U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 28 February 2013

Case No.: 2012-LCA-00005

In the Matter of:

ASHUTOSH KUMAR,

Prosecuting Party,

v.

SAMUHA, INC.,

Respondent.

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act H-1B visa program, 8 U.S.C. § 1101 (a)(15)(H)(i)(b) ("Act") and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I. On April 6, 2009, Ashutosh Kumar filed an ESA Form WH-4 alleging that Employer had failed to pay him the higher of the prevailing or actual wage, that Employer had failed to pay him for time off due to a decision by the employer, and that Employer failed to provide him with fringe benefits equal to the benefits received by U.S. workers. The Administrator, Wage and Hour Division (Administrator) investigated Employer and concluded, in its Determination Letter dated October 5, 2011, that Employer had failed to comply with the LCA posting requirements and had failed to obtain LCAs for all areas of intended employment. Mr. Kumar appealed this decision. The Determination letter did not specifically address Mr. Kumar's allegations regarding his wages or medical bills.

Statutory Framework

The H-1B visa program permits employers to temporarily employ non-immigrants to fill specialized jobs in the United States. The Act requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage. Under the Act, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must receive permission from the U.S. Department of Labor (DOL) before the alien may obtain an H-1B visa. 8 U.S.C. § 1184(i)(1). To receive permission from DOL, the Act requires an employer seeking permission to employ an H-1B worker to submit a Labor Condition Application (LCA) to the DOL. *See* 8 U.S.C. § 1182(n)(1).

The regulations specify how the H-1B worker must be paid. Under 20 C.F.R. § 655.731(c)(1), an employer must pay wages to the H-1B worker "cash in hand, free and clear, when due." The regulations further specify that H-1B workers must be paid no less often than monthly. 20 C.F.R. § 655.731(c)(4). In terms of compensable hours, the regulations require an employer to pay the H-1B worker for the number of hours listed on the LCA, even if the H-1B worker is non-productive.

> If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer . . . the employer is required to pay the salaried employee the full pro-rata amount due . . . at the required wage for the occupation listed on the LCA. If the employer's LCA carries a designation of "part-time employment," the employer is required to pay the nonproductive employee for at least the number of hours indicated on the I-129 petition filed by the employer with the DHS and incorporated by reference on the LCA . . .

20 C.F.R. § 655.731(c)(7)(i). However, if the H-1B worker voluntarily becomes non-productive, then the employer is not required to pay wages. The regulations continue:

> If an 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 . . . then the employer shall not be obligated to pay the required wage rate during that period . . . Payment need not be made if there has been a *bona fide* termination of the employment relationship. DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled [citation omitted] and require the employer to provide the employee with payment for transportation home under certain circumstances.

20 C.F.R. § 655.731(c)(7)(ii). The Administrator defines the standard for payment during nonproductive periods stating that the issue is whether or not the H-1B worker is "ready, willing, and able" to work. If the worker is not "ready, willing, and able" to work, then wages are not due for non-productive periods.

In order for there to be a "bona fide termination of the employment relationship" under the Act there must be (1) notice to the employee that the employment relationship has ended; (2) notice to the USCIS that the employment relationship has ended; (3) revocation of the LCA validity period during which the non-immigrant H-1B worker can remain in the United States to work for the specific employer; and (4) payment for transportation of the non-immigrant H-1B worker back to his/her last place of foreign residence "if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to Section 214(c)(5) of the Act" but payment of transportation of the alien is not required "if the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition … [and thereby] has not been dismissed." [§214(E)(5)(A) of the Act; 8 CFR §214.2(h)(4)(iii)(E)] See also – *Pegasus Consulting Group v. Administrative Review Board, U.S. Department of Labor*, 2008 WL 920072 (D. NJ, Mar. 31, 2008), *unpub*; *Amtel Group of Florida, Inc. v. Rungvichit Yongmahapakorn*, ARB Case No. 04-087 (Sep. 29, 2006); *Mao v. George*

Nasser and Nasser Engineering & Computing Services, ARB Case No. 06-121 (Nov. 26, 2008); *Administrator v. Avenue Dental Care, et. al.*, ARB Case No. 07-101 (Jan. 7, 2010); *Rajan v. International Business Solutions, Ltd.*, ARB Case No. 03-104 (Aug. 31, 2004); 8 CFR §§ 214.2(h)(11)(i)(A), 214.2(h)(11)(ii), and 214.2(h)(4)(iii)(E).

If the Administrator finds that an employer has violated its obligation to pay wages to the H-1B worker, the Administrator may conduct an investigation with respect to suspected violations. 20 C.F.R. § 655.50. The Administrator may then issue a Determination Letter citing violations, requiring payment of wages, and imposing fines. 20 C.F.R. § 655.70. If a party disagrees with the Determination Letter, that party may appeal to the DOL, Office of Administrative Law Judges. In this proceeding, Mr. Kumar is the Prosecuting Party and Employer is the Respondent. The Prosecuting Party bears the burden of proof with regard to each alleged violation.

Issues

1) Whether Mr. Kumar is entitled to back wages;

2) Whether Mr. Kumar is entitled to reimbursement for medical expenses;

3) Whether Mr. Kumar is entitled to reimbursement for travel expenses back to India.

Factual Background

Mr. Kumar's initial H-1B visa was approved in 2005 and the petition for an extension of his H-1B visa was approved in 2008. Mr. Kumar arrived in the United States on September 12, 2006 and entered into employment with Employer on that day. His only employment since that date within the United States has been with Employer. Mr. Kumar's LCA states a salary of $60,000, though Mr. Kumar states that his salary was in fact $70,000. From September of 2006 until December of 2008, Mr. Kumar was employed at Employers worksite and at the worksites of the New York Mercantile Exchange, Citi Bank, and the Chicago Mercantile Exchange. Mr. Kumar did not receive his salary payments in December 2008 or thereafter. In May of 2009, Mr. Kumar was informed via a telephone call that his H-1B had been cancelled and his employment was terminated. Mr. Kumar flew back to India at his own expense on May 29, 2009. Mr. Kumar did not, however, provide the Court with the cost of his flight back to India.

Mr. Kumar has alleged that he was not paid for any work from December, 2008 until May, 2009, although Mr. Kumar admits that he was in India for a voluntary vacation from April 24, 2008 until May 15, 2008. Mr. Kumar has provided copies of emails from Gautham Thangaraju, Mr. Kumar's supervisor, that appear to be offering Mr. Kumar's services to potential clients. Mr. Kumar states that he was available to work for Employer and that his resume was marketed to clients during the times he was not being paid. Mr. Kumar also attached his apartment lease indicating that the apartment co-signor was Gautham Thangaraju's brother and eviction paperwork demonstrating that Mr. Kumar was eventually sued for failure to make payments and ordered to vacate the property. Mr. Kumar's bank records demonstrate that the

only deposits to his checking account were transfers from his savings account. There were no new deposits in Mr. Kumar's savings account after December, 2008.

Mr. Kumar further alleges that he received medical care in October of 2008 at the Rush Medical Center, an in-network facility for Mr. Kumar's employer-provided medical insurance carrier. Mr. Kumar was not aware that Employer had changed insurance carriers and that his expenses at Rush Medical Center would not be covered by the new insurance plan. Mr. Kumar paid the $2,252.00 medical bills out of pocket and forwarded copies to Employer. Employer stated that it would reimburse Mr. Kumar for these expenses, but has not done so.

Employer has failed to respond to any of Mr. Kumar's allegations or to provide documentation as requested in Pre-Hearing Order #2.

Discussion

Here, the intended period of employment began in September of 2006 and was further extended in 2008. Mr. Kumar entered the United States on September 12, 2006 and immediately began working for Employer. Under 20 CFR §655.731(c)(6), an H-1B worker "enters into employment" when he first makes himself available for work or otherwise comes under the control of the employer; but, even if he has not "entered into employment", the employer must pay the required wage beginning 30 days after the date he is in the U.S. pursuant to the approved I-129 visa petition. Regulations at 20 CFR §655.731(c)(7)(i) excuse the payment of required wages if the non-immigrant's nonproductive periods away from employment are at the employee's voluntary request and convenience.

Here, Mr. Kumar has alleged that he was willing and able to work, but that Employer did not provide him with any work or a salary. Mr. Kumar has supported this contention with banking records, emails from Employer offering his services, and the lease including Mr. Thangaraju as cosigner. These records indicate that Mr. Kumar was in fact available to work during the relevant period, less the three weeks of Mr. Kumar's vacation. Mr. Kumar has presented evidence that he was not paid from December of 2008 through May 2009 and Employer has not presented any rebuttal. Accordingly, I find that Mr. Kumar is owed back wages for the period of December of 2008 through May 29, 2009, when Mr. Kumar's visa was terminated, less three weeks of vacation time and so award $29,615.30[1] in back wages.

One of the requirements of a bone fide termination of employment of an H-1B non-immigrant employee is for payment for the transportation of the non-immigrant H-1B worker back to his/her last place of foreign residence "if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to Section 214(c)(5) of the Act" but payment of transportation of the alien is not required "if the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition … [and thereby] has not been dismissed." §214(E)(5)(A) of the Act; 8 CFR §214.2(h)(4)(iii)(E) In the case of Mr. Kumar, employment was cut short prior to the expiration of the validity period. The

[1] December 1, 2008 to May 29, 2009 is approximately 25 weeks. Mr. Kumar cannot be compensated for the 3 weeks of vacation when he voluntarily made himself unavailable. Mr. Kumar was paid $70,000 per year, or $1,346.15 per week. Accordingly, Mr. Kumar is entitled to $29,615.30 in back wages.

evidence of record fails to establish that Mr. Kumar voluntarily terminated his employment prior to May 29, 2009. Accordingly, Employer is not excused from the obligation to pay for the return transportation to India. Although Mr. Kumar did not provide the cost of his flight to India, similar cases establish that a coach fare flight to India during that time was established that the cost of the return transportation was approximately $1,000. See e.g. Administrator, Wage and Hour Division of the United States Department of Labor v. Abacuss Software Technologies, 2012-LCA-00015 (July 24, 2012). In view of the foregoing, I find that Employer must reimburse Mr. Kumar $1,000.00 for his return transportation expenses.

Mr. Kumar further alleges that Employer failed to reimburse him $2,252.00 for medical expenses incurred due to Employers change in insurance coverage. In addition to salary, an Employer of an H-1B worker must provide the same fringe benefits to the H-1B worker as are provided to U.S. workers. 20 CFR §655.371. Here, it appears that Employer failed to cover Mr. Kumar's medical expenses through its health insurance. Employer has not submitted any rebuttal evidence. Accordingly, I award Mr. Kumar $2,252.00 in out of pocket medical expense reimbursement.

The purpose of applying interest to pre-judgment and post-judgment monetary awards is to make the recipient whole again. The rationale is based on the perception that the party responsible for payment of accrued monies had the use of those funds during the interim period and that the recipient had been denied use of those funds during the period, such that one party gained an investment opportunity and the other was denied the investment opportunity and had to make up monetary shortfalls during the interim period by use of other personal funds that could have been managed in other ways beneficial to the individual.

The INA does not specifically provide for the award of pre-judgment interest or post-judgment interest on back pay by statute or regulation and the Administrator has failed to provide specific Department of Labor policy guidance on this issue. Related Department of Labor programs involving employer discrimination and payment of back pay in enforcement of the discrimination provisions of Federal contracts is addressed by Federal regulations at 41 CFR §60-1.26(a)(2), 41 CFR §60-250.65(a)(1), 41 CFR §60-300.65(a)(1) and 41 CFR §60-741.65(a)(1) which provide –

> OFCCP may seek back pay and other make whole relief for [aggrieved individuals / victims of discrimination] identified during a complaint investigation or compliance investigation. … Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the under-payment of taxes.

OFCCP's Federal Contract Compliance Manual, Chapter 7, "Identification & Remedy of Employment Discrimination," sets forth Departmental policy related to remedies to "make whole" the identified aggrieved individuals. "Make whole relief means simply that the [aggrieved individual / victim of discrimination] is restored to the position, both economically and in terms of status, that he/she would have occupied had the [underlying event] never taken place. … This would normally include things such as back pay with interest … and any other employment benefits denied the victim. In construing what constitutes make whole relief,

OFCCP has followed Title VII principals." Ibid, at 7F03. "The purpose of interest on back pay awards is to compensate the discriminatee for the loss of use of his/her money. OFCCP's policy is that interest on back pay be calculated at the same percentage rate as the Internal Revenue Service's underpayment formula. Simple interest is to be calculated from the first date that is covered by the back pay award. … The IRS may adjust its rate quarterly. The interest rate applicable to various periods are set out in Appendix A to this Chapter." Ibid, at 7F07.e.

Appendix A explains that interest on back pay is calculated separately for each quarter that back pay is owed and the resulting quarterly interest is added together over the period covered to determine the amount of pre-judgment interest owed. The Appendix indicates that the quarterly "average back pay" amount to which the appropriate quarterly interest is applied is composed of the total back pay owed at the beginning of the quarter plus one-half of back pay due for the quarter itself. It provides that partial quarters are calculated the same way as full quarters. The total money due is the sum of the back pay owed for the period and the sum of the quarterly interests computed individually.

This approach of applying quarterly compound interest based on the underpayment rate set forth under 26 USC §6621(a)(2) to back wages is followed by the Administrative Review Board in cases under the INA. See *Wirth v. University of Miami, Miller School of Medicine*, ARB Case No. 2010-090 / 093 (Dec. 20, 2011)6 and the cases cited therein; *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012 (ARB May 17, 2000)7, *rev'd on other grounds sub. nom., Doyle v. U.S. Secretary of Labor*, 285 F.3d 243 (3rd Cir. 2002), *cert denied*, 537 US 1066 (2003). [The case was reversed on the finding that the complainant had not engaged in protected activity and that the respondent's actions were not related to alleged protected activity. Additionally, the complainant's petition on the issue of damage award was dismissed as moot. The computation of pre-judgment and post-judgment interest became moot on the finding that the complainant had failed to establish a violation of the Energy Reorganization Act of 1974.]

Under the Administrative Review Board's decision in *Doyle*, computation of compound interest requires applying the average monthly applicable federal rate (AFR) of interest for each quarter set forth under 26 USC §6621(b)(3) plus 3%, to the accrued principal and interest owed each separate quarter to the Complainant. The average monthly AFR is determined by averaging the monthly Federal short-term interest rate published by the Internal Revenue Service in their monthly Revenue Rulings.

It is specifically noted that 26 USC §6621 currently provides –

(a)(1) Overpayment rate: The overpayment rate established under this section shall be the sum of -

(A) the Federal short-term rate determined under subparagraph (b), plus

(B) 3 percentage points (2 percentage points in the case of a corporation). …

(a)(2) Underpayment rate The underpayment rate established under this section shall be the sum of -

(A) the Federal short-term rate determined under subparagraph (b), plus

(B) 3 percentage points. ….

> (b)(3) Federal short-term rate The Federal short-term rate for any month shall be the Federal short-term rate determined during such month by the Secretary in accordance with section 1274(d). Any such rate shall be rounded to the next nearest full percent. …

In this case, the computation of compound interest requires applying the average monthly applicable federal rate (AFR) of interest for each quarter set forth under 26 USC §6621(b)(3) plus 3%, to the accrued principal and interest owed each separate quarter to the Complainant. The average monthly AFR is determined by averaging the monthly Federal short-term interest rate published by the Internal Revenue Service in their monthly Revenue Rulings.[2] Judicial notice is taken of monthly Federal short-term interest rates published for the period from October 1, 2008 through February 1, 2013 as set forth in the Internal Revenue Service's monthly Revenue Rulings. Attachment "A" sets forth the computation of pre-judgment interest applicable for the back wages owed Mr. Kumar. The total in back wages, benefits, and travel expenses plus prejudgment interest owed Mr. Kumar through the 4th quarter ending December 2012 is $69,133.78. Of that amount, $32,867.30 is back wages and benefits. Accordingly, the prejudgment interest owed Mr. Kumar is $36,266.48.

Conclusion and Order

Based on the foregoing, I have determined that Employer failed to pay Mr. Kumar's wages during his employment, failed to reimburse Mr. Kumar for travel back to India after terminating his employment prior to the expiration of the validity period, and failed to reimburse Mr. Kumar for medical expenses due to incomplete insurance coverage. Additionally, Mr. Kumar is entitled to pre-judgment interest. Accordingly, Employer is **ORDERED** to pay Mr. Kumar a total of $69,133.78.

Digitally signed by Daniel Sarno
DN: CN=Daniel Sarno,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR/JRS/jcb
Newport News, Virginia

[2] www.irs.gov/app/picklist/list/federalRates.html

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* 20 C.F.R. § 655.840(a).

ATTACHMENT "A"

Computation of Compound Quarterly Interest
Of Pre-Judgment Interest for Accrued Wages

Year	Month	Month Federal Short-term % Interest Rate (AFR)	Quarter AFR Average % Interest Rate	Rounded Quarter AFR Average % Interest Rate PLUS 3%	Monthly Wage Payable ($$ Owed +) ($$ Paid -)	Total Quarterly Wages Payable ($$ Owed +) ($$ Paid -)	One-half of Quarterly Wage Payable	Prior Quarter Acrrued Principal & Interest Owed	Quarterly Interest Owed	Principal & Interest Owed at End of Quarter Indicated
2008	Jan	3.14			$0.00					
	Feb	3.07			$0.00					
	Mar	2.23			$0.00					
			2.81	6%		$0.00	$0.00	$0.00	$0.00	$0.00
	Apr	1.83			$0.00					
	May	1.62			$0.00					
	Jun	2.06			$0.00					
			1.84	5%		$0.00	$0.00	$0.00	$0.00	$0.00
	Jul	2.4			$0.00					
	Aug	2.51			$0.00					
	Sep	2.36			$0.00					
			2.42	5%		$0.00	$0.00	$0.00	$0.00	$0.00
	Oct	2.17			$2,252.00					
	Nov	1.61			$0.00					
	Dec	1.36			$5,833.33					
			1.71	5%		$8,085.33	$4,042.67	$0.00	$202.13	$8,287.46
2009	Jan	0.81			$5,833.33					
	Feb	0.6			$5,833.33					
	Mar	0.72			$5,833.33					
			0.71	4%		$17,499.99	$8,750.00	$8,287.46	$681.50	$26,468.95
	Apr	0.83			$4,374.99					
	May	0.76			$3,916.67					

	Jun	0.75			$0.00					
			0.78	4%		$8,291.66	$4,145.83	$26,468.95	$1,224.59	$35,985.20
	Jul	0.82			$0.00					
	Aug	0.83			$0.00					
	Sep	0.84			$0.00					
			0.83	4%		$0.00	$0.00	$35,985.20	$1,439.41	$37,424.61
	Oct	0.75			$0.00					
	Nov	0.71			$0.00					
	Dec	0.69			$0.00					
			0.72	4%		$0.00	$0.00	$37,424.61	$1,496.98	$38,921.60
2010	Jan	0.57			$0.00					
	Feb	0.72			$0.00					
	Mar	0.64			$0.00					
			0.64	4%		$0.00	$0.00	$38,921.60	$1,556.86	$40,478.46
	Apr	0.67			$0.00					
	May	0.79			$0.00					
	Jun	0.74			$0.00					
			0.73	4%		$0.00	$0.00	$40,478.46	$1,619.14	$42,097.60
	Jul	0.61			$0.00					
	Aug	0.53			$0.00					
	Sep	0.46			$0.00					
			0.53	4%		$0.00	$0.00	$42,097.60	$1,683.90	$43,781.50
	Oct	0.41			$0.00					
	Nov	0.35			$0.00					
	Dec	0.32			$0.00					
			0.36	3%		$0.00	$0.00	$43,781.50	$1,313.45	$45,094.95
2011	Jan	0.43			$0.00					
	Feb	0.51			$0.00					
	Mar	0.54			$0.00					
			0.49	3%		$0.00	$0.00	$45,094.95	$1,352.85	$46,447.79
	Apr	0.55			$0.00					
	May	0.56			$0.00					
	Jun	0.46			$0.00					
			0.52	4%		$0.00	$0.00	$46,447.79	$1,857.91	$48,305.71

	Jul	0.37			$0.00					
	Aug	0.32			$0.00					
	Sep	0.26			$0.00					
			0.32	3%		$0.00	$0.00	$48,305.71	$1,449.17	$49,754.88
	Oct	0.16			$0.00					
	Nov	0.19			$0.00					
	Dec	0.2			$0.00					
			0.18	3%		$0.00	$0.00	$49,754.88	$1,492.65	$51,247.52
2012	Jan	0.19			$0.00					
	Feb	0.19			$0.00					
	Mar	0.19			$0.00					
			0.19	3%		$0.00	$0.00	$51,247.52	$1,537.43	$52,784.95
	Apr	0.25			$0.00					
	May	0.28			$0.00					
	Jun	0.23			$0.00					
			0.25	3%		$0.00	$0.00	$52,784.95	$1,583.55	$54,368.50
	Jul	0.24			$0.00					
	Aug	0.25			$0.00					
	Sep	0.21			$0.00					
			0.23	3%			$0.00	$54,368.50	$1,631.05	$55,999.55
	Oct	0.23			$0.00					
	Nov	0.22			$0.00					
	Dec	0.24			$0.00					
			0.23	3%			$0.00	$55,999.55	$1,679.99	$57,679.54
	Jan	0.21			$0.00					
	Feb									
	Mar									
			0.21	3%			$0.00	$57,679.54	$1,730.39	$59,409.93