



Issue Date: 31 August 2010

CASE NO.: 2010-LCA-17

IN THE MATTER OF

**ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party**

v.

**NB SERVICES, INC.,
Respondent**

DECISION AND ORDER

Procedural Background

This case arises under the H-1B visa program of the Immigration and Nationality Act of 1952 (the Act)¹ and its implementing regulations.² On 15 Apr 07, an immigrant worker filed a complaint with Respondent, alleging Respondent was not paying her the prevailing wage required by law. On 16 Mar 10, the Administrator issued its determination that Respondent had committed two violations of the Act by failing to pay wages for the period 21 Mar 03 through 12 Jan 07³ and failing to maintain required records, including documentation of union and employee notification.⁴ Respondent was directed to pay \$23,327.56 in back wages to one specific nonimmigrant H-1B worker and comply with record retention regulations in the future. No civil penalties were levied against the Respondent. Respondent filed a timely appeal and the case was referred to the Office of Administrative Law Judges.

On 13 Apr 10, the parties participated in a teleconference and requested additional time to review the matter and possibly reach an agreement on outstanding issues. On 27 Apr 10, the parties participated in another teleconference and reported that while there were no significant factual disputes, they still had differences over issues of law and the case would require adjudication. However, they agreed to waive their rights to present evidence and make arguments in person and instead requested that they be allowed to

¹ 8 U.S.C. § 1101-1537(2010).

² 20 CFR Part 655, Subparts H and I.

³ As required by 20 CFR § 655.731.

⁴ As required by 20 CFR § 655.760.

submit documents and file written briefs for a hearing on the record. The parties then filed a comprehensive stipulation of fact accompanied by supporting exhibits.

Factual Background⁵

The complaining employee worked for Employer’s predecessor business entity in Ecuador from 1998 until April 2002, when she moved to the Houston, Texas office as a nonimmigrant worker. Respondent Employer filed the appropriate documents and the employee was approved through March 2005 with a required annual wage of \$35,630.00. She was subsequently approved for a second period through March 2008, with the same required wage rate. Respondent provided the following compensation during her employment:

Year	Wages reported	Cash Advances	Bonuses	Legal Fees	Rent	Gym Fees	Cell Phone	Car & Ins Payments	Health Ins	Misc
2002	21,926.24	1280	500	1170	4227.66					853.91
2003	27,851.95	538.22	1000		6206.58	337.89				1421.40
2004	28,882.84	2600	1000		2263.70	454.92	722.54			
2005	30,792.00	5102.60	1300	5885	3420		816.68	2462.10	1926	600
2006	33,072.00	684.24		951			361	2762.52	1764	600

She voluntarily terminated her employment in early January 2007. In February 2007, Respondent filed suit in Texas court to recover the outstanding amounts it had loaned her directly and the amounts she had failed to pay on the car it had sold to her on a time payment basis. In April 2007, she filed a complaint alleging Respondent had failed to pay her the requisite wages. In August 2008, she contacted Respondent and suggested resolving the matters without involving the court or Department of Labor. In November 2008, she agreed to no longer pursue her complaint with the Department of Labor in exchange for Respondent dismissing its state court claims with prejudice.

Issues

The Administrator submits that Respondent failed to pay the required salary. Respondent concedes that direct payments may have fallen short of the required figure, but notes that it also compensated the immigrant worker by paying her rent, legal fees, bonuses, gym membership fees, car payments, insurance, cell phone expenses, bonuses, and miscellaneous expenses. Respondent argues that when this other compensation is included, it met the threshold. The Administrator answers that those additional payments do not qualify as wages under the Act or regulations. Respondent also seeks a ruling that Charles L. Newcomb, its former director, is not personally liable. The Administrator seeks a finding that Respondent was not in compliance with record maintenance requirements.

⁵ I hereby incorporate by reference the stipulation of fact submitted by the parties as my finding of fact in the case.

