U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 09 July 2014

Case No.: 2014-LCA-00005

In the Matter of:

ADMINISTRATOR,
WAGE AND HOUR DIVISION
Prosecuting Party

v.

ALEUTIAN CAPITAL PARTNERS, LLC
Respondent

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION AND GRANTING ADMINISTRATOR'S CROSS MOTION FOR SUMMARY DECISION

I. STATEMENT OF THE CASE

This case was brought under § 212(n) of the Immigration and Nationality Act, 8 U.S.C. § 1182(n), as amended ("INA"), and the implementing regulations set forth at 20 C.F.R. Part 655, subparts H and I. The INA permits employers to hire non-immigrants in "specialty occupations" to work in the United Stated for prescribed periods of time. 20 C.F.R. § 655.700. Employers seeking to hire such workers, commonly referred to as H-1B non-immigrants, must obtain certification from the Department of Labor by filing a Labor Condition Application ("LCA"). The LCA stipulates the wage levels and working conditions that the employer provides the H-1B nonimmigrant. After securing certification, and upon approval by the Department of Homeland Security, the non-immigrant is issued a visa and may begin work. 20 C.F.R. § 655.705(a), (b).

In addition to the conditions set forth in the LCA, the INA requires employers to pay H-1B non-immigrants as much as it pays other similarly experienced and qualified employees or to pay the prevailing local wage level for the H-1B non-immigrant's occupational classification, whichever is greater. 8 U.S.C. § 1182(n)(1)(A)(i)(I)&(II). In this case, the Administrator, Wage and Hour Division ("Administrator"), has alleged that Aleutian Capital Partners, LLC ("Respondent") violated this provision with respect to two non-immigrant H-1B employees. Respondent has appealed the Administrator's findings. On January 14, 2014, this case was referred to the United States Department of Labor Office of Administrative Law Judges

("OALJ") and assigned to me. By Notice of Hearing dated February 18, 2014, I scheduled a hearing in this matter. At the parties' request, I subsequently rescheduled the hearing for June 6, 2014 in New York, New York.

On April 21, 2014, Respondent filed a Motion for Summary Decision pursuant to 18 C.F.R. §18.40. On May 15, 2014, the Administrator filed a Cross Motion for Summary Decision and Opposition to Respondent's Motion for Summary Decision. Respondent replied on May 16, 2014. By Order issued May 28, 2014, I granted the parties' joint Motion to Stay the Proceedings pending my decision on the cross motions for summary decision.

Respondent argues that Summary Decision is appropriate in this matter because the complaining employee, Shakir Gangjee, was paid the salary offered on the Labor Condition Application ("LCA") when his full year earnings, including bonuses, are considered. Respondent further argues that the Administrator exceeded its investigative authority when it reviewed the wages paid to a second, non-complaining, non-immigrant H-1B employee, Minh Horn, and assessed back wages due to that employee.

The Administrator agrees that Summary Decision is appropriate in this matter, but argues that summary decision should affirm the Administrator's findings that back wages are due to the two non-immigrant H-1B employees, Shakir Gangjee and Minh Horn. For the reasons set forth below, Respondent's motion is denied and summary decision is granted in favor of the Administrator.

II. SUMMARY DECISION STANDARD

Summary decision is appropriate when the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. § 18.40. The standard for granting summary decision is essentially the same as that found in Fed. R. Civ. P. 56. See Saporito v. Central Locating Services, Ltd., ARB No. 05-004, 2006 WL 535427 (ARB February 28, 2006), citing Moldauer v. Canandaigua Wine Co., Arb. No. 04-022, ALJ No. 03-SIX-026, slip op. at 3 (ARB Dec. 30, 2005). In deciding a motion for summary judgment, the fact-finder must view the facts in the light most favorable to the non-moving party. Howlett v. Birkdale Shipping Co., 512 U.S. 92 (1994). The moving party bears the burden of proof, though the opposing party "may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, 447 U.S. 242 (1986).

III. FINDINGS OF UNDISPUTED FACT

I find the following facts to be undisputed:

- On January 14, 2013, Shakir Gangjee, an H-1B non-immigrant, filed a complaint with the Administrator alleging various violations of § 1182 by Respondent. (Resp. Ex. A.)[1]

- Gangjee was a salaried employee holding a professional position as a financial analyst with Respondent. (Gov. Ex. 4; Resp. Ex. C.)

- The U.S. Department of Labor approved LCA I-200-11208-466257 (the LCA submitted for Gangjee) for an annual salary of $65,000.00. The Respondent reported that the prevailing wage was $62,566.00. (Gov. Ex. 4; Resp. Ex. C.)

