



Issue Date: 14 May 2014

CASE NO. : 2013-LCA-00035

In the Matter of

**THE PRINCIPAL DEPUTY ADMINISTRATOR,
WAGE AND HOUR DIVISION,**

Prosecuting Party

v.

INTERNATIONAL TECHNOLOGIES INC.,

Respondent.

**DECISION AND ORDER GRANTING PRINCIPAL DEPUTY ADMINISTRATOR'S MOTION
FOR SUMMARY DECISION AND CANCELLING HEARING**

This case arises under the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. §§ 1101 (a) (15)(H)(1)(b), 1182(n) and 1184 (c) and the implementing regulations in the Labor Condition Applications and Requirements for Employers Using Aliens in Specialty Occupations, 20 C.F.R. Subparts H and I, §§ 655.700 to 655.855. The Principal Deputy Administrator (PDA), pursuant to 29 C.F.R. § 18.41, moved for summary decision on all matters raised by the District Director's August 21, 2013 determination letter in which he found that International Technologies, Inc., (Respondent) owed back wages to two H-1B nonimmigrant workers, Sujive Nair and Krishna Naredla (Nair and Naredla).

The regulatory framework of the voluntary H-1B program, under which both Nair and Naredla worked, involves a two-step process in which the prospective employer first files a labor condition application (LCA) with the U.S. Department of Labor (DOL) seeking to temporarily employ unnamed nonimmigrants in specialty occupations according to certain conditions which it agrees to comply with, including rates of pay, periods of employment, job title, work location and working conditions. In turn, the INA vests the Secretary of Labor with the responsibility to determine compliance by employers with the conditions of the LCA by issuance of regulations establishing an enforcement system and delegating authority to the Wage and Hour Division, including the PDA, to determine compliance. Once the DOL certifies the LCA, the employer may petition the United States Citizenship and Immigration Services (USCIS) for H-1B visas for specific nonimmigrants. Once these visas are approved, the nonimmigrant is authorized to begin work under the provisions of the LCA, to which employer is bound. (29 C.F.R. §§ 655-700-655.855.)

I. Allegations

In this case, PDA alleges that Respondent owed Nair \$35,920.00 in back wages for a period of nonproductive time during Nair's authorized employment from October 5, 2007, the day after Nair's project with Siemens Water Technologies (Siemens) ended, until February 6, 2008, the day before Nair transferred his visa to Axon Solutions Inc. (Axon), thereby ending ITI's obligation to pay the required wage of \$60.00 per hour, or \$2,400.00 per week, plus pre-judgment and post-judgment interest.¹ PDA also alleges that Respondent owed \$3,327.50 in back wages to Naredla because of improper deductions on his last paycheck from the required wage rate of \$42.05 to \$15.00 per hour, totaling \$3,327.50. Of this reduction, Respondent reimbursed itself \$1,990.00 in unauthorized business expenses, \$500.00 for the USCIS petition filing fee (a prohibited deduction), and \$837.50 for early termination of employment (another prohibited deduction). As a result of these deductions, Respondent owes Naredla the sum of \$3,327.50, plus pre- and post-judgment interest.

On April 30, 2014, Respondent filed his response to PDA's motion. Regarding Nair, Respondent stated that it made an "extra" \$2,000 payment to Nair and all three requirements for a bona fide termination were completed on November 23, 2007, thus releasing him from any further obligation. (Resp. Br., p. 1; AX 0100²). Regarding Naredla, Respondent contends it was allowed to deduct immigration expenses per the parties' employment agreement, and that \$3,327.50 was "a very small amount of whatever was paid to him in excess of the LCA wage." (*Id.* at 2.).

II. Undisputed Facts

1. On or about July 18, 2007, Respondent filed an LCA (*Labor Condition Application ETA 1-07200-3572987 (LCA 987)*) for one H-1B nonimmigrant. (AX 0006-0009). Respondent was listed as the employer on the LCA. Respondent's President, Sanjay Anand, signed and agreed to comply with the Labor Condition statement on the LCA and DOL regulations on behalf of Respondent.
2. The LCA 987 sought one Programmer Analyst for the period of July 19, 2007 through July 19, 2010, which was also the period of employment certified by the ETA.
3. The prevailing wage rate listed on the LCA and approved by the ETA was a salary of \$40,726 per year for 2000 hours, which encompassed payment for 10 federal holidays per Respondent's pay practice.

