



Issue Date: 13 September 2011

Case No. 2011-LCA-00015

In The Matter Of:

ADMINISTRATOR, WAGE AND HOUR DIVISION

Prosecuting Party,

v.

DATEC CORPORATION,

Respondent.

**ORDER GRANTING ADMINISTRATOR'S
MOTION FOR SUMMARY JUDGMENT**

This case arises under the Immigration and Nationality Act, as amended ("INA"), 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004), and regulations at 20 C.F.R. Part 655, Subparts H and I (2004). The Administrator, Wage and Hour Division, United States Department of Labor ("the Administrator") brought this action against Datec Corporation ("Respondent") alleging that it failed to properly pay its H-1B employees for unproductive time. On April 6, 2011, the Administrator served on Respondent Interrogatories, Requests for Production, and Request for Admissions. On May 25, 2011, the Administrator filed a "Motion to Compel and Motion to Have Admissions Deemed Admitted" ("Motion to Compel") along with exhibits A through E. The undersigned granted Administrator's Motion to Compel on July 22, 2011, and ordered Respondent to provide answers to Administrator's Interrogatories, Requests for Production of Documents and Requests for Admission within 15 days of the date of the order. Because Respondent failed to submit a written reply to the Administrator's Requests for Admission within the time frame specified in the order, Admissions ("Admis.") 1 through 109 are now deemed admitted.

On August 23, 2011, the Administrator filed a Motion For Summary Judgment requesting the undersigned to enter an order against Respondent awarding two of its employees, Sreehari Narayanankutty and Uma Arumugham, back wages in the amounts of \$4,306.12 and \$9,223.67 respectively. The Administrator submitted exhibits ("EX") A- L, P, R-T, and W in support of its motion. Respondent has failed to submit an answer to the motion. The trial in this case is set for October 12, 2011.

Summary Judgment Standard

The court should grant the motion for summary disposition when the record (i.e., pleadings, affidavits and declarations offered with the motion and evidence developed in discovery) demonstrates that there are no genuine issues of material fact, and that the moving party is entitled to disposition as a matter of law. 29 C.F.R. § §18.40(d), 18.41(a); Fed. R. Civ. P. 56 (c); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). However, a court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000). The party who brings the motion for summary decision bears the burden of production to prove that the nonmoving party cannot make a showing sufficient to establish an essential element of the case. *Rusick v. Merrill Lynch & Co.*, 2006-SOX-45 (ALJ Mar. 22, 2006). A genuine issue of material fact exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *Anderson*, 477 U.S. at 242. However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. *Id.* at 249.

STATUTORY FRAMEWORK

The H-1B visa program allows U.S. employers to temporarily hire non-immigrants to fill specialized jobs in the United States. Specialized occupations are those occupations that require “theoretical and practical application of a body of highly specialized knowledge, and ... attainment of a bachelor’s or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732.

Employer’s who seek to hire an H-1B nonimmigrant in a specialty occupation must first submit to the Department of Labor (“DOL”), and obtain DOL certification of, a labor condition application (“LCA”).¹ 20 C.F.R. § 655.700(b)(1). The application must specify the number of workers sought, the occupational classification in which they will be employed, and the wage rate and conditions under which they will be employed. 8 U.S.C.A. § 1182(n)(1)(D). In addition, the employer must attest that it is offering and will offer during the period of employment the greater of: (1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the prevailing wage level for the occupational classification in the area of employment. 8 U.S.C.A. § 1182(n)(1)(A)(i)-(ii); 20 C.F.R. § 655.730(d). The employer must retain the original signed and certified LCA in its files and make a copy of the application, as well as specified necessary supporting documentation, available for public examination. 20 C.F.R. § 655.705(c)(2). Once the

¹ Within the DOL, the Employment and Training Administration (ETA) is responsible for receiving and certifying labor condition applications in accordance with applicable regulations. ETA is also responsible for compiling a list of labor condition applications and making such lists available for public examination.

DOL certifies the LCA, the employer submits paperwork to the United States Citizenship and Immigration Services (“USCIS”) and requests an H-1B visa for the workers. The non-immigrant workers are then admitted to the United States.

