



Issue Date: 09 January 2012

In the Matter of:

Case No.: 2011-LCA-00051

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

PROCESSFLOW, INC.,
Respondent.

ORDER GRANTING SUMMARY DECISION

This matter arises under the Immigration and Nationality Act (“INA”), 8 U.S.C. §1101 *et seq.* as amended by the American Competitiveness and Workforce Improvement Act of 1998, Pub. L. 105-277 (Oct. 21, 1998). Specifically, it involves 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 November 8, 2010, Rajani Abburu filed a complaint against respondent ProcessFlow, Inc., alleging that Respondent had failed to pay required wages under the H-1B program. The Administrator of the Wage and Hour Division (“Administrator”) conducted an investigation, and on June 13, 2011 issued a Determination that Respondent had 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 post notices of filing of Labor Condition Applications, in violation of 20 C.F.R. § 655.734;
3. Failing to make available for public examination the LCA and necessary documents at the employer’s principal place of business or worksite, in violation of 20 C.F.R. § 655.760(a);
4. Failing to maintain documentation, in violation of 20 C.F.R. §§ 655.731(b), 655.738(e), 655.739(i), and 655.760(c);
5. Failing to cooperate in the investigation as required, in violation of 20 C.F.R. § 655.800(c).

The Administrator ordered Respondent to pay back wages in the amount of \$96,351.50 to Abburu, ordered Respondent to comply with the pertinent regulations in the future, and assessed civil money penalties for violations numbered 3-5 above in the amount of \$1,350.00. No penalties were assessed for the violations numbered 1 and 2 above.

On June 22, 2011, Respondent timely requested a hearing on the matter, disputing that it owed back wages or that it violated any of the cited regulations. Respondent asserted that it never entered into an employment relationship with Abburu, that it provided the Administrator with all requested documents, and that it fully cooperated in the investigation.

On November 22, 2011, the Administrator filed a motion for summary decision, supported by declarations and documentary evidence. In light of Respondent's status as an unrepresented party, I issued an order on November 30, 2011, extending the time for response, and explaining the procedures for opposing the Administrator's motion and the consequences of failing to do so. Respondent has filed no opposition to the Administrator's motion or response to my order of November 30.

A. Undisputed Material Facts

Facts Established by Failure to Respond to Requests for Admission

The following facts are established pursuant to Rule 18.20(b) of the Rules of Practice and Procedure Before the Office of Administrative Law Judges, 29 C.F.R. § 18.20(b), by Respondent's failure to respond to the Administrator's Requests for Admission:

1. Respondent is a Washington corporation with an Illinois address of 800 W. 5th Avenue, Suite 1A, Naperville, IL 60563.
2. Respondent incorporated on May 15, 2003.
3. Respondent employed persons as H-1B non-immigrants.
4. Respondent's president is Shanu Sinha, and its Vice President is Rajesh Narayan
5. Respondent identifies itself as a global software services provider.
6. Respondent voluntarily filed LCA No. 1-08269-4500829 with the Employment and Training Administration (ETA), United States Department of Labor, in order to employ one H-1B non-immigrant worker in temporary employment in the United States;
7. The document attached as Exhibit A to the Administrator's Request for Admissions is a true, correct, and authentic copy of LCA No. 1-08269-4500829 filed by Respondent, consisting of five pages numbered Process 1 to Process 5.
8. The period of employment listed in *Part D, Period of Employment and Occupation Information*, is 09/29/08 to 09/28/11.
9. The work location specified in *Part E, Information relating to Work Location to the H-1B or H1-B1 Nonimmigrants*, is Naperville, IL with a prevailing wage of \$55,058.00.
10. In *Part F, Employer Labor Condition Statements*, Respondent checked "Yes" to the statement: "I have read and agree to the Employer Labor Condition Statements 1, 2, 3, and 4 as set forth in Section E of the Labor Condition Application Cover Pages." Part F summarizes those four conditions, which includes *Condition 4, Notice*, which states in pertinent part: "Notice to union or to workers at the place of employment..."

11. In *Part F-1, Additional Employer Labor Condition Statements – H-1B Employers Only*, Respondent checked that it was H-1B dependent and/or a willful violator BUT will use this application ONLY to support H-1B petitions for exempt nonimmigrants.
12. In *Part F-1, Additional Employer Labor Condition Statements – H-1B Employers Only*, Respondent did not check “Yes” or “No” to the statement: “I have read and agree to Additional Labor Condition Statements 2A, B, and C. Those three additional statements are:
 - a. Displacement: Non-displacement of the U.S. workers in employer’s work force;
 - b. Secondary Displacement: Non-displacement of U.S. workers in another employer’s work force; and
 - c. Recruitment and Hiring: Recruitment of U.S. workers and hiring of U.S. worker applicant(s) who are equally or better qualified than the H-1B nonimmigrant(s).
13. In *Part G, Public Disclosure Information*, Respondent checked that it would keep public disclosure information at its principal place of business.
14. Rajesh Narayan, Vice President for Respondent, is listed on the LCA as the hiring/designated official on behalf of the employer in *Section H, Declaration of Employer*, which states in pertinent part:

By signing this form, I, on behalf of the employer, attest that the information and labor condition statements provided are true and accurate; that I have read the sections E and F of the cover pages (Form ETA 9035CP), and that I agree to comply with the Labor Condition Statements as set forth in the cover pages and with the Department of Labor regulations (20 C.F.R. part 655, Subparts H and I).

