



Issue Date: 06 June 2018

CASE NO.: 2013-LCA-10

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party

v.

PARSETEK, INC.,
Respondent

DECISION AND ORDER ON REMAND

This matter arises under the Immigration and Nationality Act H-1B visa program,¹ (the Act), and the implementing regulations.² The Act allows employers to hire foreign workers under H-1B visas to work in specialty occupations on a temporary basis. Parsetek, Inc. (“Respondent”) challenges the Determination Letter issued by the Administrator, Wage and Hour Division (“Administrator”) on 19 Feb 13. The Administrator found that Respondent owed two of their H-1B employees, Mr. Abhishek Puppala (“Complainant 1”) and Ms. Sumikutty Maniyanakunnath (“Complainant 2”), back wages totaling \$64,800.80 for failure to pay the required wage rate and failure to comply with subparts H & I of the implementing regulations.

Procedural Background

The issues in this matter were brought to the attention of the Administrator by Complainants 1 and 2 on 6 Jul 10 and 19 Mar 10, respectively, when they both filed with the Department of Labor their allegations that Respondent failed to pay them the requisite H-1B wages.³ The Administrator investigated the allegations and found that Respondent failed to pay the required wage rate for both employees for productive and non-productive time. The findings were issued in a 19 Feb 13 Determination Letter assessing back wages in the amount of \$64,800.80: \$6,108.00 due to Complainant 1 and \$58,692.80 due to Complainant 2. The case was referred to the Office of Administrative Law Judges for hearing and determination and I held a full hearing on 23 Sep 14. Although there were a number of issues for litigation the only one relevant on remand is whether Respondent owed Complainant 2 back wages from between 12 Apr 09 and 11 Mar 10 and whether she was on productive or non-productive status during that period. Following the submission of briefs, I issued my decision and order on 1 Jun 15, ruling, *inter alia* that Complainant 2 was non-productive due to reasons unrelated to her

¹ 8 U.S.C. § 1101(a)(15)(H)(i)(B)

² 20 C.F.R. § 655, Subparts H and I

³ 20 C.F.R. § 655.731; AX-51, 52.

employment and Respondent does not owe Complainant 2 back wages from 12 Apr 09 to 11 Mar 10.⁴

The Administrator appealed that part of my decision to the Administrative Review Board (ARB). The ARB essentially ruled that since Respondent was obliged to continue to pay wages even if it had no work to assign, it carried the burden of proof to show by a preponderance of the evidence that it had work for Complainant 2, but she was in a non-productive status and unavailable to do the work due to conditions unrelated to employment that took her away from her duties at her voluntary request and for her personal convenience. The ARB reasoned that a condition unrelated to employment cannot take an employee away from her duties if she has no duties.

The ARB also noted that Respondent conceded it never actually assigned Complainant 2 any of the computer programming work duties for which she was hired under the H-1B program. It further observed that Respondent could have at any point fired Complainant 2 for frustrating its efforts to assign her work and thereby terminated its obligation to pay her. It reversed the finding that Respondent was obliged to pay Complainant 2's wages for the period from 12 Apr 09 through 11 Mar 10 and remanded the case for the calculation of wages and benefits consistent with its opinion.⁵

Positions of the Parties

On remand, the Administrator argues for a finding that the amount due for the relevant period is \$47,226.40, based on a weekly wage of \$988 and duration of 47 weeks and four days. Respondent did not address the amount at all, but rather revisited its previous arguments as to its liability for that period in general, differentiated this case from the one relied upon by the ARB, and urged another finding of no liability.

⁴ That ruling was based on my finding that Respondent established by a preponderance of the evidence that, although it paid Complainant 2, it did so for the purpose of placing her with a third party customer. Respondent could not simply assign Complainant 2 to a third party, but had to convince the third party customer to accept Complainant 2. That process required Complainant 2 to be available and cooperative. Respondent further proved by a preponderance of the evidence that, during the relevant period, Respondent had identified employment with third parties, but Complainant 2, for personal reasons (wanting to remain in the same location as Complainant 1) intentionally made herself unavailable and frustrated Respondent's ability to place her in those positions. In short, I found that implicit in her duties to perform the technical tasks for which she was granted her immigration status were also her duties to be available to be assigned those tasks. It appears to be the holding of the ARB that in such an instance, the employer has no option but to pay the recalcitrant employee until it goes through the various steps required to fire her.

⁵ The ARB acknowledged the Administrator's position that no relevant case law clearly speaks to circumstances in which the H-1B employee frustrates the process to obtain an assignment and an appeal of this decision would allow the ARB, after considering the briefs of the parties, to clarify its position regarding cases of unavailability and any role the employee might have in the assignment of work. However, in response it simply noted that employers may terminate uncooperative employees.

Discussion

Notwithstanding Respondent's disagreement with it, the ARB's order on remand was clear and I decline Respondent's invitation to enter a contrary ruling. The record is complete should Respondent elect to appeal the ARB's interpretation of the law and regulations. Consistent with the Order of Remand and evidence in the record, I find Respondent owes Complainant 2 \$47,226.40, for unpaid back wages from 12 Apr 09 to 11 Mar 10.

So ORDERED.

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).