- The Administrator investigated the complaint pursuant to 20 C.F.R. § 655. After conducting the investigation, the Administrator concluded that Respondent owed $22,953.95 in back wages to two non-immigrant H-1B employees. The Administrator notified Respondent of his findings in a determination letter dated January 9, 2014. (Gov. Ex. 3.)

- Gangjee's Form W-2 Wage and Tax Statement for the year 2012 shows that Respondent paid Gangjee $57,509.00 in wages, tips, and other compensation. (Resp. Ex. D.)

- Gangjee's wages, which Respondent paid monthly, included base pay and occasional bonuses. The bonuses were calculated at three percent of any revenue earned and received by Respondent. (Gov. Ex. 10, 12.)

- Gangjee's total wages for the year 2012 exceeded the amount required by the LCA.[2]

- However, Gangjee's monthly salary payments did not always exceed one twelfth of the promised annual salary, or $5,416.67.

- Respondent also employed another non-immigrant H-1B employee, Minh Horn.

- Respondent employed Minh Horn as a Market Research Analyst. The U.S. Department of Labor approved Horn's LCA I-200-10084-170579 for a salary of

[1] Exhibits attached to the Motions for Summary Decision and the responses thereto are designated "Gov. Ex." for exhibits received from the Wage and Hour Administrator, and "Resp. Ex." for exhibits received from the Respondent.

[2] The Administrator reduced the annual salary due by days during which Gangjee was available for work in 2012.

$42,453.00, which is also the prevailing wage for a market research analyst. (Gov. Ex. 5.)

- Respondent terminated Horn on January 2, 2013 by notifying the U.S. Citizenship and Immigration Service. (Gov. Ex. 6.) In Horn's last full month as an employee, Respondent paid her only $350.00, plus its regular $250.73 monthly contribution to Horn's healthcare plan. (Gov. Ex. 2.) This amount was less than one twelfth of the promised annual salary, or $3,537.75.

IV. ANALYSIS

A. Wages must be paid monthly and must exceed the monthly prevailing wage

20 C.F.R. §655.731 sets forth the wage requirement for non-immigrant H-1B employees. The employer must attest that, for the entire period of authorized employment, Respondent will pay the required wage rate to the non-immigrant H-1B employees. The employer must pay the greater of the actual wage rate or the prevailing wage. "The required wage must be paid to the employee, cash in hand, free and clear, when due." 20 C.F.R. § 655.731(c)(1). The regulation further defines "when due": "For *salaried employees,* wages will be due in prorated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where employer pays biweekly) paid no less often than monthly …"

Respondent paid its employees monthly. The clear language of the regulation requires that monthly wage payments of salaried H-1B employees must be prorated. "It is well-established that each pay period is to be viewed separately when determining whether an H-1B worker was paid the required wage." Administrator v. Wings Digital Corporation, 2004-LCA-00030 (ALJ March 21, 2005). Thus, Respondent was obligated to pay Gangjee at least one-twelfth of his annual salary each month. Respondent cannot credit overpayments occurring in other month against its obligation to pay the prorated wage monthly. Id.

An exception to the obligation to make monthly pro rata salary payments is set forth in the regulation:

> *except that,* in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (e.g., a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period.

20 C.F.R. § 655.731(c)(4). Respondent argues that their promise of bonus payments of three percent of any revenue earned and received by Respondent fits within the exception and excuses them of the need to pay the pro rata salary monthly.

The regulation further explains that

> Future bonuses and similar compensation (*i.e.,* unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (***i.e.*, they are not conditional or contingent on some event such as the employer's annual profits)**. Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (*i.e.,* recorded and reported as ''earnings'' with appropriate taxes and FICA contributions. (Emphasis added.)

20 C.F.R. § 655.731(c)(2)(v).

Respondent's argument fails, though, because its bonuses are contingent on how well Respondent did in any given month, which is exactly the situation that the regulation describes as impermissible. Gangjee's bonus was contingent on Respondent's revenue. In months when Respondent had revenue, Gangjee was entitled to, and received, a bonus for three percent of the revenue. In months where there was no revenue, Gangjee received nothing. In 2012, Gangjee's bonuses ranged from $60.00 (in the months when Respondent's deal revenue was only $2,000.00) to $7,266.00 in February, when Respondent had revenues of $242,190.00. (Resp. Ex. A.) Moreover, Exhibit "A" to Respondent's standard Employment Agreement characterizes the bonus as "**contingent** compensation." (Resp. Ex. D.)[3]

Respondent argues that because the bonuses were contractually promised, they were nondiscretionary, and thus within the exception to the regulation. However, whether contractually promised or not, the bonuses were at all times "contingent on an event" (Respondent's revenue), and thus the bonuses do not fall within the exception. 20 C.F.R. § 655.731(c)(2)(v).

