

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 July 2016

In the Matter of:

**DEPARTMENT of LABOR
WAGE AND HOUR DIVISION**

Claimant,

v.

Case No.: 2016-LCA-00001

SHRIJII KRUPA, INC. d/b/a VALERO,

Respondent.

**JEREMY FISHER, Esquire, U.S. Department of Labor, Office of the Solicitor
*For Complainants***

**CHANDLER FINLEY, Esquire, Miami, Florida
*For Respondents***

*Before DANIEL F. SOLOMON,
United States Administrative Law Judge*

**DECISION AND ORDER
ESTABLISHING DAMAGES**

This case arises under 20 C.F.R. § 655.820 et seq., as amended by the interim final regulations published by the Department of Labor on December 20, 2000, 65 Fed. Reg. 80110 et seq. (2000) to implement the H-1B provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(B) and 1182(n), and in accordance with 29 C.F.R. Part 18 of the Rules of Practice and Procedure of the Office of Administrative Law Judges.

This case was originally scheduled for hearing June 14-16, 2016 in Miami, Florida. Due to a conflict in scheduling, that hearing was cancelled and after a telephone conference, I reset it for a calendar call June 20, 2016 in Miami. On or about May 26, 2016, Complainant filed a Motion for Summary Decision. Normally, Respondent would have had 14 days to respond. However, I was advised by counsel for Respondent that he was not served properly and that other discovery requests that are apparently operative were never served on Respondents. Based on this representation, I denied the Motion and reset the case for June 30.

Issues arose regarding whether Respondent is bound by a failure to respond to discovery. Respondent argues that a failure to respond to the Requests for Admissions does not result in any conclusions of established facts, as the facts are to be determined by the evidence. Although Respondent admittedly failed to respond, it argues that it “has not extinguished Respondent’s version of any facts that were previously in dispute. None of the facts or admissions should therefore be ‘conclusively established,’ and they require further action.”

On June 14, 2016, I held a conference call (See Transcript, "TR"). During the conference, Respondent admitted that it had been served properly. TR at 7-8. There also had been a failure in my office to file the affidavit of Teresita Comacho, which is now marked as Complainant's exhibit ("CX") E. On the record, I read 29 C.F.R. Section 1872, Summary Decision. The parties agreed to waive an oral hearing and I set a briefing schedule for exhibits and briefing.¹

Complainant alleged that Respondent's response to the Motion for Summary Decision was filed seven days late. This fact was admitted. TR 13.²

On July 12, 2016, I received the Complainant's exhibits, all composite with subparts. There is no objection, and I enter them into evidence as CX A to CX J. The Respondent proffered no exhibits. The parties have submitted briefs.

ALLEGATIONS

The Administrator, Department of Labor Wage and Hour Division ("WHD") alleges that the Respondent, Shriji Krupa, Inc. d/b/a Valero, violated the H-1B provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(n) in that Respondent failed to pay wages as required pursuant to 20 C.F.R. § 655.731; that Respondent failed to provide notice of the filing of the Labor Condition Application ("LCA") for ten days in two conspicuous locations at the place of employment, in violation of 20 C.F.R. § 655.734; and that Respondent failed to maintain adequate payroll records, as required by 20 C.F.R. § 655.731(b), 20 C.F.R. § 655.738(e), 20 C.F.R. § 655.738(e), 20 C.F.R. § 655.739(i), and 20 C.F.R. § 655.760(c).

The Administrator determined that three former H-1B workers for Respondent were due a total of \$229,833.01 in back wages. Pursuant to 20 C.F.R. § 655.810 (b), Wage and Hour assessed a civil money penalty ("CMP") totaling \$500 for Respondent's violation of 20 C.F.R. §§ 655.731(b), 655.738(e), 655.739(i), and 655.805(a)(15). No civil money penalty was assessed for the violation of 20 C.F.R. § 655.734.