Law

The Act permits employers to hire nonimmigrant aliens under various specifically defined circumstances.⁶ However, the Act also requires the employer to file

... with the Secretary of Labor an application stating the following:

(A) The employer--

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B nonimmigrant wages that are at least--

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application, and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.⁷

The implementing regulations of the Act define wages for the purposes of satisfying the required wage obligation.⁸ “The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions [cross-reference omitted] may reduce the cash wage below the level of the required wage.”⁹

The regulations then limit qualifying cash wages to only those payments shown in the employer's payroll records as earnings and (except for authorized deductions) disbursed to the employee and properly reported and subjected to any required withholding under the Internal Revenue Code, Federal Insurance Contributions Act, and all other appropriate federal, state, and local laws and regulations. Future bonuses and similar compensation may also qualify, but only if they are not conditional or contingent on some event and once paid meet the same reporting and withholding requirements.¹⁰

Authorized deductions are limited to those (1) required by law (e.g., taxes); (2) pursuant to a collective bargaining agreement or reasonable and customary in the occupation and/or area of employment (e.g., premiums for health insurance policy covering all employees); or (3) made in accordance with a written voluntary authorization by the employee for a matter principally for the benefit of the employee and not a recoupment of the employer's business expense.¹¹

⁶ 8 U.S.C. §1101(a)(15)(H)(i)(b)(2010); 20 CFR 655.7000(2010).

⁷ 8 U.S.C. §1182(n)(1)(A)(2010).

⁸ 20 C.F.R. § 655.731(c) (2010).

⁹ 20 C.F.R. § 655.731(c)(1) (2010).

¹⁰ 20 C.F.R. § 655.731(c)(2) (2010).

¹¹ 20 C.F.R. § 655.731(c)(9) (2010).

Health insurance provided as compensation for services is not treated as wages, but as a benefit which must be offered to the nonimmigrant on the same basis as the employer offers to U.S. workers.¹²

The regulations define employer as a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with the nonimmigrant and files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) on behalf of the nonimmigrant.¹³

The regulations also require the employer to retain and make available for inspection certain records, including those that document union and employee notification.¹⁴

Discussion

The regulations are clear that in order to qualify as wages, compensation must be reported and subjected to withholding by the I.R.S. Respondent does not argue that it did so, or that it qualified for any exception, instead simply noting that the “Department of Labor does not have jurisdiction over whether a payment constitutes compensation.” Moreover, any amounts that are deducted and not actually paid to the employee must be in accordance with a written authorization. There is no indication in the record of any such authorization. Finally, it appears that in some instances, Respondent attempts to claim as wages amounts that were actually loans. The fact that the loans were later forgiven does not make them wages in the year they were originally made.

Consequently, I find that the Administrator’s assessment is correct and that Respondent owes back wages in the amount of \$23,327.56, as set forth in EX-19. I also find that Respondent failed to maintain required records, including those that document union and employee notification, but is now in compliance.

Respondent is an incorporated legal entity. The LCA was signed by Charles L. Newcomb in his capacity as an officer of the corporation rather than in his personal capacity. The aggrieved employee filed her complaint against the corporation and the enforcement action names the corporation. Accordingly, I find that Charles L. Newcomb is neither a named party nor liable in his personal capacity as the employer in this case.

¹² 20 C.F.R. § 655.731(c)(3) (2010).

¹³ 20 C.F.R. § 655.715 (2010).

¹⁴ 20 C.F.R. § 655.760(a) (2010).

Order

Respondent shall pay \$23,327.56 in back wages to the nonimmigrant worker, in accordance with the provisions of the order at EX-20. Respondent shall file with the Administrator, with copy to the worker, the appropriate documentation evidencing the computation of amounts payable after authorized deductions, as well as appropriate documentation evidencing the tender of said payment of required wages and interest as directed herein. All monetary computations made pursuant to this Order are subject to verification by the Administrator.

So ORDERED.

A

PATRICK M. ROSENOW
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).