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: 14 May 2010

In the Matter of:

ADMINISTRATOR,
WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

TECHMAGIKA, INC. and
DHEERAJ VANGALA,
Respondents.

CASE NO: 2009-LCA-00040

DECISION AND ORDER GRANTING MOTION TO WITHDRAW AND MOTION FOR SUMMARY DECISION - ERRATA[1]

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 May 12, 2008 Mr. Biraj C. Desai filed a complaint against Respondents Techmagika, Inc. and Mr. Dheeraj Vangala ("Respondents"), alleging that Respondents failed to pay wages and were otherwise in violation of several other provisions of the H1-B Program. The Administrator of the Wage and Hour Division (the "Administrator") conducted an investigation, and on August 24, 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;
2. Failing to provide notice of the filing of LCA's in violation of 20 C.F.R. §655.734;
3. Requiring or accepting from H1-B workers payment or remittance of the additional petition fee incurred in filing an H-1B petition in violation of 20 C.F.R. §655.731(c)(10)(ii);
4. Failing to maintain documentation as required by 20 C.F.R. §§655.731(b), 655.738(e), 655.739(i) and 655.760(c);

[1] Due to a system error, the original Decision and Order in this case did not include the date it was issued. It is now re-issued with the correct date. The time for appeal will be measured from the date appearing on this Errata.

5. Failing to comply with the provisions of subpart H or I in violation of 20 C.F.R. §655.730(c), by not filing LCA's for areas of employment.

The Administrator ordered Respondents to pay back wages in the amount of $62,086.57[2] to three H-1B nonimmigrant workers, including Mr. Desai, who filed the complaint, as well as $1,350.00 in civil money penalties.

On September 8, 2009, Respondents timely requested a hearing on the matter, disputing the amount in back wages owed to the three workers and alleging that the workers left the company prematurely, without warning, and in violation of their employment contracts.

A hearing was scheduled for December 2, 2009, but was cancelled in order to allow parties additional time for discovery. On January 22, 2010, the Administrator filed a Motion to Compel Respondents to respond to several discovery requests, and a Motion to Deem Requests for Admission Admitted. Respondents did not file a response to the Prosecuting Party's motions, and after review of the motions, I issued an Order Granting motions to Deem Requests for Admission Admitted and to Compel Responses to Discovery. I gave Respondents until March 12, 2010 to respond to the Administrator's written interrogatories and requests for production of documents, and deemed the matters set forth in the Request for Admission Nos. 1-53 as admitted by Respondents for all purposes in this matter.

On March 31, 2010, Respondents' counsel filed a motion asking leave to withdraw as counsel, alleging that his client was uncommunicative, failed to respond to counsel's inquiries or to provide responses to the Administrator's discovery requests. On review I found that counsel failed to serve the motion on Respondents, thus on April 9, 2010, I ordered counsel to serve a copy of his motion to withdraw upon Respondents, and gave Respondents until April 23, 2010 to file and serve a response to counsel's motion. Counsel served Respondents with the motion, and as there was no response from Respondents in response to counsel's motion, I grant his motion to withdraw. On April 5, 2010 the Prosecuting Party filed a Motion for Summary Judgment or Default Judgment in this matter.

In deciding this matter, I have fully read and considered the Administrator's motion and the attached exhibits, as well as the Administrator's previous motions and attached exhibits. Respondents did not submit a response to the Administrator's motions. For the reasons set forth below, I find that there are no disputes of material fact in this claim.

Material Undisputed Facts

1. Respondent Techmagika, Inc, is an Illinois corporation that has its principal and registered office located at 2374 South Goebbert Rd., Pat 2026, Arlington Heights, Illinois 60005.

[2] According to the motion filed by the Prosecuting Party, the Administrator has recalculated the amount of back wages to $60,420.00, consisting of $24,557.95 to Biraj Desai, $14,417.94 to Bharatkumar Savalia, and $21,444.11 to Kalendrakumar Sutariya, and requests that I modify the Determination to reflect the new amount.

2. Respondent Techmagika began business operations in 2006 and provides computer systems design and related services at sites across the United States.

3. Respondent Techmagika is owned by Dheeraj Vangala, who is also its President, sole incorporator, and corporate director.

4. Respondent Vangala owns 100% of the outstanding stock shares of Respondent Techmagika.

5. Respondents employed Biraj Desai, Bharatkumar Savalia, Kalendrakumar Sutariya, in the United States as H-1B non-immigrant workers under H-1B visas pursuant to 8 U.S.C. §1101(a)(15)(H)(i)(b) of the INA during the period of October 7, 2006 to July 27, 2007.

6. During the period from October 7, 2006 to July 27, 2007, Respondents voluntarily filed LCA Nos. I-06258-2803451, I-06258-2803499, and I-06258-2803437 with the ETA to employ H-1B non-immigrant workers in the United States. These LCA's were signed by Respondent Vangala and certified by the ETA.

7. During the period from October 7, 2006 to July 27, 2007, Biraj Desai, Bharatkumar Savalia, and Kalendrakumar Sutariya were H-1B non-immigrants employed by Respondents as software engineers. Respondents did not pay them the required wages in the total amount of $60,420.00.

8. Respondents failed to post notice of the LCA filings for 10 days, in two conspicuous locations at each place of employment where any H-1B non-immigrant would be employed.

9. Respondents failed to provide the H-1B non-immigrant workers with a copy of the LCA's used to employ them.

10. Respondents required or accepted from the H-1B non-immigrant workers, payment or remittance of the additional petition fee incurred in filing an H-1B petition.

11. During the investigation, the Administrator requested Respondents make available the public access file, including LCA's, supporting documentation and other records required to be maintained under the INA at Respondents' principal place of business. Respondents did not do so and did not maintain a public access file.