Respondent's obligation to pay Gangjee a monthly pro rata salary equal to one-twelfth of his required wage under the LCA cannot be evaded by Respondent's promise to reward Gangjee with occasional bonuses dependent on how well the company was doing. Thus, Respondent owes back wages for those months in which Gangjee received less than one-twelfth of the required wage.

Gangjee filed his complaint on January 14, 2013, within one year of the last wage violation. (According to Administrator's calculations, Gangjee did not receive his correct wage on December 12, 2012.) As the complaint was timely, the Administrator may look beyond one year before the filing of the complaint. The jurisdictional bar to complaints filed more than a year after the last wage violation does not affect the scope of the remedies. 20 C.F.R. § 655.806(a)(5). Gangjee is entitled to back wages for 2011 and 2012.

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[3] The Employment Agreement produced is a standard, unsigned copy. The parties were unable to produce an Employment Agreement signed by Gangjee, and the parties dispute whether, in fact, Gangjee ever did sign the Agreement. This fact is not material to this decision, however, as the parties agree that Gangjee was entitled to, and did receive, bonus payments based on the Respondent's monthly revenue.

B. The Administrator did not exceed his authority by investigating the pay of Respondent's other H1-B employee

Respondent also argues that the Administrator exceeded his investigative authority by looking at the pay of Minh Horn, Respondent's other H1-B employee. Respondent asserts that because the violations which Gangjee complained of were without merit, Administrator had no authority to look further into Respondent's pay practices. Initially, as I found above, Gangjee's complaints of not being paid the prevailing wage have been substantiated. Even if they had not been, however, once the Administrator finds that a complaint establishes reasonable cause to investigate, the Administrator can determine the boundaries of the investigation, to the extent necessary to determine compliance with the regulations. 20 C.F.R. Part 655.800, Administrator v. Greater Missouri Med. Pro-Care Providers, Inc., ARB 12-015, 2014 WL 469269 (ARB January 29, 2014).

Respondent does not argue that the Administrator's findings regarding Ms. Horn's pay were improper. Thus, I find summary decision appropriate with respect to Minh Horn.

C. Back Wages Due

In the Notice of Determination issued on January 9, 2014, the Administrator advised Respondent that $22,953.95 was due in back wages to two H-1B employees. (Gov. Ex. 3.) However, in Investigator David An's Affidavit submitted in conjunction with the Administrator's Cross Motion for Summary Decision, he averred that Respondent underpaid Gangjee by $9,707.16 in 2011 and $10,069.12 in 2012 for a total of $19,776.29.[4] (Gov. Ex. 2, 10.) Investigator An further averred that Respondent owed Horn $2,937.02 less than her required pro rata monthly rate. The combined total back wages due would amount to $22,713.31.[5] (Gov. Ex. 2, ¶¶13, 14.) No explanation is given for the difference between the amount set forth in the Notice of Determination and the amount set forth in Investigator An's affidavit.

In determining back wages due, Investigator An made certain reductions to the monthly rate based on days when Gangjee was unavailable to work, using a daily prevailing rate of $240.64. (Gov. Ex. 2, ¶11.) He looked at days Gangjee was available to work in a given month and multiplied that number to obtain Gangjee's required monthly wage. In any month in which Gangjee's pay (regular rate plus any bonus) did not equal the required monthly wage, Investigator An assessed back wages based on the difference between the amount Gangjee received and the amount he should have received. I find this method of calculating back wages to be reasonable and affirm the Administrator's findings that Respondent owes $19,776.28 in back wages to Mr. Gangjee.

Investigator An used a similar method with respect to Horn. Horn's prevailing rate set forth in her LCA was $42,453.00, with a monthly pro rata rate of $3,537.75. In December 2012, Respondent paid Horn $350.00 in salary and made a $250.73 contribution to Horn's health care

[4] I note that 9,707.16 + $10,069.12 = $19,776.28, not $19,776.29.
[5] This amount should be $22,713.3**0**, see footnote #4.

insurance. This total of $600.73 was $2,937.02 less than the required monthly wage. Thus, Respondent owes Horn $2,937.02 in back wages.

Accordingly,

1. Respondent's Motion for Summary Decision is DENIED.

2. Administrator's Cross Motion for Summary Decision is GRANTED.

3. Respondent is directed to pay $22,713.30 in back wages.

SO ORDERED.

Digitally signed by THERESA TIMLIN
DN: CN=THERESA TIMLIN,
OU=JUDGE, O=Office of Administrative
Law Judges, L=CHERRY HILL, S=NJ,
C=US
Location: CHERRY HILL NJ

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845. To be effective, such petition shall be received by the Board within thirty (30) calendar days of the date of this Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. The Board's address is:

U.S. Department of Labor
Administrative Review Board
Room S5220 FPB
200 Constitution Ave NW
Washington, DC 20210

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.