15. The cover pages mentioned in the previous item state in providing instructions for completing *Section H, Declaration of Employer*: “failure to meet a condition of the application or misrepresentation of a material fact may result in civil money penalties, debarment, or other appropriate relief.” See *Exhibit B, Form ETA 9035CP, Labor Condition Application Cover Pages*, p. B-8 attached to the Administrator’s Request for Admissions.
16. ETA certified the LCA on September 29, 2008 and assigned ETA Case Number 1-08269-4500829.
17. Rajani K. Abburu was the H-1B nonimmigrant worker Respondent employed with this LCA.
18. Respondent failed to pay the wages as required by 20 C.F.R. § 655.731 regarding the employment of its H-1B non-immigrant worker Rajani K. Abburu under the subject LCA during the period April 18, 2009 to February 5, 2011 and owes \$96,351.50 in required wages.
19. Attached to the Administrator’s Request for Admissions as part of *Exhibit A* is a true, correct, and authentic copy of Form I-129 Petition for a Non-Immigrant Worker filed by Respondent consisting of four pages numbered Process 6 to Process 9 for its H-1B nonimmigrant employee Rajani K. Abburu.

20. Attached to the Administrator's Request for Admissions as part of *Exhibit A* is a true, correct, and authentic copy of Form I-129 Petition for a Non-Immigrant Worker, Supplement H filed by Respondent consisting of one page numbered Process 10 for its H-1B nonimmigrant employee Rajani K. Abburu signed by Rajesh Narayan.
21. Attached to the Administrator's Request for Admissions as part of *Exhibit A* is a true, correct, and authentic copy of Form I-129 Petition for a Non-Immigrant Worker, H-1B Data Collection and Filing Fee exemption Supplement filed by Respondent consisting of two pages numbered Process 11 to Process 12 for its H-1B nonimmigrant employee Rajani K. Abburu signed by Rajesh Narayan.
22. Attached to the Administrator's Request for Admissions as part of *Exhibit A* is a true, correct, and authentic copy of Form I-797A Notice of Action consisting of one page numbered Process 13 issued by USCIS to Respondent for its H-1B nonimmigrant employee Rajani K. Abburu with a validity date of 12/31/2008 to 09/28/2011.
23. Respondent, during the period April 2009 to July 2010, rented a facility located at 1517 W. Jefferson, Apt. 302, Naperville, Illinois.
24. During the period April 2009 to July 2010, H-1B nonimmigrant Rajani K. Abburu lived in the facility Respondent rented that was located at 1517 W. Jefferson, Apt. 302, Naperville, Illinois.
25. During the period April 2009 through February 2011 Respondent did not notify USCIS requesting that USCIS terminate the H-1B Visa of its H-1B nonimmigrant employee Rajani K. Abburu.
26. At no time during the period April 2009 through February 2011 did Process pay for the reasonable cost of H-1B nonimmigrant employee Rajani K. Abburu's return transportation to his homeland.
27. Attached to the Administrator's Request for Admissions as part of *Exhibit A* is a true, correct, and authentic copy of timesheets consisting of four pages numbered Process 14 to Process 17 covering the period February 12, 2010 through March 5, 2010 for project work performed for Respondent by H-1B nonimmigrant Rajani K. Abburu for a client identified as Buckeye Technologies.
28. Attached to the Administrator's Request for Admissions as part of *Exhibit A* is a true, correct, and authentic copy of timesheets consisting of three pages numbered Process 18 to Process 20 covering the period August 15, 2010 through September 15, 2010 for work performed by H-1B nonimmigrant Rajani K. Abburu for a project identified as "MWV (Midwestvaco) BPC Project."
29. On or about July 12, 2010, Rajesh Narayan deposited into a Bank of America checking account of H-1B nonimmigrant Rajani K. Abburu the amount of \$1,500.00.
30. On or about August 9, 2010, Rajesh Narayan deposited into a Bank of America checking account of H-1B nonimmigrant Rajani K. Abburu the amount of \$1,000.00 in two separate \$500.00 deposit increments.
31. On or about August 16, 2010, Rajesh Narayan deposited into a Bank of America checking account of H-1B nonimmigrant Rajani K. Abburu the amount of \$500.00.
32. On or about August 30, 2010, Rajesh Narayan deposited into a Bank of America checking account of H-1b nonimmigrant Rajani K. Abburu the amount of \$500.00.
33. On or about October 7, 2010, Rajesh Narayan deposited into a Bank of America checking account of H-1B nonimmigrant Rajani K. Abburu the amount of \$500.00.

