



Issue Date: 26 September 2018

CASE NO.: 2017-LCA-18

IN THE MATTER OF

**ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party**

v.

**INTEGRATED GEOPHYSICS, INC.,
Respondent**

DECISION & ORDER

Procedural Background

This matter arises under the H-1B provisions of the Immigration and Nationality Act¹ (the “Act”), and the implementing regulations.² The Act allows employers to hire foreign workers under H-1B visas to work in specialty occupations on a temporary basis.

On 27 Jun 17, the Administrator issued a determination that Respondent owed \$68,738.84 to H-1B non-immigrant worker Maria Hanciuc. Respondent contested that determination and requested a hearing, which I initially set for 14 Feb 18. That date was subsequently continued to the current setting of 26 Jun 18. Both parties filed motions for summary decision and I conducted a conference call on 30 May 18. The parties agreed that they had no factual disputes and the case presented only legal issues. They agreed to waive an in person hearing and instead file a comprehensive joint stipulation of fact and individual legal arguments.

Factual Background³

Respondent is a closely held corporation with Corine Prieto as the sole shareholder and president. Respondent does business in Houston, Texas as a registered geophysics firm providing consulting, integrated interpretation of geophysical and geological data, structural models, and basement interpretations. In 2009, Respondent hired geophysicist Maria Hanciuc as an H-1B visa recipient employee.

¹ 8 U.S.C. § 1101(a)(15)(H)(i)(B).

² 20 C.F.R. Part 655, Subparts H and I.

³ Pursuant to the agreement of the parties, the relevant facts are established by their joint stipulation, which I have admitted into evidence as Joint Exhibit One (JX-1). I hereby incorporate by reference those stipulated facts to be my factual findings in the case.

On 30 Apr 12, Prieto signed a labor condition application (LCA) for the position of geophysicist. The period of employment was 8 Sep 12 through 7 Sep 15 and the wage rate and prevailing wage was \$78,894. Hanciuc's federally taxed wages for 2014 were \$68,609.71.

In March 2015, Prieto advised all of Respondent's staff, including Hanciuc, that economic conditions would force Respondent to make significant cutbacks. The reduction in business forced Prieto to loan money to Respondent. Respondent also accepted a loan from another employee. Nevertheless, Respondent was unable to pay its employees, including Hanciuc. Multiple staff members left Respondent and the remaining staff were informed that payroll would be cut in half. Respondent was unable to secure any new contracts in 2014 or 2015. Prieto met with Hanciuc that same month to discuss her immigration options in terms of avoiding the cancelation of her visa and enabling her to stay in the United States.

In August 2015, Prieto notified the remaining staff that Respondent would no longer be able to meet any payroll obligations and they should find other employment. Many of the staff did so and some sought unemployment benefits. Nonetheless, on 8 Aug 15, Prieto signed an LCA for geophysicist covering the period 26 Aug 15 through 20 Dec 16 with a wage rate and prevailing wage of \$80,538. At the time, Prieto understood that it was virtually impossible for Respondent to pay Hanciuc that amount. Hanciuc's federally taxed wages for 2015 were \$36,551.14.

In the meantime, Hanciuc was actively seeking other employment. She gave her resignation from Respondent to Prieto on 1 Apr 16. The aggregate difference between the amount Respondent paid Hanciuc and the amounts reflected in the LCA applications is \$68,738.84.

Applicable Law

The H-1B visa program permits employers to temporarily employ non-immigrants to fill specialized jobs in the United States. The Act requires that employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage. Under the Act, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must receive permission from the U.S. Department of Labor (DOL) before the alien may obtain an H-1B visa.⁴ To obtain permission from the DOL, the Act requires employers to submit a Labor Condition Application (LCA) to the DOL.⁵

The employer must ensure DOL receives a complete and accurate LCA.⁶ In submitting the LCA, and by affixing its signature on the LCA, the employer attests that the statements in the LCA are true and promises to comply with the conditions specifically identified in the LCA,⁷ including "the gross wage rate to be paid to each nonimmigrant."⁸

⁴ 8 U.S.C. § 1184(i)(1).

⁵ See 8 U.S.C. § 1182(n)(1).

⁶ 20 C.F.R. § 655.730(b).

⁷ 20 C.F.R. § 655.730(c)(2).

⁸ 20 C.F.R. § 655.730(c)(4).

Consistent with its commitment in the LCA, an employer must pay its H-1B nonimmigrant employees for the duration of the H-1B visa, unless the employer can show that one of two exceptions applies.⁹ The first exception excuses employers from the wage obligation if the employee is not working “due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant).”¹⁰ The second exception applies if employer discharges the H-1B nonimmigrant employee in good faith. However, that exception only applies if the employer (1) gives notice of the termination to the H-1B worker, (2) gives notice to the Department of Homeland Security (USCIS), and (3) under certain circumstances, provides the H-1B non-immigrant with payment for transportation home.¹¹

However, if the H-1B worker voluntarily becomes non-productive, then the employer is not required to pay wages.