FINDINGS OF FACT

¹ Respondent filed a letter requesting a decision be made from review "on the record."

² MR. FISHER: Mr. Finley has received the motion for summary decision filed on May 20th.

JUDGE SOLOMON: Is that true, Mr. Finley?

MR. FINLEY: Yes, that's true, Your Honor, but that's the first time I saw the discovery was in the motion for summary decision. I'd never seen it. It was attached as an exhibit, right.

Later at 17-18:

JUDGE SOLOMON: ...And the other factor is the seven day period. So the only defense that I hear to that, Mr. Finley, is mere inadvertence.

MR. FINLEY: Okay.

JUDGE SOLOMON: I don't hear anything else. I mean, the dog didn't eat the motion.

MR. FINLEY: No, Your Honor, this is Chandler Finley again. Except for mere inadvertence, there really is no other way you could call that except for just receiving, again, the discovery issues in their motion for summary decision.

Respondent operates two gas station convenience stores in Port St. Lucie, Florida. Following an employee complaint, the Wage and Hour Division conducted an investigation of Respondent for the period of August 1, 2006, through March 10, 2010. During the applicable period of investigation, Respondent had six Labor Condition Applications (Form ETA 9035E) for H-1B workers certified for its two locations. The undisputed facts in the record establish each of the violations cited by the Administrator, and thus those violations must be affirmed.

Respondent argues in the nature of an affirmative defense that due to the recession of 2008, the employees were working only part-time as the business income could no longer support H-1B workers full-time with the reduced income from the area's economic depression; and therefore, continued to hire them on an agreed part-time basis. The Respondent discussed the situation with each employee and explained to them that they could no longer pay the prevailing wage, and that they would have to terminate their employment on a full-time basis, but to pay them the prevailing hourly wage at least on a part-time basis, which is what the employer in good faith intended and attempted to do. I am advised that the Respondent became grossly indebted to its gas supplier who had an agreement for a minimum supply contract which the Respondent has never been able to get out from under severe economic pressure from the gas distributor to sell minimum quantities of fuels.

I am directed to an amended LCA for a part-time employment for two of the workers which was returned as accepted by the DOL for their same job positions, and at the prevailing wage, but on a part-time basis. Respondent argues that DOL approved their positions for part-time implied to the Respondent/Employer that the DOL would also approve the other positions for part-time positions at the same or new prevailing wage:

The fact that the Respondent failed to timely file an amended request for a change in the LCA should not penalize a U.S. employer so severely as to cripple the business with a burdensome overly large sum of unpaid salaries, especially where the employees knew and understood that there were no alternatives, except to close the business or terminate their employment permanently. This U.S. employer should be recognized, contrarily, as an employer who maintained employment on reasonable varied terms with its employees instead of permanent termination due to severe economic hardships, like was occurring all over the country during the subsequent depression. The government and U.S. Congress has the inherent discretion to recognize the absurdity of laws and their impact on small businesses especially during a depression, as not to impose such fines and violations on non-wilful violators, especially where the employer has a prior history of hiring H-1B workers and complying with all wage conditions, as mentioned here in this case where one of the workers had been hired since approximately 2006 at the then prevailing wage without any violations found by the local WHD going back before 2008 starting of alleged violations. Congress never made this law to be absolute in time of severe economic hardship, as it seems to

be presented by the Administrator. The violations on the face of the LCA and accompanying documents do not represent the good faith and will of the employer during an economic depression. Based on such discretion by the Administrator inherent in its authority by law, this case should be dismissed, and the violations waived, and fines and fees waived.

1. Allegation Respondent Violated 20 C.F.R. § 655.731

The Administrator first alleges that Respondent violated 20 C.F.R. § 655.731 in that Respondent failed to pay three H-1B workers the prevailing wage listed on that employee's LCA. This regulation establishes that the employee must be paid the greater of the actual wage rate or the prevailing wage rate. *Id.* In this matter, the actual wages paid to each employee were far less than the prevailing wages included on the LCAs, and thus the prevailing wages were the controlling required wage rate. All available facts in evidence establish that instead of paying the subject H-1B workers at the rates established by the applicable LCAs, Respondent simply paid each worker \$520 on a bi-weekly basis.