Wages

The employer’s obligation to pay H-1B workers the required wages begins on the date on which the worker “enters into employment with the employer.” 20 C.F.R. § 655.731(c)(6). The H-1B worker is considered to “enter into employment” when he first makes himself available to work or otherwise comes under the control of the employer, “such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.” 20 C.F.R. § 655.731(c)(6)(i). Alternatively, even if the worker has not yet “entered into employment,” where the employer “had an LCA certified and an H-1B petition approved for the H-1B nonimmigrant [it] shall pay the nonimmigrant the required wage beginning 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition, or if the nonimmigrant is present in the United States on the date of the approval of the petition, beginning 60 days after the date the nonimmigrant becomes eligible to work for the employer.” 20 C.F.R. § 655.731(c)(6)(ii). The H-1B worker becomes eligible to work for an employer on the date set forth in the approved H-1B petition filed by the employer. *Id.*

The required wage “must be paid to the employee, cash in hand, free and clear, when due.” 20 C.F.R. § 655.731(c)(1). With the exception of certain deductions authorized by the regulations, cash wages consist only of payments which meet the following criteria:

- (i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due...
- (ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1...

20 C.F.R. § 655.731 (c)(2)(i)-(v). For salaried employees, wages are due “in prorated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly...” 20 C.F.R. § at 655.731(c)(4).

The employer’s obligation to pay the required wage ends when there is a “bona fide termination” of the employment relationship. 20 C.F.R. §655.731(c)(7)(ii). In order to effectuate the termination, the employer under the H-1B program, must notify the Department of Homeland Security (DHS) that the employment relationship has been terminated so that the petition is canceled. 8 C.F.R. § 214.2(h)(11). Where appropriate, the employer must provide the nonimmigrant employee with payment for transportation back home.

Nonproductive Time

Under the INA's "no benching provision," the employer is obligated to pay the required wage even if the H-1B nonimmigrant is in "nonproductive status due to a decision by the employer (e.g., because of lack of assigned work)." 20 C.F.R. § 655.731(c)(7)(i). However, the employer does not need to pay compensation if the "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)." 20 C.F.R. § 655.731(c)(7)(ii). During this nonproductive time, the employer must pay a salaried employee the full pro-rata amount due, or 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) at the required wage for the occupation listed on the LCA. *Id.* at 655.731(c)(7)(i).

FINDINGS OF FACT

Respondent incorporated in New Jersey in 1996 and registered with the California Secretary of State on or about June 16, 2000, as a foreign corporation doing business in California. Admis. 2, 3. Between February 2, 2007, through at least December 1, 2008, Respondent provided technology consulting services such as "Oracle Fusion Middleware" and outsourcing. Admis. 1. Respondent's H-1B employees have worked in California and in other states including North Carolina, Indiana, New Jersey, and Illinois. Admis. 17. From February 2, 2007, through December 1, 2008, at least twenty nine of its employees worked under an H-1B visa. Admis. 15. During the same time period, no more than nine of its employees were non H-1B visa workers. Admis. 16. The Administrator brought this action arguing that Respondent owes back wages to its H1-B workers, Uma Arumugham and Sreehari Arathuthodi Narayanankutty.

Sreehari Arathuthodi Narayanankutty

A. Admissions

Narayanankutty was employed by Respondent as an H1-B worker. Admis. 28. On March 6, 2006, he signed an Employment Agreement with Respondent. Admis. 29; EX B. Under this agreement, the Respondent purportedly obligated itself to pay "compensation at an agreed rate shown on the employment offer letter, effective on the day that the employee starts on the project." EX B. The agreement notes that compensation will be paid on a monthly basis on the first day of the following month but can be adjusted accordingly while the employee is undergoing training. *Id.*; Admis. 1-2. On March 20, 2006, Narayanankutty also signed a "Sub: Employment Offer." Admis. 31. By signing this offer, he agreed to a starting salary of \$65,000 per year along with benefits described in the Respondent's handbook, Visa Fee reimbursements, and relocation benefits. EX C.

