



Issue Date: 20 June 2017

Case Number: 2017-LCA-00006

In the Matter of:

ADITYA CHETTYPALLY,
Prosecuting Party,

v.

PREMIER IT SOLUTIONS, INC.,
Respondent.

Appearances: Aditya Chettypally, *pro se*
Prosecuting Party

Emily Neumann, Esq.
Reddy & Neumann, P.C.
Counsel for Respondent

Before: Marc R. Hillson, *Administrative Law Judge*¹

DECISION AND ORDER

This matter is before me on appeal from the February 7, 2017 decision of the District Director of the Wage and Hour Division (WHD) finding that Respondent Premier IT Solutions committed violations of the H-1B regulations under the Immigration and Nationality Act (INA), and awarding back pay to the Prosecuting Party, Aditya Chettypally. Mr. Chettypally is seeking additional violation findings and back pay. In this decision, I find that even though Respondent committed a number of violations of the Act and its regulations, the payment ordered by the Wage and Hour Division, which was paid to the Prosecuting Party, covered all back wages due to the Prosecuting Party as well as a return trip to India, and that the Prosecuting Party is not entitled to further back pay or other damages.

¹ Appointed under the U.S. Office of Personnel Management Senior Administrative Law Judge Program. See 5 C.F.R. § 930.209.

STATUTORY AND REGULATORY BACKGROUND

The INA, as amended by the American Competitiveness and Workforce Improvement Act of 1998, permits nonimmigrants to work in the United States temporarily on H-1B visas. Employers may file a Labor Condition Application to allow them to temporarily employ foreign workers in specialty occupations, where the employer cannot find U.S. workers with the requisite skills to perform the job functions. The regulations at 20 C.F.R. § 655.731 contain detailed requirements concerning the wages to be paid to such nonimmigrants, and 20 C.F.R. § 655.731(c) particularly focuses on circumstances where an employer is required to pay employees even where they are in a nonproductive status, and when an employer is not obligated to make such payments. If an H-1B employee is in nonproductive status due to a decision by the employer, the employer is required to pay the employee's salary. 20 C.F.R. § 655.731(c)(7)(i).

However, once there has been a *bona fide* termination of the employment relationship, the H-1B employee is no longer entitled to any further salary. 20 C.F.R. § 655.731(c)(7)(ii). The regulation cites to the Department of Homeland Security (DHS) regulations which require, as part of the *bona fide* termination process, the employer to notify DHS that the employment has been terminated so that the petition which allowed the worker to enter the country could be cancelled. The regulation also cites to a DHS regulation requiring the employer, "to provide the employee with payment for transportation home under certain circumstances." (*Id.*, citing 8 C.F.R. 214.2(h)(4)(iii)(E)).

PROCEDURAL AND FACTUAL BACKGROUND

The Prosecuting Party, Aditya Chettyally, entered into an employment agreement with Respondent Premier IT Solutions to work under the H-1B visa program from October 1, 2015 through September 3, 2018. Although the facts are not crystal clear, it appears that beginning sometime in November 2015 Mr. Chettyally was in a non-productive status, due to the failure of Respondent to provide him work assignments.

On March 21, 2016 Mr. Chettyally filed a complaint with the Wage and Hour Division, alleging that Premier IT had committed a number of violations of the Labor Condition Application (LCA) regulations, including a failure to pay him the agreed upon salary. Approximately one month later, when checking his status on the USCIS website, Mr. Chettyally discovered that Premier IT had submitted a notice to terminate the H-1B visa and that the termination had been approved. (Transcript, p. 15). Mr. Chettyally was never directly notified by Premier IT that his visa had been terminated, nor was he given any payment for transportation home to India. He eventually borrowed funds and returned home.

On February 7, 2017, WHD issued a decision finding that Premier IT had committed three violations of the H-1B regulations, including failure to pay wages in violation of 20 C.F.R. § 655.731. The Administrator found that there was a failure to pay Mr. Chettyally for both productive and non-productive work, and for travel expenses "associated with the petition." The Administrator did not assess a civil penalty but ordered Premier IT to pay Mr. Chettyally "back wages in the amount of \$26,737.97" for the period November 1, 2015 through May 13, 2016.

Violations for failure to provide health benefits and for failure to provide Mr. Chettyally a copy of the notice of filing of the LCA were also found, but no penalty was assessed for either violation. The decision indicated that Premier IT had paid the back wages in full. Premier IT was ordered to comply with the regulations in the future.

On February 21, 2017, Mr. Chettyally requested a hearing on the WHD determination. In particular, Mr. Chettyally contended that Premier IT did not comply with the *bona fide* termination process in that it did not notify him of his employment termination, nor did it provide him with a flight ticket home. In his request, Mr. Chettyally implied that WHD was in error by limiting back pay to the period ending May 13, 2016, rather than September 2018, when the H-1B visa was originally set to expire.

