

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 11 December 2017

CASE NO.: 2016-LCA-00019

In the Matter of:

MAJID VARESS,
Prosecuting Party,

vs.

**PERSIAN BROADCAST SERVICE
GLOBAL, INC.,**
Respondent.

APPEARANCES:

NORMAN J. RESNICOW, Esq.
For the Prosecuting Party.

DAVID M. STURMAN, Esq.
JONATHAN R. STURMAN, Esq.
For the Respondent.

BEFORE: **CHRISTOPHER LARSEN**
Administrative Law Judge

DECISION AND ORDER DENYING RELIEF

This is a claim arising under the Immigration and Nationality Act (“INA” or “Act”) H-1B visa program, 8 U.S.C. §1182.

I held a telephonic hearing in this matter on October 26 and 27, 2017. Attorney Norman J. Resnicow appeared for the Prosecuting Party, Majid Varess, and Attorneys David M. Sturman and Jonathan R. Sturman appeared for the Respondent, Persian Broadcasting Service Global, Inc. At the hearing, I heard testimony from

the Prosecuting Party, Majid Varess; and from witnesses Daryoush “Nick” Zahab and Amir Shadjareh. I received in evidence Prosecuting Party’s Exhibits (“CX”) 1-10 and “G,” and Respondent’s Exhibits (“RX”) 6.

Before the hearing, the parties stipulated in writing:

1. Respondent, Persian Broadcast Service Global, Inc. (hereinafter, “Respondent” or “Pars TV”), is a legal entity incorporated under the laws of the State of California.
2. Amir Shadjareh is the President of Pars TV.
3. Prosecuting Party, Majid Varess (hereinafter, “Claimant”), is a national of Australia, where he currently resides.
4. In September 2011, Respondent filed an application for labor certification (LCA) with the Department of Labor (DOL) on behalf of Claimant. The LCA was approved with a validity date of September 12, 2011, to September 12, 2013, at an annual Wage Rate of \$45,000.
5. On November 23, 2011, Claimant entered the U.S. on an E-3 visa and commenced working for Respondent as a Pars TV television producer (of content) and reporter from the U.S.
6. Claimant departed the U.S. on August 19, 2012.
7. Claimant returned to the U.S. on October 17, 2012.
8. Claimant departed the U.S. on January 14, 2013.
9. Claimant returned to the U.S. on May 17, 2013.
10. Claimant departed the U.S. on July 14, 2013. During these periods outside the U.S., Claimant produced and solo hosted sports programs for Pars TV.
11. In August 2013, Respondent filed a second LCA with the DOL on behalf of Claimant at an Annual Wage Rate increased by 33.3% to \$60,000, on the stated “Basis” of “Continuation of previously approved employment without change with the same employer.” The second LCA was approved with a validity date of September 12, 2013 to September 12, 2015.
12. On September 3, 2013, Claimant returned to the U.S. and was admitted for stay until September 2, 2015.

13. On November 16, 2013, Claimant departed the U.S., and has not returned since.

14. On February 5, 2015, Claimant filed a written complaint against Respondent with the Wage and Hours Division (WHD) of the DOL which refers to a complaint on his behalf made by phone on December 9, 2014. On March 18, 2015, Claimant submitted to DOL a completed Nonimmigrant Worker Information Form WH-4 describing the claimed wage and other violations, including but not limited to claimed constructive termination in July 2014.

15. On March 28, 2016, the WHD concluded that Respondent had not committed any wage violations as to Claimant.

16. At no point prior to July 14, 2014, did Respondent notify the DOL of termination of Claimant's employment under 20 C.F.R. §655.731, subsection (c)(7)(ii) (see also 8 C.F.R. §214.2, subsection (h)(11)(i)(A)).

The dispute between the parties is clearly defined. Mr. Varess claims Respondent employed him and failed to pay the agreed salary. Respondent contends it engaged Mr. Varess as a contractor for a shorter period than Mr. Varess alleges, and owes him nothing. Respondent further contends Mr. Varess's claim is time-barred.