On October 1, 2006, Respondent submitted an LCA to obtain authorization to employ Narayanankutty in Fremont, California. EX D; Admis. 33. The LCA contained the following information:

Filing date: 10/01/2006
Job title: Computer Programmer (full-time)
Location: Fremont, California
Period of Employment: 10/01/2006-10/01/2009
Listed Wage rate: \$65,000/year
Prevailing Wage rate: \$58,926/year

See EX D. On August 1, 2006, the government issued an Approval Notice to Respondent Corporation for Narayanankutty. *See* EX E; Admis. 34.

Narayanankutty arrived in the United States on March 11, 2007. Admis. 37. He reported to Respondent's Fremont, California office on March 12, 2007. Admis. 38. At this time, Respondent instructed Narayanankutty to apply for a bank account, driver's license and Social Security number before beginning his first assignment. Admis. 39-40. Narayanankutty was in unproductive status with Respondent for four weeks between March 12 and April 6, 2007. Admis. 41. In March of 2007, he attended a client interview. Admis. 42.

Between March 12 and April 5, 2007, instead of paying Narayanankutty wages, Respondent paid him a daily allowance of \$50 per day. Admis. 44-45. On March 23, 2007, Respondent issued check No. 5275, in the amount of \$500, to Narayanankutty for "Allowances Paid." Admis. 46-47; EX F. On March 30, 2007, Respondent issued another check No. 5343, in the amount of \$250, to Narayanankutty for "Employment Allowances." Admis. 48-49; EX G. On April 4, 2007, Respondent issued check No. 5357, in the amount of \$700, for "Relocation Expenses & Allowances paid." Admis. 50; *see* EX H. Of the \$700 paid through check No. 5357, \$200 was for allowances and \$500 was for relocation expenses. On April 4, 2007, Respondent issued Narayanankutty check No. 5419, in the amount of \$1,155, for "Relocation Expenses Paid." Admis. 55; EX I.

Before April 7, 2007, Respondent required Narayanankutty to relocate from Fremont to Sylmar, California. Admis. 56. Respondent filed LCA No. I-07129-3448857 for Narayanankutty to work in Sylmar, California. Admis. 57; EX J. The LCA listed May 9, 2007, as the new starting date. *Id.* Narayanankutty's listed wage rate of \$65,000 remained the same; however, the new prevailing wage rate was only \$57,990. Respondent issued Narayanankutty his first paycheck on May 1, 2007. Admis. 60-61; EX K. This check was purportedly for the pay period beginning April 1, 2007 and ending April 30, 2007, and showed total earnings of \$4,000. *See* EX K.

Respondent paid Narayanankutty a salary of \$65,000 per year for his work beginning April 9, 2007. Admis. 62. In November 1, 2007, it began paying him \$75,000. Admis. 63. Respondent issued Narayanankutty check No. 10431 in the amount of \$6,250 for the period between November 16, 2007, and December 15, 2007. Admis. 68. Respondent issued Narayanankutty check No. 10432 in the amount of \$2,187 for the period between December 16, 2007, and December 28, 2007. Admis. 70-71. In a letter dated January 14, 2008, Respondent

requested the U.S. Government to cancel Narayanankutty's visa effective December 28, 2007. Admis. 64-66; EX L.

B. Administrator's Argument

According to the Administrator, Respondent paid Narayanankutty less than the required wages for the period from March 12 to April 5, 2007 and owes Narayanankutty \$4,306.12 in back wages. The Administrator bases its calculation on the prevailing wage of \$58,962 at the time Narayanankutty was on nonproductive status in Fremont, California.² Admis. 33; EX D.

The employer must pay the non-immigrant worker the higher of the actual wage or the prevailing wage. 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(a); 20 CFR §§ 655.715, 655.730(d)(1). Here, when Narayanankutty was hired, the prevailing wage was \$58,926 per year. However, his employment contract specified that Respondent will pay him a salary of \$65,000 per year. Respondent began paying Narayanankutty \$65,000 per year beginning April 9, 2007. Admis. 62. Accordingly, the undersigned finds that Narayanankutty's back wages should be based on his actual wage rate of \$65,000 per year. The period of time from March 12 to April 5, 2007, correlates to 19 days. In accordance with the formula described at 20 C.F.R. § 655.731(c)(4), an annual salary of \$65,000 divided by twenty six (bi)-weekly pay periods equates to a wage in the amount of \$2,500 per pay period, and a daily rate, based on ten days per pay period, in the amount of \$250. Accordingly, Narayanankutty is entitled to the amount of \$4,750 in back wages for employment during the period of March 12 through April 5, 2007.