The Administrator's investigation revealed that H-1B worker Mr. Kalpesh K. Gandhi had been employed as an Electrical Engineer by Respondent from 2006 through the end of the period of the investigation, with the LCA for Mr. Gandhi stating that he was a full time employee with a prevailing wage of \$53,144 annually for October 1, 2008 through October 1, 2011. Mr. Gandhi primarily worked on electrical installations for gas pumps, cameras, generators, and appliances. Through interviews and review of available payroll records, Wage Hour determined that Mr. Gandhi was paid a gross bi-weekly salary of \$520.00 during the period of the investigation. In his interview with WHD, Mr. Gandhi stated that he did not receive bonuses, compensation for travel, or a per diem during his employment, and also received no benefits, sick leave, or vacation time. He worked only a few hours a day for Respondent. Mr. Gandhi stated that he was not paid the rate listed on the LCA, but did not complain because conditions could have been worse. Mr. Gandhi was provided housing by Respondent at no charge. Under the prevailing wage rate listed on the LCA, Mr. Gandhi should have been paid \$116,473.93 over his period of employment covered by the LCA; however, he was paid only \$30,953.33 over that period. When payroll records were requested by WHD during the investigation (repeatedly, by letters dated November 10, 2011; November 14, 2011; and April 17, 2012), Respondent allegedly supplied tax documents only. I am advised that due to Respondent's failure to maintain payroll records for H-1B workers, WHD was forced to rely on W-2 forms, interview statements, and Department of Revenue Quarterly Reports for Unemployment Compensation forms to reconstruct payments actually made to Mr. Gandhi. These documents confirmed Mr. Gandhi's assertions that he was paid a bi-weekly salary of \$520 across his entire employment period. Based on this information, the Wage Hour Division determined that Mr. Gandhi was owed back wages in the amount of \$85,520.60, or the difference between what Mr. Gandhi should have earned under the applicable LCA, and what he was actually paid by Respondent over that period.

Respondent alleges that there is a gross factual error between starting work on January 18, 2006 and filing an I-129 Petition in September 2008, "as it throws into conclusion that Mr.

Gandhi was working in the position prior to filing the I-129 prior to the H-1B petition having been filed.” I am advised that this allegation is factually in error on its face.

I am advised:

The Respondent would have to be allowed the time to provide answers to all of the discovery to properly determine which facts are established and which are still in dispute; however, without such additional time, then any reliance on the facts at hand may be a great injustice before the Court in determining what are the facts of the case.

Actually, the Respondent had plenty of time to answer and elected to proceed with the record presented to me. The Respondent had an opportunity to present an affidavit, which I noted during the conference call. Therefore, I reject this defense.

The Administrator's investigation revealed that H-1B worker Mr. Uday Kumar Montipara had been employed as a Financial Analyst by Respondent from late 2005 through the end of the period of the investigation. When Mr. Montipara first began working for Respondent, he was promised a salary of \$43,118, but “[f]rom my very first paycheck I was not paid my promised salary. I was paid \$520 for every two weeks of employment.” When Mr. Montipara expressed displeasure at this reduced pay rate to Respondent, he “was told that the situation had changed and that financially it was not viable for them. They told me that my pay was going to be less and that I would only be working part-time.” Mr. Montipara continued to earn \$520 bi-weekly for his entire period of employment, earning no bonuses, per diem, or travel expenses, and earning no vacation or sick days. No records were kept of Mr. Montipara's hours, and his pay stub did not record his hours worked. Like Mr. Gandhi, Mr. Montipara lived in housing provided by Respondent at no cost.