Discussion

Stripped to its essence, this case is a garden-variety claim for unpaid wages. It comes before the Department of Labor, rather than a state administrative agency or a court of general jurisdiction, because the putative employer in this case filed two Labor Condition Applications ("LCAs") with the Department under 8 U.S.C. § 1182(n)(1), *see also* 20 C.F.R. §§ 655.371 and 655.373. The filing of an LCA with the Department is a necessary first step in the admission into the United States of so-called "H-1B workers" or "H-1B nonimmigrants" – non-citizens allowed to work temporarily in the United States. The United States allows such temporary workers to enter the country if 1) U.S. workers are not available to perform such temporary employment in the United States, *and* the employment of aliens for such temporary work will not adversely affect the wages or working conditions of similarly-employed U.S. workers. *See* 20 C.F.R. §§ 655.0, subsection (a)(1); 655.731; 655.732. Thus, "[n]o alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application." 8 U.S.C. § 1182(n)(1)(G)(vi).

As the Administrative Review Board observed in *Gupta v. Compunnel Software Group, Inc.*, ARB Case No. 12-049 (ARB May 29, 2014), 2014 WL 2917576,

“Four federal agencies (Department of Labor, Department of State, Department of Justice, and Department of Homeland Security) are involved in the process relating to H-1B nonimmigrant classification and employment.” [Citation.] More importantly, the H-1B hiring process involves three procedural phases that fundamentally impact DOL’s resolution of H-1B wage complaints. The first of the three phases requires the H-1B employer to file with DOL for certification of the completed LCA. [Citation.] In the LCA, the employer stipulates to the wage levels and working conditions, among other things, that it guarantees for the H-1B worker for the period of his or her authorized employment. Second, if DOL certifies the LCA, then the employer must file an H-1B petition with USCIS, requesting permission to employ the H-1B worker and allowing the H-1B beneficiary to apply for an H-1B visa. Third, if USCIS approves the H-1B petition, the H-1B beneficiary must apply to the U.S. State Department for an H-1B visa. An approved visa grants the H-1B beneficiary permission to seek entry into the United States up to a date specified on the visa as the “expiration date.”

Once the H-1B petition is granted, the petitioning employer assumes various legal obligations after the H-1B beneficiary enters the country or becomes “eligible to work for the petitioning employer.” [Citation.] The H-1B employer must begin paying the H-1B worker within the time prescribed in 20 C.F.R. § 655.731(c)(6)(ii). . . . The employer may end its obligation to pay the H-1B nonimmigrant through a “*bona fide* termination” of the employment relationship, and it must inform DHS of such termination. [Citation]. . . .

Similarly, to work in more than one location, an H-1B nonimmigrant “must include an itinerary with the dates and locations of the services or training and [the itinerary] must be filed with USCIS as provided in the form instructions.” [Citation] USCIS explained that this regulation “was designed to ensure that aliens seeking H-1B nonimmigrant status have an actual job offer and are not coming to the United States for the purpose of seeking employment” upon arrival. [Citation.] . . . In the event of a material change in the terms or conditions of the nonimmigrant’s employment, the petitioning employer must file a new certified LCA together with an amended H-1B petition with USCIS. [Citation.] USCIS’s guidance provides that any change in employment that requires a new LCA also requires an amended H-1B petition.

The Administrator of the Wage and Hour Division has broad authority to investigate an employer's compliance with the representations and attestations on an LCA. *See* 20 C.F.R. § 655.805. In an appropriate case, the aggrieved employee may recover back wages. 20 C.F.R. § 655.810, subsection (a). Mr. Varess contends Respondent did not pay him consistently with the representations it made in the two LCAs in this case. Accordingly, he comes before this court to claim the wages he alleges are due.