Furthermore, although Respondent issued several checks to Narayanankutty between March 23 and May 17, 2007, these payments were not shown on Respondent's payrolls nor do these payments meet the requirements set out in 20 C.F.R. 655.731(c)(i)-(ii) and therefore do not constitute wages which offset Respondent's obligation. *See Motion to Compel at DOL 000608, 000188, 000189, 000475, 000473; see Administrator v. Pegasus Consulting Group, Inc.*, ARB Case No. 03-032, 04-333 (June 30, 2005), ALJ 2001-LCA -29, 2005 WL 1542545 (holding that miscellaneous payments an employer made to an H-1B worker while the worker was in nonproductive status could not reduce the employer's liability for paying wages because the employer failed to record the payments as wages and failed to report them to the IRS); *Administrator v. Avenue Dental*, ARB Case No. 07-101, ALJ Case No. 2006-LCA-00029 (Jan. 7, 2010); *Vojtisek-Lom v. Clean Air Tech. Int'l, Inc.*, ARB Case No. 07-097 (June 30, 2009), ALJ Case No. 2006-LCA-00009, 2009 WL 2371236, *6.

Uma Arumugham

A. Admissions

Arumugham was employed by Respondent as a H1-B worker. Admis. 74. In March of 2006, she signed an Employment Agreement and a "Sub: Employment Offer. *See* EX P, Q;

² The weekly equivalent of the annual prevailing wage of \$58,962 was \$1,133. \$1,133 per week multiplied by 3.8 weeks equals a total of \$4,306.12 in back wages. Admis. 73.

Admis. 76, 78. The government issued an Approval Notice for Arumugham to work in the United States. Admis. 80; *see* EX R. On October 1, 2006, Respondent submitted LCA I-06101-2390083 for Arumugham to work in Fremont, California. *See* EX S; Admis. 82-83. The LCA contained the following information:

Filing date: 10/01/2006
Job Title: computer programmer (full-time)
Location: Fremont, California
Period of Employment: 10/01/2006-10/01/2009
Listed Wage rate: \$60,000/year
Prevailing Wage rate: \$58,926/year

Arumugham arrived at San Francisco International Airport on March 22, 2008, and flew to New Jersey. Admis. 84-85. From March 22, 2008 through June 15, 2008, Respondent had no work available for Arumugham, and she was on unproductive status during this time. Admis. 86-88. Between March 22, 2008, and April 1, 2008, Respondent sent Arumugham a packet of paperwork to initiate her employment. By no later than the first week of April 2008, Arumugham returned the packet of paperwork to Respondent. Admis. 90. By no later than April 8, 2008, Arumugham set up a computer user account in at least one of Respondent's computer systems. Admis. 91. Between late March 2008 and June 15, 2008, Mary John, one of Respondent's staff members, had contact with Arumugham approximately three times per day, usually by phone. Admis. 93.

Respondent's policy was that Arumugham would not be paid until she started working for a client. Admis. 95. Respondent did not cancel Arumugham's H1-B authorization in March, April, May, or June 2008. Admis. 96. Respondent only began to pay Arumugham when she began working with Respondent's client, Wurth, U.S.A., in New Jersey on June 16, 2008. Admis. 97-100. Respondent submitted LCA No. I-08199-4399985 for Arumugham to work in Ramsay, NJ. Admis. 101-02; *see* EX T. The new LCA listed a prevailing wage of \$48,776, but the actual wage rate remained at \$60,000. EX T. In December 2008, Arumugham ceased employment with Respondent. Admis. 103. In a letter dated January 5, 2009, Respondent asked the U.S. Government to cancel her visa. Admis. 104-105; *see* EX U.