Mr. Montipara was employed under two LCAs during the period of investigation. The first LCA authorized a full-time Financial Analyst for the period of August 1, 2006 through August 1, 2009, with a prevailing wage rate of \$17.42 an hour. As a result, Mr. Montipara should have been paid a minimum of \$696.80 for a full-time workweek, but instead was paid a bi-weekly salary of \$520.00. Mr. Montipara worked under another LCA for a full-time Financial Analyst beginning July 1, 2009, through the end of the period of the investigation. The prevailing wage rate for this LCA was \$43,118 annually, but instead Mr. Montipara was paid a \$520.00 bi-weekly salary, based on interviews and review of available pay records. Over the period of the investigation, Mr. Montipara should have been paid a total of \$181,642.08, based on the prevailing wage rates listed on the LCAs, but instead was paid only \$58,890.00. The Administrator determined that Mr. Montipara was owed back wages in the amount of \$122,752.08, or the difference between what Mr. Montipara should have earned under the applicable LCA, and what he was actually paid by Respondent over that period.

The Administrator's investigation also revealed that H-1B worker Mr. Nirav Parikh had been employed as an Electrical Engineering Manager by Respondent under an LCA authorized for a full-time position in that role, at a pay rate of \$76,523.00 annually, valid for the period of

October 1, 2009 through October 1, 2012. Through review of available records, including W2 tax forms and Department of Revenue Unemployment Compensation Tax reports, the investigator determined that Mr. Parikh was paid \$29,455.00 during the period of investigation, but should have been paid \$51,015.33 based on the prevailing wage rate.

In its request for hearing, dated September 24, 2015, Respondent stated that the nation's "economic situation" meant that Respondent could not afford to pay the H-1B workers full-time wages, and that each was working part-time. Therefore, Respondent admits that it did not pay the prevailing wage as required by the LCA, only an "hourly rate" as it applied to part-time employment. Under 20 C.F.R. § 655.731(c)(7)(i), a H-1B worker in a "nonproductive status due to a decision by the employer (e.g., because of lack of assigned work)," the employer must still compensate salaried employees at "the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week...at the required wage for the occupation listed on the LCA." The only circumstances in which an H-1B employer is excused from its payment obligations occur for conditions "unrelated to employment" that take a worker away from the workplace for reasons voluntarily requested by the worker, or for cases of bona fide termination. 20 C.F.R. § 655.731(c)(7)(ii). Thus, in order for the employer "to be relieved from paying wages for nonproductive periods the H-1B employer must prove: (1) the existence of conditions unrelated to the employee's employment that either; (2) took the employee away from his/her duties at his or her request and convenience, or (3) otherwise render the employee unable to work." In the *Matter of Arvind Gupta v. Compunnel Software Group, Inc.*, 2014 WL 2917576 (May 29, 2014), at 9.

I accept the allegation that no such circumstances existed in this case, and thus Respondent was responsible for paying each worker the wage rate listed on the LCA. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731(c)(6)(i), 655.731(c)(7)(i). See also *In the Matter of Nalinabai P. Chelladurai v. Infinite Solutions, Inc.*, 2006 WL 1151942 (April 26, 2006), at 5.

I find that the LCAs at issue were approved for full time positions, and thus Respondent – despite the flagging economy – was legally obligated to pay the wage rates for a full time schedule. *Id.* This same section does allow for an employer to pay a part-time employee for "at least the number of hours indicated on the I-129 petition" and "in no event shall the employee be paid for fewer than the minimum number of hours indicated for the range of part-time employment." 20 C.F.R. § 655.731(c)(7). This provision is irrelevant for Respondent, since the wage violations were cited for LCAs issued for full-time positions. On March 18, 2011, Respondent did obtain an amended LCA certified by the Employment and Training Administration that authorized a part-time Electrical Engineer from March 14, 2011 through September 30, 2011, intended for Mr. Gandhi. However, the effective date of this amended LCA occurred after the wage violations involving Mr. Gandhi had already occurred. Further, Respondent cannot claim that any housing provided to Mr. Gandhi or Mr. Montipara can be credited towards the amount due, as any such deduction was not an allowable "authorized deduction" under 20 C.F.R. § 655.731(c)(9)(iii)(A), as there was no record of any "voluntary, written authorization" completed by either worker.