¹ In its August 21, 2013 letter, the District Director initially assessed Respondent \$12,880.50 based upon a conservative but erroneous determination that Nair was terminated on November 23, 2007. PDA did not learn until after issuance of its August 21, 2013 letter when Respondent's President, Sanjay Anand, was deposed that Respondent had never offered Nair a return trip home, and thus a bona fide termination had not occurred because one of the three elements of such a termination was not present. 20 C.F.R. § 655.731(c)(7)(ii); *see also In the Matter of University of Miami, Miller School of Medicine*, ARB Case Nos. 10-090, 10-093 slip op. at p. 7 (Dec.20, 2011). 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, except where the employee voluntarily becomes non-productive or, as in this case, where the employee transfers his visa to another employer.

² "AX" refers to the Administrator's Exhibits.

4. By signing and filing the LCA, Respondent attested, through its President Anand, that it would pay the required wage rate for productive and nonproductive time during the entire period of authorized employment.
5. Respondent filed a Form I-129, Petition for Nonimmigrant Worker (Nair I-129) on behalf of Sujive Nair. The certified LCA was attached to the Nair I-129 and was signed by Anand on behalf of Respondent.
6. The Nair I-129 was approved by USCIS from August 17, 2007 to July 19, 2010 and listed Respondent as Nair's petitioner.
7. Respondent placed Nair at the client-site, Siemens Water Technologies in Pennsylvania, on July 30, 2007, before the H-1B visa was approved by USCIS.
8. Nair was the only Respondent consultant placed at Siemens from July 30, 2007 to October 4, 2007.
9. On July 5, 2007, Respondent offered Nair a yearly salary of \$120,000.00 for 2000 hours worked each year, or \$60.00 per hour.
10. Nair was paid for the number of hours worked at Siemens instead of on a yearly salary basis as listed on the LCA.
11. Respondent's payroll records shows it paid Nair five paychecks in which he received \$60.00 per hour for every hour worked as an H-1B employee from August 17, 2007 to October 14, 2007, instead of the lower prevailing wage of \$20.36.
12. Respondent paid Nair \$60.00 for every hour worked from August 17, 2007 to October 4, 2007 on a biweekly basis, with one pay period in reserve.
13. Respondent did not pay Nair for federal holidays, totaling 8 hours per holiday, which he did not work since that pay was already contemplated in the \$60.00 actual wage rate.
14. On October 4, 2007, the Siemens project was completed, and this was Nair's final day of work at Siemens.
15. From October 5, 2007 until December 27, 2007, Nair emailed Respondent numerous times to secure his next job placement and to inquire about his payment.
16. After the Siemens project ended, Respondent actively tried to place Nair on a project by sending out his resume to potential clients.
17. Nair did not take any voluntary time off from July 20, 2007 to February 7, 2008, nor did he abandon or terminate his employment with Respondent.

18. Respondent presented documentation demonstrating that on November 23, 2007, it noticed the employee, as well as USCIS, about Nair's employment termination. (AX-0061, AX-00062).
19. Respondent admitted never offering or paying for Nair's transportation home. (AX 0103).
20. Nair transferred his H-1B visa to Axon on February 7, 2008. (AX 0063).
21. Respondent filed an LCA for one nonimmigrant on March 24, 2007. *Labor Condition Application 1-07080-3174305(LCA305)*. (AX 0064-0067). Respondent was listed as the employer on the LCA. Anand, Respondent's president, signed and agreed to comply with the Labor Condition statements on the LCA and DOL regulations on behalf of Respondent.
22. LCA305 sought one Programmer Analyst for the period of March 24, 2007 through March 24, 2010, which was the period of employment certified by ETA.
23. LCA listed a yearly prevailing wage of \$52,541.00 (or \$26.27 per hour) for 2000 hours per year which encompassed payment for federal holidays per Respondent's practice.
24. By signing and filing the LCA, Respondent attested it would not make unauthorized or prohibited deductions from then required wage rate.
25. Respondent filed an I-129 on behalf of Krishna Naredla. *Form I-129, Petition for Nonimmigrant Worker (Naredla I-129)*. The certified LCA was attached to the Naredla I-129. The Naredla I-129 was signed by Respondent's president, Anand.
26. The Naredla I-129 was approved by USCIS for the period from October 10, 2007 to March 24, 2010 and listed Respondent as petitioner for Naredla.
27. On April 20, 2008, Respondent and Naredla entered into an "Employment Agreement" to deduct certain expenses from compensation if Naredla's employment was terminated before one year.
28. The Employment Agreement did not list amounts to be deducted which were fixed or stipulated by the parties at the inception of the contract.
29. Paragraph 10 of the Employment Agreement purported to allow Respondent to deduct the following expenses from Naredla's compensation if his employment was terminated within one year of joining the company: "all settling, relocation, immigration costs, attorney 's fee and other Monies advanced/reimbursed to [him]" by Respondent in connection with his joining or relocation. (AX 0079).
30. Respondent did not incur any damages for Naredla's relocation.
31. Naredla joined Respondent in March 2007.