B. Administrator's Argument

The Administrator requests the undersigned to enter a judgment against Respondent for \$9,223.67 in back wages due to Arumugham for the period of March 24 to June 15, 2008. Admis. 106. The Administrator calculated this amount as follows: the prevailing wage for Arumugham's work in New Jersey was \$48,776 annually, which divided by 12 months, comes to \$4,064.67 per month.

As with Narayanankutty, Arumugham's back wages should be based on her actual wage of \$60,000, which is higher than the prevailing wage rate. By failing to reply to the Administrator's Requests for Admission, Respondent has admitted that Arumugham was in unproductive status between March 24, 2008, and June 15, 2008. Admis. 88. Accordingly, she is

entitled to back wages for six bi-weekly pay periods or 60 work days.³ *Id.* Therefore, Arumugham should have been paid \$230.77 per day which amounts to \$13,846.20 in back pay (\$230.77 x 60).

Interest

Respondent also owes pre-judgment and post-judgment interest on all the amounts due. *Mao v. Nasser Eng'g & Computing Serv.*, ARB No. 06-121, ALJ No. 2005-LCA-36, slip op. at 9–10 (Nov. 26, 2008); *Inkwell v. Am. Info. Tech. Corp.*, ARB No. 04- 165, ALJ No. 2004-LCA-13, slip op. at 8 (Sept. 29, 2006); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989- ERA-022, slip op. at 18 (May 17, 2000); *Limanseto v. Ganze & Co.*, 2011-LCA-00005 (ALJ Jun. 30, 2011).

Interest is due on the wages from the time each installment of wages became due. For Uma Arumugham the wage liability began on March 24, 2008, and wages became payable at the end of the month; the liability ends only on June 15, 2008. For Narayanankutty, wage liability began on March 12, 2007 and ended on April 5, 2007. 8 U.S.C. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(6)(i); *see also* the Department's commentary at 65 Fed. Reg. 80, 172 (Dec. 20, 2000). The interest rate is that for underpayment of Federal income taxes, determined under 26 U.S.C. § 6621(b)(3), plus three percentage points, compounded and posted quarterly. *Doyle*, slip op. at 16–18.

The Secretary's regulations prescribe that the Administrator will —oversee the payment of back wages or fringe benefits to any H-1B nonimmigrant who has not been paid . . . as required. 20 C.F.R. § 655.810(a); *see also* § 655.810 (f). The amounts due (including compound interest) must be calculated by the Administrator, and the Administrator must disburse the unpaid wages and associated interest to Narayanankutty and Arumugham. *See* 20 C.F.R. § 655.810(f) (prescribing the Administrator's involvement in the distribution of unpaid wages, and presumably other unpaid amounts too). These duties the regulations describe don't depend on whether the Administrator participated as a litigant in the adjudication that fixes the wages and other amounts due. *Huang v. Ultimo Software Solutions, Inc.*, ARB No. 09-044, 09-056, ALJ No. 2008-LCA-11, slip op. at 32 (March 31, 2011). The amounts Respondent must pay are due immediately.

ORDER

It is **ORDERED** that within 30 days:

1. Datec Corporation must pay the Administrator for distribution to Sreehari Arathuthodi Narayanankutty back wages in the amount of \$4,750 for his employment during the period of March 12 through April 5, 2007.

³ \$60,000 per year/26 = \$2,307.69 per pay period or \$2,307.69/10 = \$230.77 per day.

2. Datec Corporation must pay the Administrator for distribution to Uma Arumugham back wages in the amount of \$13,846.20 for employment during the period of March 24, 2008, and June 15, 2008.
3. Datec Corporation must pay pre-judgment interest and post-judgment interest on these amounts at the Federal Short Term Interest rate plus 3%, as specified in 26 U.S.C. § 6621, compounded quarterly.
4. The Administrator of the Wage and Hour Division, DOL, must make any calculations necessary and appropriate to effectuate this Decision and Order.
5. Datec Corporation must pay the amounts computed to the Wage and Hour Division, U.S. Department of Labor.
6. The hearing scheduled herein for October 12, 2011, is hereby **CANCELLED**.

SO ORDERED

A

Russell D. Pulver
ADMINISTRATIVE LAW JUDGE

San Francisco, California

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).