At a conference call on March 23, 2017, the parties agreed that it would be infeasible to hold a hearing within the time period (60 days after the filing of the request for hearing) specified by regulation, and jointly agreed that I would conduct a telephone hearing on May 16, 2017. The parties also agreed that the required prehearing statement would be filed by April 21, 2017 and that any dispositive motions must be filed no later than 30 days before the hearing. While Mr. Chettyally filed his prehearing statement in a timely manner, including a list of 39 proposed exhibits, Premier IT did not submit the required statement, but several days after the due date requested an extension of time to file. Premier IT also filed a Motion to Dismiss less than a week before the hearing date.

I conducted a hearing via telephone on May 16, 2017. At the start of the hearing I denied the two Premier IT motions.

After being sworn, Mr. Chettyally testified that there had never been a *bona fide* termination in that he was never notified by Premier IT that his employment was terminated, nor was he provided a return ticket to his home in India. He admitted that he received actual notice of his termination via the USCIS website where he saw that his H-1B visa was revoked. (Tr. 15) He indicated that he was seeking an additional one year's compensation. (Tr. 19). The bulk of his testimony consisted of his recounting failures of Premier IT to assign him to a job and/or to give him work in the position for which he was hired. He indicated that he had frequently attempted to contact Premier IT and was unsuccessful in getting assignments. He also indicated that Premier IT was one of a group of related companies and that it was very difficult to figure out who were the appropriate individuals to contact. He seemed to indicate that he was preparing to look for other employment, but believed he was unable to do so because he did not have a copy of his LCA document.

Both parties submitted briefs and reply briefs after the hearing. In his reply brief, Mr. Chettyally admitted that he eventually received, as part of the back wages ordered by the Administrator, after-the-fact payment for his return trip to India.

FINDINGS AND CONCLUSIONS

1. Mr. Chettyally, the Prosecuting Party, was authorized to work for Premier IT Solutions, the Respondent, under an approved H-1B visa, from October 2015 through September 3, 2018.
2. Beginning sometime in November 2015, Mr. Chettyally was in a nonproductive work status with respect to Premier IT. (ALJ Ex. 2, Tr. 13-18).
3. In March or April 2016, Premier IT filed documentation with the USCIS to withdraw Mr. Chettyally's H-1B visa.
4. Premier IT never notified Mr. Chettyally that his employment was terminated and that they had filed documentation with the USCIS to withdraw the H-1B visa. (Tr. 14).
5. Sometime in April 2016 Mr. Chettyally, by checking the USCIS website, discovered that his employment with Premier IT was terminated. (Tr. 14-15).
6. At the time of his termination, Mr. Chettyally was not offered, nor did he receive, any payment for transportation home to India. Mr. Chettyally borrowed funds and financed his own return trip in mid-May 2016. (Tr. 16).
7. In March 2016 Mr. Chettyally filed a complaint with the Wage and Hour Division of the Department of Labor, alleging that Premier IT had committed a number of violations of the H-1B regulations. (ALJ Ex. 2). In February 2017, the Administrator of the Wage and Hour Division found that Premier IT had violated the regulation concerning the payment of wages for nonproductive work status. WHD determined that Mr. Chettyally was entitled to a "back pay" of \$26,737.97. This amount included payment for transportation costs from the United States to Mr. Chettyally's home in India. WHD also found that Premier IT failed to provide health benefits and a copy of the LCA. (ALJ Ex. 2)
8. Premier IT paid Mr. Chettyally the back pay awarded by WHD, minus a deduction for taxes. (ALJ Ex. 2).
9. With respect to *bona fide* termination, Premier IT did not properly notify Mr. Chettyally that he was being terminated. However, once Mr. Chettyally found out about the termination on his own, he had actual notice, and the purpose of the notification requirement was achieved.
10. With respect to *bona fide* termination, Mr. Chettyally was not provided transportation costs home when he was terminated. However, Mr. Chettyally received transportation costs after the fact as a result of the decision of WHD.
11. Since Mr. Chettyally received back wages from the period November 1, 2015 through May 13, 2016, along with compensation for his travel costs, Mr. Chettyally is not entitled to additional compensation even though Premier IT fell short of its initial obligations in effectuating termination of Mr. Chettyally's H-1B visa.

DISCUSSION

As the Administrative Review Board (ARB) held in *Vinayagam v Cronous Solutions, Inc.*, ARB Case No. 15-045; ALJ No. 2013-LCA-029, (February 14, 2017), citing *Amtel Group of Fla., Inc. v. Yongmahapakorn* ARB No. 04-087, ALJ No. 2004-LCA-006, slip

op. at 11 (Sept. 29, 2006), there are three requirements necessary to effectuate a *bona fide* termination under the regulations, and thus end the obligation to pay wages. First, the “employer must expressly terminate the employment relationship with the H-1B nonimmigrant worker.” Second, the employer must notify USCIS of the termination so that the approval of the employer’s H-1B petition can be revoked. Third, the employer must, “under certain circumstances,” provide the worker with payment for transportation home. *Cronous*, at p. 7.