32. On January 30, 2008, after working for Respondent for approximately nine months, Naredla emailed Respondent his resignation, effective February 14, 2008. (AX 0086).
33. Respondent paid Naredla \$42.50 per hour for every hour worked from May 23, 2007 to January 31, 2008.
34. After Naredla emailed his resignation on January 30, 2008, Respondent reduced the hourly rate from \$43.50 per hour to \$15.00 per hour for 121 hours worked from February 1, 2007 through February 28, 2007.
35. The reduction in Naredla's last paycheck totaled \$3,327.50.
36. Respondent's president, Anand, testified the deduction from Naredla's final pay was meant to cover immigration fees and attorney fees related to obtaining Naredla's H-1B visa. (AX 0109).
37. Respondent paid USCIS H-1B fees on behalf of Naredla in the amounts of \$190.00, \$500.00, \$750.00, and \$200.00.
38. Respondent paid to the law firm Amarnath Gowda in connection with legal services provided to Respondent to file the paperwork to obtain Naredla's H-1B visa.
39. Krishna Reddivari was a Respondent employee directly supervised by Anand from 2005 to 2010 who was responsible for communication with Respondent consultants, maintaining client relationships, and figuring out what was happening at client sites.

III. Legal Procedure and Statutory and Substantive Law

A. Standard for Motion for Summary Decision

PDA argues summary decision is appropriate, pursuant to 29 CFR § 18.40, because there is no genuine issue as to any material fact, even when viewing all the evidence and factual inferences in the light most favorable to the non-moving party. (*Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at p. 6 (ARB Nov.30 1999); *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1985). When a motion for summary judgment is supported by affidavits, depositions, payroll, and government applications as PDA has done, Respondent must go beyond the mere allegations or denials of the pleadings and set forth specific facts showing a genuine issue of fact to warrant a hearing. *Anderson*, 477 U.S. at 248. In this case, Respondent has not met this burden, and thus I find it appropriate to rule by summary judgment on the 39 facts as presented by PDA, in accord with the Rules of Practice and Procedure of Administrative hearings, as set forth at 29 C.F.R. § 18 and applied to H-1B hearings at 20 C.F.R. § 755.825.

Respondent, as an employer seeking to hire foreign workers for a position American workers cannot fill, must accept certain conditions in the LCA in order to participate in the H-1B visa program. 8

U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), and 1184 (c). Those conditions include paying the H-1B visa immigrants (Nair and Naredla) the required wage rate for productive and nonproductive time during the entire period of their authorized employment, unless the employee experiences periods of nonproductive status due to his/her voluntary request and convenience or the employer issues a bona fide termination of the employee. 20 C.F.R. § 655.731 (a)(c).

B. Sujive Nair

In Nair's case, Respondent placed him in nonproductive status by not assigning him additional work following the completion of the Siemens project on October 4, 2007. From October 5, 2007 until December 27, 2007, Nair communicated with Respondent through Reddivari, who was employed by Respondent from 2005 to 2010, gave Nair his job offer, and was Nair's point of contact with Respondent. Nair emailed Reddivari numerous times to secure his next job placement but without success, even though Respondent actively tried to place Nair on other projects by sending Nair's resume to potential clients.

Nair did not take voluntary time off while he waited for his next assignment and did not end his nonproductive status until February 7, 2008, when he transferred his H-1B visa to Axon, thereby ending Respondent's obligation to continue paying him. Although Respondent argued that it terminated Nair on November 23, 2007, when it notified Nair and USCIS of his termination, such a termination was not effective because in so doing Respondent did not provide Nair with payment for transportation home as required by both statute and case law. 20 C.F.R. § 655.731(c); *In the Matter of University of Miami, Miller School of Medicine*, ARB Case Nos. 10-090, 10-093, slip op. at p. 7 (Dec. 20, 2011) (*Miami*). Respondent was required to pay the prevailing wage rate, which is the higher of the prevailing wage rate or the actual wage rate Respondent paid similarly experienced and qualified employees or, if no other exists (which applies in this case), the actual wage paid to Nair of \$60.00 per hour as substantiated on Respondent's payrolls from August 17, 2007 through October 14, 2007. 20 C.F.R. § 655.731 (a)(1). In this case Respondent owed Nair \$60.00 per hour for 40 hours per week per week, except for federal holidays at 8 hours per holiday, for the time it placed Nair in nonproductive status, October 4, 2007 through February 7, 2008. This amounts to \$35,920.00, plus pre-judgment and post-judgment interest pursuant to 26 U.S.C. § 6621(a)(2), which is the federal short-term rate plus 3 percentage points, as provided for in *Miami* and *Limanseto v. Ganze & Co.*, ARB Case No. 11-068 (June 6, 2013). *See Miami*, slip op. at p. 10.