12. Biraj Desai worked at a client site located in San Bruno, California from December 21, 2006 to February 1, 2007 and Ashburn, Virginia from February 26, 2007 to July 27, 2007. Respondents did not file an LCA for both of those locations.

13. Bharatkumar Savalia worked for Respondents at a client site located in Middletown, New Jersey from December 10, 2006 to February 15, 2007. Respondents did not file an LCA for Middletown, New Jersey.

14. Kalendrakumar Sutariya worked for Respondents at a client site located in Lake Forest, California from January 8, 2007 to April 30, 2007. Respondents did not file an LCA for Lake Forest, California.

Applicable Law

1. *Summary Decision*

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.*

2. *Coverage under 20 C.F.R. Part 655 of the Immigration and Nationality Act*

Under 20 C.F.R. §655.820, an interested party may request a review of a determination issued under §§655.805 and 655.815 by an Administrative Law Judge, in the following circumstances: 1)The complainant or any other interested party may request a hearing where the Administrator determined, after investigation, that there is no basis for a finding and that an employer has committed violations(s), and 2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). Upon completion of the investigation, the Administrator shall issue a written determination as to whether or not any violations have been committed. 20 C.F.R. §655.815. Within fifteen days of such determination, any interested party may request a hearing with the Office of Administrative Law Judges of the Department of Labor. Under 20 C.F.R. §655.840(b), an Administrative Law Judge has the authority to "affirm, deny, reverse, or modify, in whole or in party, the determination of the Administrator."

Conclusions of Law

As stated in my Order issued on February 22, 2010, the matters set forth in the Requests for Admission Nos. 1-53, submitted by the Administrator on November 17, 2009, were deemed to be admitted by Respondents for all purposes in this matter, and are appropriate for use in determining whether the Administrator is entitled to a summary decision in this case. Where, as here, admissions are made under Rule 36 of the Federal Rules of Civil Procedure, they can serve as the factual predicate for summary judgment. *U.S. v. Kasuboski*, 834 F.2d 1345, 1350 (7th Cir. 1987).

1. *Respondents Failed to Pay the Required Wages to Their H-1B Workers*

Under 20 C.F.R. §655.731, an employer filing an LCA must agree to pay non-immigrant workers at least the local prevailing wage, or the employer's actual wage, whichever is higher and pay for non-productive time. According to the default admissions set forth in the Administrator's interrogatories, Respondents admit that they failed to pay the required wage, and therefore owe Mr. Desai, Mr. Savalia, and Mr. Sutariya the difference between the actual wages paid and the full amount of the prevailing wage rates. 20 C.F.R. §655.810. This amount totals $60,420. The Administrator calculated that Respondents underpaid Biraj Desai by $24,557.95, Bharatkumar Savalia by $14,417.94, and Kalendrakumar Sutariya by $21,444.11. As Respondents admitted that they failed to pay wages as required by the regulations and there is no evidence to the contrary, I find that there is no dispute of material fact with regards to this violation and I affirm the Administrator's finding. The Administrator requested that the back wage calculation be modified according to the new calculations submitted, thus in affirming this finding I also modify the amount from the previously decided $62,086.57 to $60,420.00.

2. *Respondents Failed to Provide Notice of Filing Their LCA's at Intended Places of Employment*

The regulations require employers to provide notice of filing LCA's, such as posting in conspicuous locations at the place of employment for H-1B workers for a total of ten days. 8 U.S.C. §1182(n)(1)(C)(ii). 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 LCA's 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 Mr. Desai, Mr. Savalia, and Mr. Sutariya were sent to work. There is no dispute of material fact that the Respondents failed to provide the required notice of filing their LCA's thus, I affirm the Administrator's finding.

3. *Respondents Required H-1B Workers to Pay the Additional H-1B Petition Fee in Violation of the Regulations*

Employers are prohibited from receiving any part of the $1000.00 additional filing fee for LCA's "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

Mr. Desai, Mr. Savalia, and Mr. Sutariya 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 $1,350.00. 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 $1,350.00.

4. *Respondents Did Not Make Available Required Records in Their 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).

5. *Respondents Failed to File LCA's for All 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 filed LCA's in Illinois, but not for the various locations in California, New Jersey, and Virginia that the H-1B workers were actually working in. Respondents admit that they failed to file LCA's in these locations, thus I affirm the Administrator's finding that Respondents failed to file LCA's for all areas of intended employment in violation of 20 C.F.R. §655.730(c).

I conclude that the facts established by the default admissions establish that there is no genuine issue of material fact in dispute and the Administrator is entitled to a summary decision in this matter.

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 LCA's 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

LCA's for all areas of intended employment. As Respondents have not provided any evidence to the contrary, and there are no genuine issues of material fact, I find that the Administrator is entitled to a summary decision in this matter, and the Respondents are ordered to pay Mr. Desai ($24,557.95), Mr. Savalia ($14,417.94), and Mr. Sutariya ($21,444.11), a total of $60,420.00 in back wages and an additional civil money penalty fee of $1,350.00.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. The motion of Respondents' counsel to withdraw is GRANTED;
2. Complainant's motion for summary decision is GRANTED; and
3. Respondents shall pay Biraj Desai the amount of $24,557.95 less federal, state, and local taxes that are required to be withheld;
4. Respondents shall pay Bharatkumar Savalia $14,417.94 less federal, state, and local taxes that are required to be withheld;
5. Respondents shall pay Kalendrakumar Sutariya $21,444.11 less federal, state, and local taxes that are required to be withheld; and
6. Respondents shall pay the Department of Labor civil penalties in the amount of $1,350.00.

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).