2. Allegation that Respondent Violated 20 C.F.R. § 655.734

Complainant alleges that Respondent failed to provide notice of the filing of the LCAs for ten days in two conspicuous locations at the place of employment, in violation of 20 C.F.R. § 655.734. I accept that Respondent admits as much in its request for hearing, stating that the “gas station and convenience store...did not provide any notice board for employees,” but that a notice board “was kept in the file at the location in a small private office space which was always available to the public on request.” I am advised that this is a clear violation of the regulation, which states that the notice shall be “posted in two or more conspicuous places.” 20 C.F.R. § 655.734(a)(1)(A)(1). The keeping of a single notice board violates the “two or more” provision, and the fact that this board was supposedly kept in a file within a “small private office space” violates the provision regarding “conspicuous places.”

The Administrator did not assess civil money penalties for this violation, despite Respondent's obvious and admitted violation of the standard.

3. Allegation that Respondent Violated 20 C.F.R. § 655.731(b), 20 C.F.R. § 655.738(e), 20 C.F.R. § 655.739(i), and 20 C.F.R. § 655.760(c)

The Administrator's investigation revealed that Respondent had not maintained payroll records for any H-1B employee that showed gross amount of wages, the pay period of wage payments, dates of payment, or total additions or deductions from employees' pay. Respondent also did not record the hours worked by hourly employee Mr. Montipara, who told investigators that his pay stub did not list his hours. Complainant argues that WHD requested these records from Respondent on numerous occasions, and they were never provided; instead, Respondent presented the agency with tax filing records and indicated that “all records” had been produced. The only records maintained by the employer showing pay rates were W-2 tax forms and Department of Revenue Quarterly Reports for Unemployment Compensation Tax (UCT-6 Quarterly) showing gross amounts paid to employees each quarter. Thus, I am advised that the Administrator determined that Respondent had violated the recordkeeping requirements of C.F.R. § 655.731(b), 20 C.F.R. § 655.738(e), 20 C.F.R. § 655.738(e), 20 C.F.R. § 655.739(i), and 20 C.F.R. § 655.760(c). Respondent alleges that it was in compliance with these regulations, and that “[t]here is no specific requirement of daily timesheets in the regulations.” However, 20 C.F.R. § 655.731(b) requires that employers keep complex records including “hours worked each day” -- in direct refutation of Respondent's argument that the regulations do not require “daily timesheets” -- as well as total wages per pay period, deductions, and pay rate. 20 C.F.R. § 655.738(e) requires the employer to maintain records of displacement of domestic workers; 20 C.F.R. § 655.739(i) requires maintenance of documentation that the employer attempted to recruit domestic workers for the positions; and 20 C.F.R. § 655.760(c) requires the employer to maintain applicable records for at least one year after the departure of an H-1B worker.

I accept that Respondent failed to comply with any of these provisions, and accept that Respondent's request for hearing, considered in a vacuum, establishes the violation. As these inadequate records impeded the investigation in a case that involved financial losses to affected employees, the Administrator recommended a civil money penalty of \$500, “well below the statutory maximum.”

CONCLUSION

Complainant has met its burden of proof on the three allegations set forth above. Although Respondent may have set forth valid arguments if proven, it offered no evidence to support them.

ORDER

After having been fully advised in these premises, I render the following:

1. Because the claim has been heard “on the record” the issue of summary decision is moot.
2. Respondent is hereby ordered to pay three former H-1B workers a total of \$229,833.01 in back wages.
3. Respondent is hereby ordered to remit a civil money penalty of \$500 to the Administrator.

DANIEL F. SOLOMON
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.