



Issue Date: 25 June 2010

In the Matter of

ADMINISTRATOR,
WAGE AND HOUR DIVISION,
Prosecuting Party,

Case No.: 2009-LCA-00041

v.

BOSE SOFTWARE SYSTEMS, LLC,
Respondent.

**DECISION AND ORDER GRANTING ADMINISTRATOR'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).

A. *Background*

On August 25, 2009, the Administrator of the Wage and Hour Division issued a determination that Respondent had violated certain regulations related to its applications for H-1B visas for three employees. The Administrator ordered Respondent to pay those employees a total of \$78,150.25 and to pay civil penalties totaling \$900.00. By letter dated September 9, 2009, Respondent requested a hearing on the Administrator's determination. I scheduled a hearing for December 2, 2009 in Chicago, Illinois. On October 30, 2009, the parties jointly requested that the hearing be canceled in order to permit time for discovery and, by Order dated October 30, 2009, I granted that request.

On November 16, 2009, the Administrator propounded certain discovery requests to Respondent. On December 14, 2009, counsel for Respondent submitted a motion to withdraw as counsel and an unopposed motion to extend the time to respond to Prosecuting Party's discovery requests. By Order dated December 17, 2009, I granted the request for an extension of time to respond to discovery, and deferred ruling on counsel's motion to withdraw.

On January 26, 2010, Respondent's counsel submitted a renewed motion to withdraw and an additional request to extend the time for responding to the Administrator's discovery requests.

On January 29, 2010, the Administrator filed a non-objection to counsel's request to withdraw, but opposed the motion for an additional extension of time to respond to discovery. By Order dated February 1, 2010, I granted counsel's motion to withdraw and denied the motion for an extension of time.

In its response to counsel's renewed motion to withdraw, the Administrator also requested an Order to Show Cause why Respondent's request for a hearing should not be deemed withdrawn and the Administrator's determination affirmed, in light of Respondent's failure to participate in this matter. Respondent did not reply to the Administrator's request, and on February 24, 2010, I issued such an order. Shortly thereafter, new counsel entered an appearance on behalf of Respondent, and Respondent and the Administrator filed timely responses to the Order to Show Cause. On April 23, 2010, I issued an Order denying the Administrator's motion to deem the hearing request withdrawn, and denied a further extension of time to respond to discovery.

Now pending is the Administrator's motion for summary judgment dated May 25, 2010. Respondent has not filed an opposition to the motion.

B. Legal Standards

Summary decision may be entered pursuant to 29 C.F.R. § 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. See *Gillilan v. Tennessee Valley Authority*, 91-ERA-31 at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1 at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, summary decision should be entered only when no genuine issue of material fact exists that must be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). When a respondent moves for summary decision on the grounds that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex Corp. v. Catrett*, *supra*.

C. Findings of Fact

Under the Rules of Practice and Procedure applicable to hearings in the Office of Administrative Law Judges, requests for admission that are not answered with 30 days are deemed to be admitted, with certain exceptions not applicable here. 29 CFR § 18.20(b). Under 29 CFR § 18.20(e), "[a]ny matter admitted under this section is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission."

Here, the Administrator propounded requests for admission to Respondent on November 16, 2009, and Respondent has not answered them. The Administrator's requests for admission are therefore deemed to be admitted and are conclusively established. Based on those requests and on additional evidence submitted with the motion, I make the following findings of undisputed fact:

1. Respondent is a Delaware limited liability company with its principal and registered office located at 2356 Hassle Road, Suite D, Hoffman Estates, Illinois. [Request for Admission ("RFA") Nos. 1 and 3, Exhibit 1 to Administrator's Motion for Summary Judgment.]
2. Respondent began business operations in 2001. [RFA 2.]
3. Respondent provides computer systems design and related services at sites across the United States. [RFA 4.]
4. Harindar Reddy Puliyala is the owner, President, sole member, and sole corporate director of Respondent, and owns 100% of Respondent's outstanding stock. [RFA 5-9.]
5. Respondent employed individuals in the United states as H-1B non-immigrant workers under H-1B visas issued pursuant to 8 USC § 1101(a)(15)(H)(i)(b) of the Immigration and Nationality Act during the period of January 1, 2006 to February 28, 2008. [RFA 10.]
6. Chandra Bathini, Ravinder Malkireddy, and Srikantha Sanagala were employed by Respondent as H-1B non-immigrant workers during the period from January 1, 2006 through February 28, 2008. [RFA 11.]
7. During the period from January 1, 2006 through February 28, 2008, Respondent filed LCAs with the Employment and Training Administration ("ETA") to employ H-1B non-immigrant workers in the United States. [RFA 12.]
8. By utilizing LCAs approved by ETA to employ H-1B non-immigrant workers in the United States, Respondent was subject to and required to comply with the provisions of 8 USC § 1101(a)(15)(H)(i)(b) and 20 CFR part 655, Subparts H and I. [RFA 13.]
9. Respondent voluntarily filed LCA Nos. I-06129-2488845, I-05292-2087669, I-06293-2864073, and I-06091-2345179 with ETA in order to employ H-1B non-immigrant workers in temporary employment in the United States. [RFA 14-16.]
10. Attachment A to the Administrator's RFA is a true, correct, and authentic copy of LCA No. I-06129-2488885, which was used by Respondent to employ Chandra Bathini as an H-1B non-immigrant worker. [RFA 17-18.]

11. Attachment B to the Administrator's RFA is a true, correct, and authentic copy of LCA Nos. I-05292-2087669 and I-06293-2864073, which were used by Respondent to employ Ravinder Malkireddy as an H-1B non-immigrant worker. [RFA 19-20.]
12. Attachment C to the Administrator's RFA is a true, correct, and authentic copy of LCA No. I-06091-2345179, which was used by Respondent to employ Srikantha Sanagala as an H-1B non-immigrant worker. [RFA 21-22.]
13. Each of the LCAs attached to the Administrator's RFA as Attachments A-C contained dates setting forth a time period in which they were valid for use by Respondent to apply for the admission into the United States of its H-1B non-immigrant workers. [RFA 24.]
14. The LCAs attached to the Administrator's RFA as Attachments A-C were signed by Harindar Reddy Puliyala on behalf of Respondent. [RFA 25.]
15. The LCAs attached to the Administrator's RFA as Attachments A-C were certified by ETA. [RFA 26.]
16. The LCAs attached to the Administrator's RFA as Attachments A-C are (1) records that were made by a person with knowledge of or made from information transmitted by a person with knowledge of the acts and events appearing on them, (2) records that were made at or close to the time of the acts and events appearing on them, (3) records made in the course of regular practice of Respondent, and (4) records kept in the course of regular conducted business activity. [RFA 27-30.]
17. Chandra Bathini was an H-1B non-immigrant employed by Respondent as a systems analyst from July 16, 2007 to February 28, 2008. [RFA 31; Declaration of William J. Long, Jr., Exhibit 3 to Administrator's Motion for Summary Judgment, ¶ 4A and Exhibits 3-B, 3-C thereto.]
18. From July 16, 2007 to February 28, 2008, Respondent did not pay Chandra Bathini the required wages. [RFA 32; Long declaration ¶ 4A and Exhibits 3-D and 3-E thereto.]
19. Chandra Bathini is due the sum of \$21,975.55 in wages for the period from July 16, 2007 to February 28, 2008. [RFA 33; Long declaration ¶ 4A and Exhibit 3-E thereto.]
20. Ravinder Malkireddy was an H-1B non-immigrant employed by Respondent as a systems analyst from January 1, 2006 to February 2, 2007. [RFA 34; Long declaration ¶ 4B.]
21. From January 1, 2006 to February 2, 2007, Respondent did not pay Ravinder Malkireddy the required wages. [RFA 35; Long declaration ¶ 4B.]