But there is a further complication in this case. The nature of the legal relationship between Mr. Varess and Respondent, and the terms of Mr. Varess's compensation, are disputed. The burden is on Mr. Varess to establish not only his entitlement to compensation, but the amount of that compensation.¹

In Mr. Varess's view, he was an employee of Respondent. He contends Respondent agreed to pay him \$45,000 per year for two years, and \$60,000 per year for an additional two years, but failed to do so. Mr. Shadjareh, the President of Respondent, testified Mr. Varess was an independent contractor, rather than an employee, producing sports programming; and that he was paid at first in the form of rental on an apartment in the United States (TR p. 168, line 5 - p. 170, line 19; p. 187, lines 4-19), or, later, a set fee per program produced, rather than a salary (TR p. 162, line 5 - p. 163, line 21).

To support his view, Mr. Varess relies on four documents signed by Mr. Shadjareh: CX 1, an LCA signed on September 8, 2011; CX 2, an LCA signed on September 4, 2013; CX 4, a "To-Whom-It-May-Concern" letter signed on or about September 7, 2013; and CX 5, a letter to the Nonimmigrant Visa Section of the United States Consulate General in Sydney, Australia, dated November 13, 2013. CX 1 recites that Respondent intends to employ Mr. Varess as a TV producer and reporter from September 12, 2011, to September 12, 2013, at a yearly salary of \$45,000 (CX 1, pp. 2, 4). CX 2 recites that Respondent intends to employ Mr. Varess as a TV producer and reporter from September 12, 2013, to September 12, 2015, at a yearly salary of \$60,000 (CX 2, pp. 2, 4). The first paragraph of CX 5 reads

We submit this letter on behalf of Majid Varess in order that he may be authorized to continue to perform temporary ser-

¹ The Office of Administrative Law Judges' Rules of Practice and Procedure, 29 C.F.R. Part 18, Subpart A, apply in this case. 29 C.F.R. §1978.107, subsection (a). Under those rules, within 21 days of entry of an initial notice or order acknowledging the case had been docketed (29 C.F.R. §18.80, subsection (c)(1)(iv), and "without awaiting a discovery request" (29 C.F.R. §18.80, subsection (c)(1)(i), Mr. Varess should have disclosed to Respondent "[a] computation of each category of damages claimed by the disclosing party," including supporting documentation. In addition to that, Mr. Varess had a continuing duty under 29 C.F.R. §18.53 to "supplement or correct" that disclosure if, at any time, he learned it had become incomplete or incorrect in some material respect. Given those obligations, one would reasonably expect find, at some point in the hearing or in the post-hearing brief, a computation of Mr. Varess's claimed damages. To my astonishment, there is none. This failure alone comprises grounds for denying relief in this case.

VICES in the specialty occupation of TV Producer and Reporter with Persian Broadcast Service Global, Inc. Persian Broadcast Service Global, Inc., wishes to continue to engage the services of Mr. Varess, an Australian citizen, for an additional two-year period. He will be compensated in the amount of \$60,000 per year.

(CX 5, p. 1).

Finally, CX 4 recites “Mr. Majid Varess is working for Pars TV station as a sport *[sic]* producer until Sep 2015. His monthly salary is \$5000.00” (CX 4, p. 1).

