U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 December 2010

Case No.: 2011-LCA-00004

In the matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

ALTURA CAPITAL GROUP,
Respondent.

ORDER DISMISSING CASE

This is a proceeding pursuant to 20 C.F.R. Part § 655, et seq., promulgated to implement the H-1B provisions of the Immigration and Nationality Act ("the Act", hereinafter), 8 U.S.C. §§ 1101(a)(15)(H)(i)(B) and 1182(n), and in accordance with 29 C.F.R. Part 18 (the Rules of Practice and Procedure of the Office of Administrative Law Judges). Under the Act, an employer may hire nonimmigrant workers from other countries to work in the United States in "specialty occupations" for prescribed periods of time. 8 U.S.C. § 1101(a)(15)(H)(i)(B). Such workers are issued H-1B visas by the Department of State upon approval by the Immigration and Naturalization Service ("INS"). 20 C.F.R. §655.705(b). In order for the H-1B visa to be issued, the employer must file a Labor Condition Application ("LCA") with the Department of Labor ("DOL"), and describe the wage rate and working conditions for the prospective employee. 8 U.S.C. § 1182(n)(1)(D); 20 C.F.R. §§ 655.731 and 732. Once DOL certifies the LCA, INS can then approve the nonimmigrant's H-1B visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. §§ 655.700 (a)(3).

On October 21, 2010[1] the Administrator, Wage and Hour Division, DOL ("Administrator") issued a determination following its investigation into an LCA filed by Altura Capital Group ("Respondent"). The Administrator determined that Respondent had failed to properly pay an H-1B employee, and advised that back wages were due. E-mail correspondence sent on Monday, November 1, 2010 by Respondent to a representative of DOL, refers to telephonic communication between Respondent and a representative of DOL in which Respondent challenged DOL's calculations. The e-mail referred to an attached letter explaining Respondent's position. (see, letter dated October 28, 2010 addressed to Assistant District Director of Wage Hour Division Louis Greer.)

In an e-mail dated November 2, 2010, Mr. Greer responded to Respondent's correspondence by requesting records supporting Respondent's position. Mr. Greer advised that

[1] The letter is dated October 21, 2009, but I infer from subsequent correspondence between the parties that the determination letter was misdated. At no time did the Administrator indicate that Respondent's construed request for reconsideration was untimely filed.

"if [DOL is] in error, it may be possible to reissue the determination letter." (See, e-mail of November 2, 2010 at 9:44 a.m.). At 4:52 p.m. on November 2, 2010, Respondent forwarded to Mr. Greer a copy of the letter dated October 28, 2010, as well as payroll information pertaining to the targeted employee. Mr. Greer responded at 5:04 p.m. on November 2, 2010, with an e-mail that reads in the entirety: "I am out today and tomorrow but I will look this over and get back to you shortly. Thanks."

On Sunday, November 7, 2010, Respondent sent by facsimile a letter dated October 28, 2010 to the Office of Administrative Law Judges ("OALJ") requesting a hearing in this matter. Respondent also sent at that time copies of all of the above-noted correspondence. The filing was docketed by OALJ on Monday, November 8, 2010. The matter was then assigned to me. Upon review of the procedural history, I perceived that the case was not properly before OALJ. In the first instance, the Administrator did not forward to OALJ a copy of its determination letter in this matter, as is required. I construed this to mean that Mr. Greer had re-opened the Administrator's investigation, as the correspondence suggested. In addition, Respondent's request for a hearing before OALJ was untimely. Pursuant to 20 C.F.R. § 655.820, a party may request a hearing on the Administrator's determination by filing a written request with the Chief Administrative Law Judge OALJ no later than fifteen (15) calendar days after the date of the determination. 20 C.F.R. § 655.820. Notwithstanding the date on the letter addressed to OALJ (October 28, 2010), the only filing received by OALJ was the facsimile sent on November 7, 2010, constructively filed on November 8, 2010. Since Respondent's request was filed more than fifteen days after the date of the determination letter of October 21, 2010, it would have been time barred.

Accordingly, by Order issued November 18, 2010, I directed the Administrator to provide a written clarification of the date of issuance of the subject determination letter; to advise me whether a new determination letter had been issued; and to provide me with any additional correspondence between the Administrator and the Director that is not reference herein. I directed Respondent to provide me with a written summary of any oral communications, and copies of any written communications, between Respondent and the Administrator that ensued after November 2, 2010; and provide me with copies of any evidence to establish that Respondent's request for a hearing was timely filed with OALJ.

On November 29, 2010, the Administrator filed with me a copy of the Administrator's determination dated November 24, 2010. In that document, the Administrator noted that the previously issued determination letter of October 21, 2010 was in error. The Administrator did not explain or otherwise clarify the procedural quagmire that my Order asked to be addressed. Respondent declined to file anything with me.

As it is clear that the determination letter dated October 21, 2010 has been rescinded, Respondent's request for a hearing on that determination is moot, and the instant case is hereby DISMISSED.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

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).