to be typographical errors, as all the other evidence shows that McMahon's last pay was in October of ***2007***.

Immigration Services (USCIS)[2] of McMahon's termination, West did so. [*Id.*, ¶ 25; Avello declaration, ¶ 6; Exhibit 19 to Respondent's Motion.]

After Respondent laid off its staff on October 26, 2007, and prior to West's informing McMahon that his employment had been terminated on January 23, 2008, McMahon performed some of the duties of Executive Director/Head Coach, including:

1. On November 9, 2007, McMahon was tasked with finding players for one of Respondent's teams [Exhibit 9 to Administrator's Motion];
2. On November 19, 2007, West asked McMahon "as director" of Respondent to recommend one of Respondent's players for a training program [Exhibit 8 to Administrator's Motion];
3. On November 27, 2007, McMahon attempted to find a coach for a game to be played five days later [Exhibit 17 to Administrator's Motion];
4. Between December 17, 2007 and January 1, 2008, McMahon accompanied an unidentified portion of the organization to a tournament in Tampa [Exhibit 15 to Administrator's Motion];
5. Between December 17, 2007 and January 4, 2008, McMahon discussed a possible merger or sale of Respondent with another soccer club [Exhibits 10 and 16 to Administrator's Motion].

After being informed that his employment with Respondent had been terminated on January 23, 2008, McMahon was permitted to coach two teams on a voluntary basis. One was McMahon's son's soccer team, which West permitted after McMahon made an emotional plea to be allowed to do so. [West Affidavit, ¶¶ 26-27.] The second team was Respondent's boys' under-10 team, which had told Respondent that it was leaving the organization at the end of the season to join a new club that McMahon was planning to establish. [*Id.*, ¶ 28.]

As of October 26, 2007, McMahon was being paid $2,500.00 per biweekly pay period. [Avello declaration, ¶¶ 7, 9.] He was paid no wages after October 26, 2007. [*Id.*, ¶ 8; McMahon Declaration, ¶ 4.]

Discussion

1. *Summary Decision*

Summary decision may be entered pursuant to 29 C.F.R. § 18.40(d) if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact. The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

[2] USCIS is located within the Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

2. *LCA Wages*

Under the LCA program, the employer of a nonimmigrant worker holding an H1-B visa is required to pay the worker for all periods of employment, including nonproductive time, until the employer effects a *bona fide* termination of the employment. 8 USC § 1182(n)(1)(A); 20 C.F.R. § 655.731(c)(7). The determinative issues in this case are (1) the date on which Respondent effected a *bona fide* termination of McMahon's employment, and (2) whether McMahon was in a nonproductive status after October 26, 2007, and if so, whether that status was voluntary or involuntary.

a. Termination

Respondent argues that McMahon's employment was terminated on January 23, 2008, when West informed McMahon explicitly be email. [Respondent's Motion, p. 13.] The Administrator argues that McMahon's employment was terminated on May 5, 2008, when Respondent notified USCIS that McMahon's employment had ended. [Administrator's Motion, pp. 15-19.]

The applicable regulation, 20 C.F.R. § 655.731(c)(7)(ii), provides in pertinent part as follows:

> Payment [of wages] need not be made if there has been a *bona fide* termination of the employment relationship. DHS[3] regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is cancelled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

The regulations do not define what actions constitute a "*bona fide* termination of the employment relationship." The dispute between the parties is whether the regulatory requirement to notify USCIS of the termination is a requirement of a *bona fide* termination, or merely evidence of termination.

Respondent relies on *In the Matter of Ken Technologies, Inc.*, ARB Case No. 03-140, ALJ Case No. 2003-LCA-015 (ARB September 30, 2004) to support its argument that providing the required notice to USCIS is not essential to show a *bona fide* termination, but is only some evidence of termination. Respondent further argues that under the circumstances of this case – where McMahon was explicitly informed that his employment had been terminated, and that the parties acted in accordance with the belief that termination had been effected – notice to USCIS was not necessary for a *bona fide* termination.

The Administrator relies on *Amtel Group of Florida v. Yongmahapakorn (Rung)*, ARB No. 04-087, ALJ No. 2004-LCA-6 (ARB Sept. 29, 2006) to argue that a termination is not a *bona*

[3] As discussed above, n. 2, USCIS is a part of DHS. Consistent with the usage of the parties in their evidence and briefs, the agency will be referred to here as USCIS.

fide termination unless and until the employer notifies USCIS that the worker's employment has been terminated, as it is the notification that ends the employer's obligation to pay wages.

In *Ken Technologies, supra,* the worker arrived in the United States to begin work on February 18, 2001, and returned to his home in India on July 17, 2001. He was paid no wages during the time he was in the United States, and was assigned no projects. The employer argued that the employment relationship had been terminated about one week after the worker arrived in the United States, but the worker represented that he had not been informed of the termination, and continued to live in employer-provided housing until his return to India. The administrative law judge held that a *bona fide* termination did not take place until the Immigration and Naturalization Service (then the appropriate agency) was notified of the termination. The Administrative Review Board held:

> The ALJ attached too much significance to [the] failure to notify the INS…[W]hether a termination is *bona fide* does not turn solely on whether the employer notified INS. The employer should be entitled to present other evidence concerning whether it terminated the H-1B employee. Filing such notification with INS constitutes additional, not conclusive, evidence of termination.

Ken Technologies, supra, slip op. p. 5. The ARB further held, however, that the employer did not prove by a preponderance of the evidence that it had effected a *bona fide* termination, and affirmed the ALJ's decision awarding back wages to the employee.

In *Amtel Group, supra,* the employee was certified to work for a period from November 29, 2002 through November 28, 2004. In May of 2003, the employee went to Thailand on leave and, when she returned on June 1, 2003, was informed that her employment had been terminated. The employer did not notify INS of the termination. After conducting a hearing, an ALJ awarded back pay on the grounds that the employer had not effected a *bona fide* termination because the employer had failed to show valid basis for termination. The ARB held that whether an employer has a valid basis for termination is irrelevant to the issue of whether a *bona fide* termination has been effected under the INA. Additionally, the ARB held that there was "no issue" as to whether the employment relationship had been terminated in fact on June 1, 2003, but found that there was no *bona fide* termination under the INA because the INS had not been notified of the termination. The ARB reviewed the comments accompanying 20 C.F.R. § 655.731(c)(7) in conjunction with its plain language, and held that the regulations "compel us to hold that, to ultimately effectuate a '*bona fide* termination' under the INA, an employer must notify the INS that it has terminated the employment relationship with the H-1B nonimmigrant employee and provide the employee with payment for transportation home."[4] Because there was no notification to INS, and the employee paid her own way home, the ARB held that there was no *bona fide* termination. *Amtel Group,* slip op. p. 11.

The holding in *Amtel Group* – that a termination becomes *bona fide* only upon notification to USCIS – was reaffirmed in *In the Matter of Avenue Dental Care,* ARB No. 07-

[4] In the present case, the Respondent "offered" to pay McMahon's transportation home. [Exhibit 19 to Respondent's Motion.] Apparently believing that the offer was sufficient to meet the requirement that the employee be "provided" with payment for transportation home, the parties have apparently agreed that McMahon's termination was *bona fide* as of May 5, 2008, when Respondent notified USCIS of the termination. As the parties do not contest this point, I will accept that the offer of payment was sufficient under the regulations.

101, ALJ No. 2006-LCA-029, slip op. at 7 (ARB January 7, 2010). The facts in this case are materially indistinguishable from those in *Amtel Group*. Accordingly, notification to USCIS is a prerequisite for a *bona fide* termination.[5]

Based on the foregoing, I find that a *bona fide* termination of the employment relationship between Respondent and McMahon was effective on May 5, 2008, when Respondent provided notification to USCIS that McMahon had been terminated.[6]

b. Nonproductive Time

Having determined that a *bona fide* termination became effective on May 5, 2008, I must now determine whether McMahon is entitled to payment of wages between October 26, 2007 (when he was last paid, and along with the entire office staff, was laid off) and May 5, 2008.

The applicable regulation provides in pertinent part:

> (i) *Circumstances where wages must be paid.* If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA….
>
> (ii) *Circumstances where wages need not be paid.* If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period.

20 C.F.R. § 655.731(c)(7).

---

[5] It also appears that notification to USCIS, while a necessary condition, is not determinative when the parties continue to act as if no termination had occurred after notification is provided. See *In the Matter of Innawalli v. American Information Technology Corp.*, ARB No. 04-165, ALJ No. 2004-LCA-013, slip op. at 7 (ARB September 29, 2006.) That is not the case in the present matter.

[6] Respondent suggests that its failure to notify USCIS of the termination of McMahon's employment should be excused, because although Respondent sought legal advice, the attorney never advised Respondent that such notification was required; and because McMahon affirmatively represented that notification was not required as long as he was seeking employment in the same field. Respondent has provided no authority for its proposition, and I am unable to find any. Given the clear requirements in the WHD and DHS regulations, I find no merit to Respondent's suggestion.

Respondent argues that for several months leading up to the layoff of the staff on October 26, 2007, McMahon had failed to perform the duties of his job. He had failed to report to the office to work, and on the occasions that he was in the office, he spent his time watching soccer on line or surfing the websites of other soccer clubs. He was warned more than once about his failure to do his job. Nonetheless, there is no dispute that McMahon performed some of his duties, and Respondent paid McMahon his full required salary up until the staff was laid off.

Then, after the staff layoff, McMahon continued to perform some of the duties of his job. At least for the period between November 9, 2007 and January 4, 2008, Respondent continued to rely on him to act as its Executive Director in spite of its position that he had been laid off. Specifically, Respondent tasked McMahon with finding players for one of the teams in the soccer club and referred to him as "director" when seeking a recommendation for a player; McMahon coordinated coaching responsibilities, accompanied the club to an out-of-state tournament, and engaged in merger/sale discussions with a third party. (See statement of facts, *supra.*) After being informed of his termination on January 23, 2008, however, McMahon did not perform his duties as Executive Director/Head Coach, and was permitted to coach two soccer teams on a voluntary basis.

I find first that McMahon was not in nonproductive status during the period between October 27, 2007 and January 23, 2008. He continued to perform duties as Executive Director, and was clearly considered to be the Executive Director by the president and staff of Respondent. He is entitled to wages for that period of time not because of any exception to the regulation, but because he was in fact performing his duties.

As to the period from January 23, 2008 to May 5, 2008, it is clear that McMahon is entitled to be paid during this period of nonproductive time, regardless of the reason for it,[7] unless nonproductive status is (1) due to conditions unrelated to employment, and (2) either at his voluntary request and convenience or because he is unable to work due to a temporary incapacity. I find that in this case McMahon's nonproductive status was not "due to conditions unrelated to employment." Respondent stopped paying McMahon when it laid off the entire paid staff because there was no money to pay them, and continued to receive the benefit of his efforts after the layoff without paying him.[8] The layoff cannot be considered unrelated to employment; it is clearly an employment-related action affecting all of Respondent's employees. In addition, McMahon's inactivity was not at his voluntary request – he was involuntarily laid off, and then involuntarily informed of his termination. Finally, there is no evidence that McMahon suffered from any temporary incapacity. For these reasons, Respondent does not qualify for the section (c)(7)(ii) exemption from its obligation to pay McMahon the certified wages.

---

[7] The obligation to pay wages continues during nonproductive status "due to" "<u>any other reason</u> except as specified in paragraph (c)(7)(ii)."

[8] I sympathize with Respondent's position – McMahon was the person who, had he performed his duties fully, would have generated enough funds to pay not only his salary but that of the other office staff. Likewise, Respondent clearly wanted to help McMahon retain his nonimmigrant worker status so that he would not be required to leave the United States. In spite of Respondent's good will and McMahon's nonperformance, the legal obligation to pay McMahon did not end until May 5, 2008.

Accordingly, I find that Respondent is obligated to pay McMahon his back wages for the period between October 26, 2007 and May 5, 2008. This period encompasses 14 bi-weekly pay periods; multiplied by $2500 (the bi-weekly amount of McMahon's wages), McMahon is entitled to $35,000 in back wages.

3. *Making Records Available for Public Examination*

An employer who employs an H-1B nonimmigrant worker is required to make a copy of its LCA application and any necessary supporting documentation available for public examination at the employer's principal place of business. 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.760(a). As discussed above, Respondent in this case did not do so. I find that Respondent violated this regulatory requirement.

4. *Conclusion*

I find that Respondent is liable for McMahon's back wages in the amount of $35,000, and will affirm the Administrator's determination. I further find that Respondent failed to make the required records available for public examination, and will affirm the Administrator's determination as well as the ordered remedy.

ORDER

Based on the foregoing, IT IS ORDERED:

1. Respondent's motion for summary decision is DENIED;
2. The Administrator's motion for summary decision is GRANTED;
3. The Administrator's Determination dated August 13, 2009 is AFFIRMED;
4. Respondent shall pay back wages to Ian McMahon in the amount of $35,000.00, less any legally required deductions, for the period from October 27, 2007 through May 5, 2008;
5. Respondent shall pay McMahon prejudgment interest and post-judgment interest on the back wages, the amounts to be calculated by the Administrator in accordance with 26 U.S.C. § 6621; and
6. Respondent is ORDERED to make copies of all LCA applications together with their supporting document whenever it employs an H-1B nonimmigrant worker in the future.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days

of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).