C. Krishna Naredla

Concerning Naredla, he joined Respondent in March 2007. On April 20, 2008, Respondent and Naredla entered into an "Employment Agreement" allowing Respondent to deduct certain expenses from his compensation if Naredla's employment was terminated before one year. The deductions included "all settling, relocation, immigration costs, attorney fees and Monies advanced." On January 30, 2008, after working for Respondent for about 9 months, Naredla, emailed his resignation to Respondent effective February 14, 2008. In response, Respondent reduced Naredla's actual wage rate on his final paycheck from \$42.50, the required wage rate pursuant to 20 C.F.R. § 755.731, to \$15.00 per hour for 121 hours worked from February 1, 2007 through February 14, 2007 because of Naredla's early cessation of

employment. Before the resignation Respondent paid Naredla \$42.50 for every hour worked from May 23, 2007 to January 31, 2008.

The reduction in the actual wage rate totaled \$3,327.50 ($\$42.50 \times 121 = \$5,142.50$; $\$15.00 \times 121 = \$1,815.00$; $\$5,142.50 - \$1,815.00 = \$3,327.50$). When questioned about the deduction, Respondent's president testified the deduction was meant to cover immigration and attorney fees related to obtaining Naredla's H-1B visa. Respondent paid USCIS H-1B fees on Naredla's behalf of \$190.00, \$750.00, and \$200.00, totaling \$1,990 to obtain the visa. Respondent paid an additional \$800.00 to the law firm of Amarnath Gowda for legal services in connection with paperwork filed to obtain Naredla's H-1B visa. An employer such as Respondent is not allowed under the regulations to deduct from an employee's pay the filing fee paid of \$500.00 paid to the USCIS or a penalty for resigning before an agreed date. 20 C.F.R. § 655.731(c)(10) and (11).

Respondent reduced Naredla's required wage from \$42.50 to \$15.00 to cover the \$500.00 filing fee it paid to USCIS. This \$500.00 reimbursement constitutes a prohibited deduction and must be returned to Naredla. The remaining amount, \$2,827.50, cannot be deducted if it is a penalty for early cessation or resigning before an agreed date as opposed to bona fide liquidated damages, which are permitted under 20.C.F.R. §655.731(c)(10)(i)(B). The agreement between Respondent and Naredla is governed and interpreted in accordance with laws of the State of Texas. (AX-0079). Under Texas law, liquidated damages are contractual provisions which fix liability at a specified certain amount because the harm caused by the breach is incapable of being estimated at the time of entering the agreement and the amount of liquidated damages represents a reasonable forecast of just compensation for damage or loss sustained. *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys. Inc.*, 997 S.W.2d 803, 810 (Tex. App-Dallas, 1999); *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991). In this case, none of the remaining \$2,827.50 satisfies the requirements for liquidated damages because none of those amounts were fixed or stipulated by the parties at the inception of the contract nor were they reasonable approximations of actual cost incurred. In essence, they amount to a prohibited early cessation penalty and thus should be awarded back to Naredla, along with pre- and post- judgment interest under 26 U.S.C. § 6621(a)(2), the federal short term rate plus 3 percentage points, in computing interest on back pay.

IV. Order

Inasmuch as Respondent produced no facts to show any genuine issues with respect to Nair's bona fide termination before February 7, 2008 or the lawfulness of any deductions Respondent made to Naredla's wages because of his early termination, I find PDA's Motion for Summary Decision to be appropriate and find the following order to be in accord with applicable statutes and case law:

1. The undersigned has jurisdiction to hear this matter.
2. Respondent, as the H-1B employer of Nair and Naredla, was obligated to pay the required wage as set forth herein for the entire period of their authorized employment.
3. Respondent owes back wages to Nair in the amount of \$35,920.00 because of its failure to pay Nair the required wage rate during a period of nonproductive status.

4. Respondent owes Naredla the sum of \$3,327.50 because of its action in improperly deducting that amount from his back wages.
5. Respondent owes pre- and post-judgment interest on their back pay awards computed at the federal short-term interest rate plus 3 percentage points.

YOU ARE HEREBY NOTIFIED that a hearing on the above entitled claim which was to be held before an Administrative Law Judge of the U.S. Department of Labor, on **September 15, 2014, 9:00 am**, in **DALLAS, TX. is cancelled.**

So **ORDERED** this 13th day of May, 2014 in Covington, Louisiana.

**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless, within twenty (20) days from the date of service, a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed at the following address:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400N
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties and be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