34. On or about October 18, 2010, Rajesh Narayan deposited into a Bank of America checking account of H-1B nonimmigrant Rajani K. Abburu the amount of \$4,000.00.
35. The pages bearing Bates stamp numbers Process 1-20, attached to Exhibit A to the Administrator's Request for Admissions, are records that Respondent made at or close to the time of the acts and events appearing on them.
36. It is or was the regular practice of Respondent to make and/or maintain such records as Exhibit A, Bates stamp numbers Process 1-20.
37. Exhibit A, Bates stamp numbers Process 1-20 are or were records kept in the course of a regularly conducted business activity of Respondent.
38. Respondent failed to post notice of the LCA filings for ten days in two conspicuous locations at each place of employment where it placed its H-1B nonimmigrant employees during the period April 2009 through February 2011.
39. Respondent failed to have available for the Administrator's representative the documents required to be made available for public examination as required by 20 C.F.R. § 655.760(a).
40. Respondent failed to cooperate with the Administrator's investigation commenced under the INA, 8 U.S.C. § 1101(a)(15)(H)(i)(B) and the regulations at 20 C.F.R. § 655, Subparts H and I as required in violation of 20 C.F.R. § 655.800(c).
41. Respondent failed to maintain copies of required documentation regarding the wage rate, required documentation regarding the actual wage, required documentation regarding the prevailing wage, required documentation regarding benefits and benefit plans, and documents reflecting that Respondent satisfied the union/employee notification requirements.

Facts Established By Other Evidence

42. Abburu started working for Respondent beginning in the week of April 19, 2009. [Declaration of Rajani Kenneth Abburu, Exhibit 4 to Administrator's Motion for Summary Decision ("Abburu Declaration"), ¶ 8.]
43. Abburu worked for Respondent during the period from April 19, 2009 to January 31, 2011 [Abburu Declaration, ¶ 13.]
44. During the period that he worked for Respondent, Abburu did not receive a paycheck, pay stubs, or W-2 forms or any kind of health insurance. [Declaration of Regional Enforcement Coordinator Annie Robson, Exhibit 3 to Administrator's Motion for Summary Decision ("Robson Declaration"), ¶ 4p.]
45. Respondent did not have any payroll records, W-2 forms or any other kind of records showing payments made to Abburu when asked. [Robson Declaration, ¶ 4q.]
46. In addition to the \$8,000.00 Abburu received as described in Undisputed Material Facts 29-34, he received \$1,500.00 from Narayan through a friend. [Abburu Declaration, ¶ 15.]
47. When Abburu asked Narayan about the payments deposited into his bank account, Narayan told Abburu that no taxes have to be paid if payment is accomplished by a transfer. [Abburu Declaration, ¶ 15.]
48. Abburu was not paid any wages during the period from May 31, 2009 to January 31, 2011. [Robson declaration, Attachment 1.]

B. Conclusions of Law

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*.

Failure to Pay Required Wages

The employer of an H-1B nonimmigrant worker must pay the worker "at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time." 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731. Based on the undisputed material facts, I find and conclude that Respondent failed to pay Rajani K. Abburu the required wages. [Undisputed facts number 7, 14, 17-19, 42-44, 48; Labor Condition Application and Forms I-129 attached to Prosecuting Party's Request for Admissions.] The total amount of unpaid wages is \$96,351.50. [Undisputed fact number 18; Robson declaration, Attachment 1.] By failing to pay the required wages, Respondent violated the statute and regulation cited in this paragraph.

Failure to Provide Notice of Filing

An H-1b employer must provide notice of filing a labor condition application under 20 C.F.R. § 655.734. The notice must be posted in conspicuous locations at the place of employment for at least 10 days. 8 U.S.C. § 1182(n)(1)(C)(ii). The notices must be filed at the customer jobsites or worksites where Respondents physically place the H-1B workers to perform work. *U.S. Dept. of Labor v. Analytical Technologies, Inc.*, Case No. 94-LCA-012 (ALJ Jan. 31, 1995). Respondent failed to post notices of its LCA filings at all locations where its H-1B workers performed work. [Undisputed fact number 38; Robson declaration, ¶ 4(t).] By failing to post notices of LCA filings, Respondent violated the statute and regulation cited in this paragraph.