These documents are not primary evidence of an employment agreement. An LCA is not an employment contract, and neither is an unverified letter addressed to the world at large. The distinction is important in this case. Mr. Varess employs these documents as secondary evidence of an employment agreement, perhaps even as grounds for estopping Respondent from contradicting Mr. Varess’s theory of the case. But Mr. Shadjareh testified he did not write CX 1, CX 2, or CX 5. Instead, he testified – *and Mr. Varess admitted* – those documents were written by Noah Klug, an attorney Mr. Varess hired for that purpose (TR p. 52, lines 2-19; p. 53, lines 14-22; p. 53, line 24 - p. 54, line 19). In fact, according to Mr. Shadjareh, Mr. Varess had asked Mr. Shadjareh to apply for a visa for him; Mr. Shadjareh had replied he could not; and Mr. Varess had told him Mr. Varess would hire an attorney to prepare “papers” Mr. Shadjareh need only sign. Mr. Shadjareh testified he signed those “papers” without reading them or further considering them (TR p. 168, line 5 - p. 170, line 19; p. 187, lines 4-19; p. 208, lines 4-25; p. 210, lines 9-21). In spite of what those documents recited, according to Mr. Shadjareh, the understanding between the parties was that Respondent would pay Mr. Varess’s rent in the United States, up to \$1,800 per month, in exchange for Mr. Varess’s producing two one-hour programs per week for broadcast (TR p. 167, line 10 – p. 168, line 1; p. 168, lines 13-24).² As to CX 4, Mr. Shadjareh testified he signed it at Mr. Varess’s request solely to help Mr. Varess qualify to rent an apartment (TR p. 199, line 3 - p. 200, line 16). What is more, Mr. Zahab testified that he and Mr. Varess, in July, 2013, began working together, as independent contractors, to produce sports programming for Respondent (TR p. 116, line 5 – p. 119, line 8), supporting Mr. Shadjareh’s testimony to that effect (TR p. 173, line 1 - p. 180, line 5). Mr. Zahab testified the terms of that independent-contractor relationship were set forth in RX 4, a proposed contract – although RX 4 is not signed either by Mr. Zahab himself, by Mr. Varess, or by Mr. Shadjareh.

² While this testimony may appear to contradict his earlier testimony that Respondent agreed to pay Mr. Varess per program (TR p. 162, line 5 - p. 163, line 21), Mr. Shadjareh also testified Mr. Varess terminated the programs-for-rent agreement in May or June of 2013; worked briefly for a competitor, Channel One; and then resumed a working relationship with Respondent, together with Mr. Zahab, under an oral contract identical to the unsigned written contract in evidence as RX 4, under which he would have been paid per program produced (TR p. 173, line 1 – p. 180, line 5).

Significantly, Mr. Varess did not specifically testify at the hearing that Respondent had ever agreed to pay him a salary in a particular amount. He merely responded to leading questions from his counsel:

Q: Okay. When you started working, you were – your stated salary \$45,000 a year *[sic]*. What payment patterns developed when you started working, I believe it was, in November 2011 after your arrival?

A: There wasn't any specific pattern. I was given sometimes check (inaudible) and sometimes a thousand, sometimes five hundred, and all they say, "We have financial problem. We'll pay you later." And later, and that was the pattern, basically, from the beginning right to the end.

...

Q: Yes. When you would say, "Why aren't I getting my salary every week, every two weeks, every month, on the \$45,000?" When you would ask him why you weren't getting it, and when were you going to be paid, give me some examples of the kind of answers he would give you.

A: Most of the time, it was about that we are short in project. We are not getting enough responses. We don't have enough advertising. I can pay you, you know. I believe in you. You believe in me. And those are things and that was basically the things he was saying.

Q: And now from the time you started producing shows in November 2011, until your final show under the second LCA, on July 2014, did he ever pay you regularly –

A: Never.

Q: – the amount he was supposed to pay you?

A: Never.

(TR p. 19, line 8 - p. 20, line 12).

Q: Did not your second LCA, which was approved and accepted, provide for an increase from \$45,000 a year to \$60,000 a year?

A: Could you repeat that again, please?

Q: Okay. Would you have accepted a decrease in salary when your first LCA salary of \$45,000 a year was increased to \$60,000 a year for your second LCA period? Would you have accepted a reduction in salary below the \$45,000?

A: No.

Q: So you go – is it fair to say that your going forward with a second LCA looked to an increase in salary, not a decrease in salary?

A: It was obvious to everyone, I think, in the PARS TV.

(TR p. 30, line 23 - p. 31, line 11).

One can parse this language too closely, but I am struck by the fact it is counsel, and not Mr. Varess, who repeatedly offers the specific figures here. I search the record in vain for an unqualified sworn statement by Mr. Varess that Mr. Shadjareh, or anyone else at Respondent, ever promised to pay him \$45,000 per year for two years, or \$60,000 for two years. Instead, what Mr. Varess most commonly says (or agrees with) is that the LCAs indicate those salaries – LCAs written by his own lawyer, and not by Respondent. I find his credibility on this issue is impaired as a result.

Finally, after September, 2011, in at least two important respects, the parties' working relationship appears never to have conformed to the LCA. Their conduct, in fact, supports an inference that neither was too concerned with the particulars of Mr. Varess's H-1B status.

First, Mr. Varess contends (TR p. 19, line 8 - p. 22, line 11), and Respondent does not dispute (RX 6), that Respondent never paid him a regular salary. Nonetheless, Mr. Varess continued to produce programs for Respondent. He testified he did so for two reasons: because of the expenses he had incurred in moving to the United States (and the potential expenses he might incur to leave again), and because he did not want to disappoint his fans (TR p. 31, line 12 - p. 32, line 16). But neither explains his failure to complain to the Wage and Hour Administrator at that time, as he has finally done now. It is, after all, the Administrator's job to protect H-1B immigrants who find themselves in the very situation Mr. Varess describes. The Administrator's determination that Mr. Varess was entitled to a salary consistent with the LCA would have done him much more good in 2011 than now, after years of uncompensated work. Respondent, if it truly could not pay what it had promised, might have chosen then to effect a *bona fide* termination of Mr. Varess's employment and return him to Australia at its expense under 20 C.F.R. § 655.731, subsection (c)(7)(ii); 8 C.F.R. § 214.2, subsection (h)(4)(iii)(E). Mr. Varess's stated reasons for continuing to work do not explain his failure to bring a formal complaint.

Second, Mr. Varess worked away from Tarzana, California, much of the time. He testified he produced programs in England, Ireland, Belgium, France, and Australia (TR p. 47, lines 8-23). He traveled outside of the United States of his own volition, and not because Respondent required it (TR p. 77, line 4 - p. 78, line 4; p. 78, line 21 - p. 79, line 10; p. 170, line 24 - p. 171, line 11). Under 20 C.F.R. § 655.735, subsection (c), an H-1B nonimmigrant generally should not work at a location other than his place of employment listed on the relevant LCA for more than 60 days in a one-year period. But during the one-year period beginning on August 19, 2012, Mr. Varess spent most of his time not only away from Tarzana, California, but outside of the United States entirely: 59 days from August 19, 2012, to October 17, 2012; 123 days from January 14, 2013, to May 17, 2013; and 34 days from July 14, 2013, until August 17, 2013, a total of 216 days of the 365-day period. He was outside the United States for an additional 14 days in 2013 before leaving the country for the last time on November 16, 2013. Mr. Varess appears to have been free to work from wherever in the world he chose, and neither party appears to have been too concerned about his staying in Tarzana in conformance with the LCAs.

All of this evidence supports Mr. Shadjareh's testimony that he signed CX 1, CX 2, and CX 5 merely as an accommodation to Mr. Varess, and his testimony that CX 4 was likewise an accommodation to Mr. Varess is uncontradicted in the record. Undoubtedly Mr. Varess had some kind of a working relationship with Respondent beginning in September, 2011, but there is insufficient credible evidence to show the parties agreed to employ him in Tarzana, California, under the terms of CX 1 or CX 2 in exchange for a salary of \$45,000 per year (in the case of CX 1) or \$60,000 per year (in the case of CX 2). Under the particular facts of this case, I conclude the evidence as a whole, including the LCAs, does not establish an obligation for Respondent to pay Mr. Varess the salary he claims.

I make no findings on the issue of Respondent's, or Mr. Shadjareh's, potential culpability for misrepresentations in CX 1, CX 2, CX 4, or CX 5, because that issue is not before me. I do not reach, and do not decide, Respondent's claim that the complaint was untimely.

ORDER

Although there was a working relationship of some kind between them, the Complainant has not shown, by a preponderance of the evidence, that Respondent was obligated to pay him a salary.

In the alternative, the court denies the complaint as untimely.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge

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.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

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.