22. Ravinder Malkireddy is due the sum of \$24,556.70 in wages for the period from January 1, 2006 to February 2, 2007. [RFA 36; Long declaration, ¶ 4B¹.]
23. Srikantha Sanagala was an H-1B non-immigrant employed by Respondent as a software engineer from February 5, 2007 to October 31, 2007. [RFA 37; Long declaration ¶ 4C and Exhibit 3-G thereto.]
24. From February 5, 2007 to October 31, 2007, Respondent did not pay Srikantha Sanagala the required wages. [RFA 38; Long declaration ¶ 4C and Exhibits 3-H and 3-I thereto.]
25. Srikantha Sanagala is due the sum of \$31,608.00 in wages for the period from February 5, 2007 to October 31, 2007. [RFA 39; Long declaration ¶ 4C.]
26. Respondent did not post notice of the LCA filings for 10 days in two conspicuous locations at each place of employment where any H-1B non-immigrant worker would be employed. [RFA 40.]
27. Respondent failed to provide the H-1B non-immigrant workers with a copy of the LCAs used to employ them. [RFA 41.]
28. Respondent required or accepted \$3,000 from Ravinder Malkireddy and \$2,500 from Srikantha Sanagala, with \$1,500 of each payment attributed to additional petition fees incurred in filing their H-1B petitions. [RFA 42; Long declaration ¶ 5 and Exhibits 3-J and 3-K thereto.]
29. The Administrator requested that Respondent make available the public access file, including LCAs, supporting documentation and other records required to be maintained under the INA at Respondent's principal place of business, and Respondent failed to do so. [RFA 43-44; Long declaration ¶ 6.]
30. Respondent did not maintain a public access file. [RFA 45; Long declaration ¶¶ 6-7.]
31. Chandra Bathini worked for Respondent at a client site located in St. Louis, Missouri from October 8, 2007 to February 28, 2008. [RFA 46.]
32. Respondent did not file an LCA for St. Louis, Missouri. [RFA 47.]
33. Srikantha Sanagala worked for Respondent at a client site located in Maryland Heights, Missouri from May 29, 2007 to August 10, 2007. [RFA 48.]
34. Respondent did not file an LCA for Maryland Heights, Missouri. [RFA 49.]

¹ See discussion below about the revised amount of wages due to Ravinder Malkireddy.

D. Conclusions of Law

1. Wages

To employ an H-1B non-immigrant worker, an employer must complete and file an LCA with the ETA. 8 USC § 1182(n)(1); *Kolbusz-Kline v. Technical Career Institute*, ALJ Case No. 93-LCA-004 (July 18, 1994). By doing so, the employer makes certain representations, including a representation that the H-1B worker will be paid at the actual wage level paid to other individuals with similar experience and qualifications, or the prevailing wage for the occupational classification in the area of employment, whichever is higher. 8 USC § 1182(n)(1). Under that statute and 20 CFR § 655.731, the employer must pay its non-immigrant workers at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time.

In this case, the undisputed facts establish that Respondent failed to pay the three H-1B non-immigrant workers the wage it was required to pay under INA and its implementing regulations. The amount it failed to pay Chandra Bathini was \$21,975.55 and the amount it failed to pay Srikantha Sanagala was \$31,608.00. The amount it failed to pay Ravinder Malkireddy was originally established as \$24,566.70 by the Administrator's calculation and by Employer's deemed admission. The Administrator, however, has re-calculated that amount by adjusting the prevailing rate after determining that Malkireddy should have been classified as a Computer Programmer rather than as a Computer Systems Analyst. [Long declaration, ¶ 4B.] The Administrator submits that the correct wages remaining due to Malkireddy total \$23,825.68 rather than the original \$24,566.70.

Based on the foregoing, Respondent will be ordered to pay wages in the amount of \$21,975.55 to Chandra Bathini, \$23,825.68 to Ravinder Malkireddy, and \$31,608.00 to Srikantha Sanagala.

2. Notice of Filing

Under 20 CFR § 655.734, an employer is required to post notice of the filing of its LCAs "to the bargaining representative of the employer's employees in the occupational classification in which the H-1B nonimmigrants will be employed or are intended to be employed in the area of intended employment, or, if there is no such bargaining representative, has posted notice of filing in conspicuous locations in the employer's establishment(s) in the area of intended employment...." The place of employment includes the worksite or physical location where the work is performed. 20 C.F.R. §655.715. Thus, Respondents are required to post a notice of the filing of LCAs at the worksite or physical location where H-1B workers are to perform their work. *U.S. Dept. of Labor v. Analytical Technologies, Inc.*, 1994 LCA 00012 (Jan. 31, 1995.) Respondents admitted that they failed to post notices of LCA filings in any of the locations where the non-immigrant workers were sent to work. As there is no dispute of material fact that the Respondents failed to provide the required notice of filing their LCAs, I affirm the Administrator's finding.