Failure to Make Available Required Records

Under the INA, an employer is required to make a copy of its LCA application, along with supporting documents, available for public examination at the employer's principal place of business within one working day after the LCA is filed. 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.760(a). Respondent failed to make the required documents available for public examination at its principal place of business. [Undisputed fact number 39.] By failing to do so, Respondent violated the statute and regulation cited in this paragraph.

Failure to Maintain Required Records

Under the INA, an H-1B employer is required to maintain and retain copies of certain records, including those that document the applicable wage rate, the actual wage, the prevailing wage, benefits and benefit plans, and those that demonstrate that the employer satisfied the union/employee notification requirements. 20 C.F.R. §§ 655.731(b), 655.738(e), 655.739(i), 655.760(c). Respondent failed to maintain the records required to be maintained by the regulations. [Undisputed fact number 41.] By failing to do so, Respondent violated the regulations cited in this paragraph.

Failure to Cooperate in Investigation

An H-1B employer is required to cooperate in administrative and enforcement proceedings, and must make available to the Administrator all records and other information that the Administrator deems appropriate to copy, transcribe, question, or inspect. 20 C.F.R. § 655.800(c). Respondent failed to provide the required records available to the Administrator during the Administrator's investigation in this matter. [Undisputed fact numbers 39 and 40; Robson declaration ¶ 4(w).] By failing to do so, Respondent violated the regulation cited in this paragraph.

C. Penalties

The Administrator assessed the following penalties on Respondent:

- *Failure to Pay Required Wages:* None.
- *Failure to Provide Notices of Filing:* None.
- *Failure to Make Documents Available for Public Examination:* \$450.00.
- *Failure to Maintain Required Documentation:* \$450.00.
- *Failure to Cooperate in Investigation:* \$450.00

Under 20 C.F.R. § 655.840(b), the administrative law judge may “affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.” Each of the violations in this case carries a maximum of \$1,000.00. 8 U.S.C. § 1182(n)(2)C); 20 C.F.R. § 655.810(b). In assessing penalties, the type of violation and other relevant factors must be considered, including but not limited to:

- (1) Previous history of violation, or violations, by the employer under the INA and this subpart I or subpart H of [20 C.F.R. Part 655];
- (2) The number of workers affected by the violation or violations;
- (3) The gravity of the violation or violations;
- (4) Efforts made by the employer in good faith to comply with the provisions of 8 U.S.C. 1182(n) or (t) and this subparts H and I of this part;
- (5) The employer's explanation of the violation or violations;
- (6) The employer's commitment to future compliance; and
- (7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

20 C.F.R. § 655.810(c).

Of the factors listed in the regulation, only numbers (1) and (2) favor the Respondent in this case. The record shows no prior history of violations, and Abburu is the only nonimmigrant worker affected by the violations. On the other hand, the Respondent's failure to pay the required wages is a grave violation, as it deprived the nonimmigrant worker of almost \$100,000 in earnings. Additionally, Respondent has made no showing of good faith efforts to comply with any of the regulations, has not given any explanation of the violations, and has made no commitment to future compliance. As a consequence of its failure to pay the required wages, Respondent has enriched itself by almost \$100,000, while also receiving the benefit of Abburu's work on its behalf. In reducing the penalty from a maximum possible \$5,000 to \$1,350, the Administrator showed Respondent unwarranted mercy. I find and conclude that Respondent's cavalier attitude toward both its responsibilities under the INA and the proceedings before this tribunal warrant an increase in the amount of civil penalties proposed by the Administrator. Accordingly, the following penalties will be assessed:

- Failure to Pay Required Wages: \$500.00.
- Failure to Provide Notices of Filing: \$500.00.
- Failure to Make Documents Available for Public Examination: \$1,000.00.
- Failure to Maintain Required Documentation: \$1,000.00.
- Failure to Cooperate in Investigation: \$1,000.00

The total amount of civil penalties assessed is \$4,000.00.

Respondent also owes pre-judgment and post-judgment interest on all the amounts due. *Mao v. Nasser Engr'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.

ORDER

For the reasons set forth above, IT IS ORDERED:

1. Respondent shall pay \$96,351.50 plus pre-judgment and post-judgment interest in accordance with 26 U.S.C. § 6621, less proper withholding, to the Administrator for further distribution to Rajani K. Abburu;
2. Respondent shall pay to the Administrator the amount of \$4,000.00 in civil money penalties;
3. The Administrator of the Wage and Hour Division, DOL, must make any calculations necessary and appropriate to effectuate this Decision and Order.
4. Respondent must pay the above amounts to the Wage and Hour Division, U.S. Department of Labor.
5. Respondent is ordered to comply with 20 C.F.R. §§ 655.731, 655.734, 655.738, 655.739, 655.760, and 655.800 in the future.

SO ORDERED.

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PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge