



Issue Date: 10 June 2015

Case No.: 2013-LCA-00036

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

OHIO INSTITUTE OF CARDIAC CARE,
Respondent.

ORDER GRANTING ADMINISTRATOR'S MOTION FOR 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.¹ On May 16, 2013, Anuradha Kompella filed a complaint against Respondent, Ohio Institute of Cardiac Care ("OICC"), alleging that Respondent had failed to pay required wages for work undertaken under the H-1B program. The Administrator of the Wage and Hour Division ("Administrator") conducted an investigation, and on August 21, 2013, 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. Requiring payment of a penalty for early cessation of employment, in violation of 20 C.F.R. § 655.731(c)(10)(i);
3. Failing to post notice of filing of the LCA for 10 days in two conspicuous location at each place of employment where the H-1B non-immigrant would be employed, in violation of 20 C.F.R. § 655.734.

The Administrator ordered Respondent to pay back wages in the amount of \$27,588.37 to Anuradha Kompella, by making a check payable to her and sent to the Wage and Hour Division, U. S. Department of Labor at an address provided.

¹ See 8 U.S.C. §1101(a)(15)(H)(i)(b).

No penalties were assessed for the violations numbered 1, 2 or 3 above.

On September 5, 2013, Respondent timely requested a hearing on the matter, disputing that it owed back wages to the H-1B non-immigrant, Dr. Kompella, or that it violated any of the cited regulations. Respondent asserted that, during Dr. Kompella's employment, her duties were reduced, based upon mutually agreed upon written modifications and all monies were paid to Dr. Kompella. Respondent further asserted that Dr. Kompella failed to perform the requirements set forth in the LCA, and that no further wages should be awarded her based upon her alleged breach of her original Employment Agreement with Respondent OICC.

On April 17, 2015, the Administrator filed a motion for summary decision and a motion deeming written requests for admissions to Respondent admitted for failure to respond, supported by declarations and documentary evidence. Respondent, who is represented by counsel, has filed no opposition to either of the Administrator's motions. On June 4, 2015, I issued an Order granting the Administrator's motion deeming written requests for admission to Respondent admitted for failure to respond and continued the hearing set for June 16, 2015.

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 failed to pay the required wages, as required, in violation of 20 C.F.R. § 655.731.
2. Respondent failed to provide notice of the filing of the Labor Condition Application, in violation of 20 C.F.R. § 655.731(c)(10)(i).

Statement of Undisputed Material Facts

The following facts are established by the Administrator per Exhibit A, Statement of Undisputed Material Facts in Support of the Administrator's Motion for Summary Decision, and supported by evidence attached as exhibits to the Memorandum of Law in Support of its Motion:

1. This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1101(A)(15)(H)(i)(b) and U.S.C. § 1182(n)(2001) ("the Act") and the regulations found at 20 C.F.R. Part 655. (Respondent's Memorandum in Support of Motion for Summary Decision, Exhibit A, ¶ 1).
2. Dr. Salimo Dahdah is the President and Cindy Dahdah is the Vice President and CEO of the Ohio Institute of Cardiac Care. (Exhibit A, ¶ 2).
3. Ohio Institute of Cardiac Care filed a Labor Condition Application for the H-1B

Nonimmigrant Visa Program (LCA case number 1-200-10054-017677), executed by Cindy Dahdah, requesting permission to hire a foreign worker for the position of physician in Springfield, Ohio. (Exhibit A, ¶ 3).

4. On LCA case number 1-200-10054-017677, Ohio Institute of Cardiac Care agreed to pay the foreign worker as a salaried employee and identified the prevailing wage for a physician in Springfield, Ohio as \$160,000 per year. (Exhibit A, ¶ 4; Exhibit K; Exhibit D, p.4, Section 3).

5. On March 4, 2010, Cindy Dahdah executed a Form 1-129 Petition requesting an H-1B visa for Anuradha Kompella to fill the physician position described in LCA case number 1-200-10054-017677. The petition was approved. (Exhibit A, ¶ 5; Exhibit M).

6. From July 31, 2009 to August 2012, the H-1B employee, Dr. Kompella, worked as a family practice physician for Ohio Institute of Cardiac Care. (Exhibit A, ¶ 6; Exhibit D).

7. Effective February 8, 2011, Ohio Institute of Cardiac Care and Dr. Kompella amended the employment agreement to accommodate Dr. Kompella's Maternity Leave. The amendment called for a suspension of on-call and rounding assignments at hospitals until the end of Maternity Leave on or around March 11, 2011. As a result of the assignment suspensions, Ohio Institute of Cardiac Care and Dr. Kompella agreed to a \$350.00 weekly salary reduction to offset costs associated her no longer taking calls and making rounds to hospitals where Ohio Institute of Cardiac Care provides services. (Exhibit A, ¶7; Exhibit L, ¶ B).

8. The parties agreed the Employment Agreement Amendment would terminate upon Dr. Kompella's return to work on or around the first week of June, 2011, at which time Dr. Kompella would assume her full work responsibility per the original Employment Agreement. (Exhibit A, ¶8; Exhibit L).

9. On June 6, 2011, Ohio Institute of Cardiac Care and Dr. Kompella agreed to a second amendment of the Employment Agreement to restore on call assignments and rounding at hospitals where Ohio Institute of Cardiac Care provides services and to exempt Dr. Kompella from taking weekend calls. In addition, Ohio Institute of Cardiac Care reduced Dr. Kompella's annual salary from \$160,000 to \$145,000. (Exhibit A, ¶9; Exhibit E).

10. On June 11, 2011, Dr. Kompella returned to work from Maternity Leave. (Exhibit A, ¶10).

11. In August of 2012, Dr. Kompella resigned. (Exhibit A, ¶ 11).

12. On August 27, 2012, Ohio Institute of Cardiac Care, through counsel, notified Dr. Kompella, by letter, that the firm withheld Dr. Kompella's last two payroll checks, in the amounts of \$3,559.15 and \$2,298.47, respectively, in accordance with the early-termination clause of her employment agreement requiring a \$10,000 penalty for early termination and stated that Dr. Kompella remained indebted to the firm for \$4,142.38. (Exhibit A, ¶ 12; Exhibit H).

13. On May 16, 2013, Dr. Kompella, through counsel, filed a complaint with the U.S. Department of Labor, Wage & Hour Division, 200 North High Street, Room 646, Columbus, Ohio 43215, alleging that Ohio Institute of Cardiac Care failed to pay wages for work undertaken while on H-1B visa status. (Exhibit A, ¶13).

14. On June 12, 2013, the Wage & Hour Division contacted Ohio Institute of Cardiac Care, by letter, to schedule an investigation to determine compliance with the H-1B LCA provisions of the INA. (Exhibit A, ¶14).

15. Ohio Institute of Cardiac Care failed to submit a request to change the LCA to reflect a change in salary from \$160,000 to \$145,000 as agreed upon in the amended Employment Agreement. (Exhibit A, ¶15).

16. Beth Phillips-Glacken is an Investigator for the Wage and Hour (W&H) Division of the U. S. Department of Labor, in Columbus, Ohio office. She is responsible for investigating allegations of violations of the H-1B provisions of the INA and has personal knowledge of all matters stated in her Declaration. (Exhibit A, ¶16; Exhibit B, ¶ 1).

17. In the year 2012, the District Director for the W&H Division of the U. S. Department of Labor, assigned Beth Phillips-Glacken to investigate a complaint against the OICC. (Exhibit A, ¶17; Exhibit B, ¶ 2).

18. The investigation found violations of the H-1B provisions of the INA² (Exhibit A, ¶18; Exhibit B, ¶ 3).

19. Beth Phillips-Glacken calculated a total back wage amount of \$27,588.37, as a result of violations alleged in the Administrator's Determination letter. This amount, owed to one H-1B nonimmigrant, Anuradha Kompella, remains outstanding. (Exhibit A, ¶19; Exhibit B, ¶ 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.³ 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."⁴ Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision.⁵ 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.⁶ Thus,

² 8 U.S.C. § 1182(n).

³ 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).

⁴ 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).

⁵ *Anderson*, 477 U.S. at 251-52.

⁶ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587

summary decision should be entered only when no genuine issue of material fact exists that must be litigated.⁷ 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.⁸

Failure to Pay Required Wage

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.”⁹ An employer is required to pay an H-1B nonimmigrant the required wage throughout the period stated in the LCA.¹⁰ The only two exceptions are: (1) when the H-1B employee is unavailable to work for reasons that are unrelated to his employment, such as leave taken at the request of the employee and not subject to payment under the employer’s benefit plan or a benefit statute; and (2) when the employer has effectuated a *bona fide* termination of the employment relationship.¹¹

Based on the undisputed material facts, I find and conclude that Respondent failed to pay Anuradha Kompella, M.D., the required wages. [Undisputed facts number 4, 6-12, 15, 18-19, Labor Condition Application (Exhibit K), and Forms I-129 (Exhibit M), attached to Prosecuting Party’s Memorandum in Support of Motion for Summary Decision.] The total amount of unpaid wages is \$27,588.37. [Undisputed fact number 19; Phillips-Glacken Declaration, Exhibit B.] By failing to pay the required wages, Respondent violated the statute and regulation cited in this paragraph.

Improperly withholding pay as a required penalty for early cessation of employment

Deductions from wages expressly not authorized under the regulations include “a penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.”¹² The INA and its implementing regulations expressly prohibit early termination penalties. Specifically, it is a violation of the INA for an employer who has filed an application under this subsection to require an H-1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. The Administrator has determined that the required payment is a penalty.

Through internal email messages, Respondent memorialized a telephone conversation where it informed the Dr. Kompella that she owed the Respondent firm a \$10,000.00 fee for terminating her employment prior to the end of the employment agreement. In the e-mail,

(1986).

⁷ *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962).

⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex Corp. v. Catrett*, *supra*.

⁹ 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731.

¹⁰ 20 C.F.R. § 655.731(a).

¹¹ 20 C.F.R. § 655.731(c)(7)(ii).

¹² 20 C.F.R. § 655.731(c)(10)(i).

Respondent stated that it withheld the final two paychecks, totaling \$5,857.62, to apply to the early termination penalty and that Dr. Kompella remained indebted to the Respondent firm for the remaining \$4,142.38. [Undisputed facts number 12, 19]. In addition, counsel for Respondent followed up by letter, confirming to Dr. Kompella that the last two paychecks were being applied to the \$10,000 early termination fee and reminded her of her obligation to pay the remaining amount. (Exhibit H). Therefore, I find that Respondent violated 29 C.F.R. § 655.731(c)(10)(i).

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.¹³ The notices must be filed at the customer jobsites or worksites where Respondent physically places the H-1B workers to perform work.¹⁴ Respondent failed to post notices of its LCA filings at all locations where Dr. Kompella performed work. [Prosecuting Party's Request for Admissions to Respondent, Number 2 (deemed admitted by Order dated June 4, 2004)] By failing to post notices of the LCA filing, Respondent violated the statute and regulation cited in this paragraph and I so find.

C. Administrator's Back Wage Calculations are Reasonable.

Based on the findings that Respondent failed to pay the required wage in violation of 20 C.F.R. § 655.731(c)(7)(ii), the Administrator calculated back wages. The total back wages calculated as being owed to Anuradha Kompella, M.D., the H-1B employee, is \$27,588.37 (Phillips-Glacken Declaration, Exhibit B, ¶4).

The Administrator has the authority to order payment of back wages as a remedy for violations of the INA or its implementing regulations.¹⁵ The back wages amount is "the difference between the amount that should have been paid and the amount that actually was paid."¹⁶ The Administrator has "enforcement discretion" in calculating back wages, and can consider the totality of circumstances in fashioning remedies appropriate for the violation.¹⁷ However, back wages cannot be arbitrary or evidence an abuse of discretion.¹⁸

The Administrator's back wage calculations are reasonable and supported by facts and law. The Administrator calculated back wages by subtracting the amount that should have been paid and the amount that actually was paid. (Exhibit J, p. 2).¹⁹ Using the required wage of \$160,000, which is listed on the LCA filed by Respondent (Exhibit K, p.30, the Administrator calculated that Dr. Kompella should have made at least \$6,153.85 on a bi-weekly basis. (Exhibit J, p. 2). The Administrator then added the number of days between June 11, 2011, the date the

¹³ 8 U.S.C. § 1182(n)(1)(C)(ii).

¹⁴ *U.S. Dept. of Labor v. Analytical Technologies, Inc.*, Case No. 94-LCA-012 (ALJ Jan. 31, 1995).

¹⁵ See 8 U.S.C. § 1182(n)(2)(D); 20 C.F.R. §655.810(b) (2012).

¹⁶ 20 C.F.R. § 655.731 (a); *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 2001-LCA-010 – 2001-LCA-025, slip op at 7 (ARB May 31, 2009).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See also 20 C.F.R. § 655.731(a).

employer stopped paying the H-1B employee, and August 24, 2012, the date of the *bona fide* termination. Because the H-1B employee and Respondent agreed to modify the employment agreement to deduct \$350 per week from the H-1B employee's salary, beginning February 18, 2011, to offset the cost for times when the H-1B employee could not take regular calls and conduct rounds because of pregnancy, the Administrator added three days between March 4, 2011 and March 18, 2011 to the total. (Exhibit J, p.1; Exhibit L, ¶B). The total back wage amount owed to the H-1B employee is \$27,588.37. (Exhibit J, pp. 1-2).

I find that the Administrator's method of calculation of back wages supported by the record and the amount of back wages calculated to be reasonable. Therefore, such finding of back wages to Anuradha Kompella, M.D. should be affirmed.

D. Penalties and Interest

The Administrator assessed no penalties against the Respondent.

Respondent also owes pre-judgment and post-judgment interest on the amounts due.²⁰ Interest is due on the wages from the time each installment of wages became due.

ORDER

For the reasons set forth above, **IT IS HEREBY ORDERED:**

1. The Administrator's Motion for Summary Decision is **GRANTED** and the initial determination by the Administrator, of August 21, 2013, is affirmed as to the Respondent's violation of the INA and the Regulations, by Respondent's failure to pay the required wage, Respondent improperly requiring the payment of a penalty for early cessation of employment, and its failure to provide notice of filing of the LCA.
2. Respondent shall pay \$27,588.37, 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 Dr. Anuradha Kompella;

²⁰ *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).

3. The Administrator of the Wage and Hour Division, U.S. Department of Labor, must make any calculations necessary and appropriate to effectuate this Decision and Order.
4. Respondent must pay the above amount to the Wage and Hour Division, U.S. Department of Labor.

Joseph E. Kane
Administrative Law Judge