Based on the foregoing, the Administrator's order that Respondent comply with the notice requirements of 20 CFR § 655.734 in the future will be affirmed.

3. Payment of H-1B Petition Fee

Employers are prohibited from receiving any part of the \$1000.00 additional filing fee for LCAs "whether directly or indirectly, voluntarily or involuntarily," even if the payment is made by a third party on behalf of the worker. 20 C.F.R. §655.731(c)(10)(ii). Respondents required two of the non-immigrant workers to pay the additional H-1B petition filing fee in violation of the regulations. The fees paid by the H-1B workers are included in the total amount of back wages requested by the Administrator, who also imposed a civil money penalty of \$900.00. The Administrator is authorized to assess civil money penalties for violations of the regulations, and has "enforcement discretion" with regards to the appropriate remedy for the particular violation. 8 U.S.C. §1182(n)(2)(C); 20 C.F.R. §655.810; *Administrator v. Kutty*, ARB Nos. 01-LCA-10 through 01-LCA-025 (ARB May 31, 2005.)

After consideration of the violation and the admissions of the Respondents, I find that there is no dispute of material fact with regards to this issue and that the penalty assessed by the Administrator is appropriate for this violation. I affirm the Administrator's finding that Respondents violated 20 C.F.R. §655.731(c)(10)(ii) and the civil money penalty of \$900.00.

4. Public Access File

Within one working day after an LCA is filed, employers are required to make a copy of the application and necessary supporting documentation, available for public examination at his or her principal place of business. 8 U.S.C. §1182(n)(1); 20 C.F.R. §655.760(a). During the Administrator's investigation, Respondents admitted that they did not make all of the required documentation accessible for examination within one working day, and also failed to maintain a public access file. 20 C.F.R. §655.760(a). As there is no evidence to the contrary, I affirm the Administrator's finding that Respondents failed to maintain and, upon request, produce a public access file in violation of 20 C.F.R. §§ 655.731(b), 655.738(e), 655.739(i), 655.760(c). The Administrator's order to comply with the regulations regarding the public access file in the future will be affirmed.

5. Areas of Intended Employment

When filing an LCA, employers are required to state the area of intended employment. 20 C.F.R. §655.730(c)(4). The area of employment is defined as the area within normal commuting distance of the worksite or physical location where the work of the H-1B worker is or will be performed. 8 U.S.C. §1182(n)(4)(A). Respondents did not file an LCA for work in Missouri, but employed Chandra Bathini in St. Louis, Missouri and Srikantha Sanagala in Maryland Heights, Missouri. Respondents admit that they failed to file LCAs in these locations, thus I affirm the Administrator's finding that Respondents failed to file LCAs for all areas of intended employment in violation of 20 C.F.R. §655.730(c). The administrator's order to comply with 20 CFR § 655.730(c) in the future will be affirmed.

E. Conclusion

The facts of this case show that Respondents failed to pay the required wages to their H-1B workers, failed to provide notice of filing of LCAs at the workers' intended places of employment, required their H-1B workers to pay the additional petition fee in violation of the regulations, failed to make available the required records in a public access file, and failed to file LCAs for all areas of intended employment. I find that the Administrator is entitled to a summary decision in this matter, and the Respondents will be ordered to pay Chandra Bathini (\$21,975.55), Ravinder Malkireddy (\$23,825.68), and Srikantha Sanagala (\$31,608.00), a total of \$77,409.23 in back wages and an additional civil money penalty fee of \$900.00.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. Complainant's motion for summary decision is GRANTED; and
2. Respondents shall pay Chandra Bathini the amount of \$21,975.55 less federal, state, and local taxes that are required to be withheld;
3. Respondents shall pay Ravinder Malkireddy \$23,825.68 less federal, state, and local taxes that are required to be withheld;
4. Respondents shall pay Srikantha Sanagala \$31,608.00 less federal, state, and local taxes that are required to be withheld;
5. Respondents shall pay the Department of Labor civil penalties in the amount of \$900.00; and
6. In all other respects, the Administrator's Determination is AFFIRMED.

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).