With respect to the first requirement, it appears undisputed that Premier IT never directly or expressly informed Mr. Chettyally that he was being terminated, but rather that Mr. Chettyally found out about the termination on his own when he checked his status on the USCIS website sometime in April, 2016. In *Vyasabattu v. eSEMANTIKS*, ARB Case No. 10-117; ALJ Case No. 2008-LCA-00022 (February 11, 2015), the ARB held that an employer had not effected a *bona fide* termination when it contacted USCIS to revoke the H-1B worker’s visa, but never expressly informed the H-1B worker that his employment was terminated. However, the ARB based its decision on the “ambiguousness of the record evidence relevant to th[e] relationship [between the H-1B worker and the employer].” *eSEMANTIKS* at 8. Specifically, the employer admitted that it did not fire the H-1B worker and the employer continued to email the H-1B worker about time sheets, a W-2, and other related matters. *Id.* at 7-8. Furthermore, the H-1B worker in *eSEMANTIKS* had no knowledge that USCIS had revoked his visa. None of these factors are present in the instant case. Even though the actions of Premier IT itself did not meet the requirements of *bona fide* termination, since Mr. Chettyally’s contention that he was never informed by Premier IT of his termination was unchallenged and since there appears to be no evidence to the contrary, this failure in itself does not warrant extending the salary award beyond that found by the Administrator. Actual notice from USCIS that his employment with Premier IT was terminated satisfies the notification requirement with respect to Mr. Chettyally. Since the intent of this requirement is obviously to give notice to the H-1B employee and since Mr. Chettyally received actual notice—albeit not directly from Premier IT, I find that the purpose of this requirement has been accomplished.

With respect to the second requirement of whether a *bona fide* termination had been effected, it is clear that Premier IT did notify USCIS that the employment relationship with Mr. Chettyally was terminated. Although the exact date of the USCIS notification is unclear from this record, it obviously was no later than April, 2016, since that is when Mr. Chettyally found out about it when checking the USCIS website. With respect to the third requirement, the record clearly establishes that Mr. Chettyally was not given payment for his return trip home at the time he was forced to leave the United States, but was reimbursed for the cost of his trip as a result of the decision by the Administrator.

While Mr. Chettyally was not given payment for a return to his home at the time he was terminated from employment, the failure of Premier IT to provide this benefit does not resolve the matter of whether there was a *bona fide* termination. “The fact of an H-1B employer’s nonpayment of return transportation costs to a discharged H-1B nonimmigrant employee is not dispositive in all cases of the issue of whether or not the employer has established a *bona fide* termination of the employment relationship, thereby ending its liability to pay the employee’s wages.” *Ninthya Vinayagam v. Cronous Solutions, Inc.*, ARB No. 15-045, ALJ No. 2013-LCA-

029, slip op. at 7 (ARB Feb. 14, 2017). In that case, unlike the situation here, the H-1B employee voluntarily elected to stay in the United States, even though her visa had been terminated, and the Board found there was no obligation to pay return expenses. Here, however, Mr. Chettyally, with no source of income and an expired visa, borrowed funds and did return home. In fact, the Administrator award of back wages included transportation costs for Mr. Chettyally to return home to India, and these costs were paid to Mr. Chettyally after the fact of his return home. Evidence introduced by Mr. Chettyally included confirmation from the WHD investigator that he was never notified by Premier IT of his termination and that Premier IT did not comply with the *bona fide* termination requirements. (CX-5). Thus, at the time of Mr. Chettyally's termination, Premier IT had not met the third requirement for a *bona fide* termination.

The failure of Premier IT to comply with all the requirements for *bona fide* termination does not, in itself, constitute a basis for directing the payment of additional wages beyond that ordered by the Administrator. Although the payment for the return trip to India was after-the-fact, Mr. Chettyally was nevertheless fully compensated for his return trip. If an individual is informed that his employment is terminated, and an employer has filed the requisite documentation with USCIS, and the individual returns home on his own, it is difficult to see how the regulations justify payment of additional salary for the period the individual is no longer in this country. Other than the back pay owed for the period of nonproductive status, which appeared to include not only the time up to when Mr. Chettyally became aware of his termination, but also included the period until he left the country the following month, there is no justification for awarding additional back pay to Mr. Chettyally. Requiring additional back pay where the employee has returned to his home country after discovering that he has been terminated only because the return trip has not been paid for would be an irrational extension of the regulatory protections for H-1B workers. Since Mr. Chettyally had already left the country as of May 13, 2016, he was obviously in no position to continue working for Premier IT, and with the WHD Administrator's decision to require Premier IT to provide full back pay from November 1, 2015 through May 13, 2016, and to provide, although after-the fact, the cost of a return trip home, there was no further financial obligation to Mr. Chettyally on behalf of Premier IT.

Accordingly, I affirm the decision of the Wage and Hour Division.

MARC R. HILLSON
Administrative Law Judge
Washington, D.C.

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.