If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience . . . then the employer shall not be obligated to pay the required wage rate during that period Payment need not be made if there has been a *bona fide* termination of the employment relationship. DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled [citation omitted] and require the employer to provide the employee with payment for transportation home under certain circumstances.¹²

Whether there is a nonproductive period depends on whether or not the H-1B worker is “ready, willing, and able” to work. If the worker is not “ready, willing, and able” to work, then wages are not due for non-productive periods. “If the H-1B nonimmigrant is not performing work and is in a nonproductive status *due to* a decision by the employer (e.g., because of lack of assigned work)... the employer is required to pay the salaried employee . . . at the required rate for the occupation listed on the [Labor Condition Application].”¹³

If the Administrator suspects that an employer has violated its obligation to pay wages to the H-1B worker, the Administrator may conduct an investigation.¹⁴ The Administrator may then issue

⁹ 20 C.F.R. § 655.731(c)(7) (“If the H-1B nonimmigrant is not performing work and is in a nonproductive status *due to* a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or *any other reason except as specified in paragraph (c)(7)(ii) of this section*, the employer is required to pay the salaried employee , . . . at the required rate for the occupation listed on the [Labor Condition Application]” (emphasis added).)

¹⁰ 20 C.F.R. § 655.731(c)(7)(ii); see *Gupta v. Compunnel Software Grp., Inc.*, ARB No. 12-049, ALJ No. 2011-LCA-045, slip op. at 16 (ARB May 29, 2014).

¹¹ See *Baiju v. Fifth Ave. Comm.*, ARB No. 10-094, ALJ No. 2009-LCA-045, slip op. at 9 (ARB Mar. 30, 2012, Reissued Apr. 4, 2012).

¹² 20 C.F.R. § 655.731(c)(7)(ii).

¹³ 20 C.F.R. § 655.731(c)(7); *Administrator, Wage and Hour Div. v. Gov’t Training, LLC*, 2105-LCA-5 (ARB Feb. 23, 2018).

¹⁴ § 655.50.

a Determination Letter citing violations, requiring payment of wages, and imposing fines.¹⁵ A party disagreeing with the Determination Letter may appeal to the DOL, Office of Administrative Law Judges.¹⁶

Discussion¹⁷

The essential facts in this case are straightforward. Respondent hired Hanciuc as an H-1B geophysicist in 2009 and continued her employment through multiple LCA applications. Over time, changing economic conditions ultimately devastated Respondent's business. Respondent tried to adapt by borrowing money from its owner and cutting pay in half, but was ultimately forced to lay off its entire staff. In that regard, Hanciuc was treated the same as the rest of Respondent's employees and, as a result, was not paid the wages reflected in the LCA application. During this period, Respondent's owner discussed Hanciuc's options with her. Even though she understood she would not be paid, Hanciuc accepted Respondent's offer to give her time to find other employment and avoid deportation. Consequently, Respondent did not fire Hanciuc and renewed her LCA application, even though it understood that it would be virtually impossible to meet the wage conditions therein. Hanciuc did finally submit her formal resignation to Respondent on 1 Apr 16 and less than two weeks later formally complained to the Administrator that Respondent had failed to meet its obligations under the LCA.

Based on those facts, the Administrator found that Respondent had filed LCA applications committing it to pay Hanciuc certain wages, but failed to do so. Since business failure does not relieve an employer of paying its H-1B employees, the Administrator determined that Respondent owes Hanciuc the unpaid wages.

In response, Respondent makes a compelling equitable argument. It correctly points out that the Administrator's order will force it to treat Hanciuc much more favorably than any of its other employees, which is clearly contrary to the intent of the act. Of course, the statute empowering the Administrator to issue the order is designed to discourage employers from ignoring their obligations to comply with immigration law. However, in this case it gives a windfall to Hanciuc, who comes to the litigation with unclean hands. The Administrator makes a fair argument that Respondent's knowingly incorrect LCA applications could be viewed as some sort of fraud. However, to the extent that is true, Hanciuc was a co-conspirator and the only one who stood to benefit.

¹⁵ § 655.70.

¹⁶ Parties may request a hearing under two circumstances. First, the complainant, or any other interested party, may request a hearing where the Administrator determines, after investigation, that there is no basis for finding that an employer has committed violations of the Act. Second, the employer, or any other interested party, may request a hearing where the Administrator determines, after investigation, that the employer has committed violations of the Act. § 655.820(b). An "interested party" is defined as "a person or entity who or which may be affected by the actions of an H-1B employer or by the outcome of a particular investigation and includes any person, organization, or entity who or which has notified the Department of his/her/its interest in the Administrator's determination." § 655.715.

¹⁷ The parties at one point discussed this issue in terms of the Administrator's motion for summary decision. However, the parties ultimately agreed that since there were no factual disputes, the question of whether or not a genuine issue of material fact exists is moot. Accordingly, this decision is based on a full consideration of the record and does not apply the summary decision standard.

Nonetheless, notwithstanding Respondent's arguments to the contrary, equity and good faith toward its non-immigrant employee do not excuse the failure to comply with the statute and implementing regulations. When Respondent's business began to fail and it was no longer able to meet the wage conditions of the LCA application, to act in good faith in terms of its obligations under the H-1B program meant it was required to discharge Hanciuc and notify the Department of Homeland Security (USCIS). Instead, it appears to have tried to accommodate a long time employee by giving Hanciuc an opportunity to find another way to remain in the United States. Consequently, it remained legally obligated to pay Hanciuc until she submitted a resignation. When it did not do so, she became an unintended and not particularly compelling beneficiary of a regulation designed to protect domestic workers. That Hanciuc may have fully understood she was not going to be paid, but still sought and received Prieto's help to avoid deportation does not constitute a legal defense for Respondent, no matter how frustrating it may be to find that Hanciuc then initiated this enforcement action.¹⁸

Consistent with the foregoing and the parties' stipulations, I find Respondent owes Hanciuc \$68,738.84 in unpaid wages for the period ending 1 Apr 16.

ORDERED this 26th day of September, 2018, at Covington, Louisiana.

PATRICK M. ROSENOW
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

¹⁸ See e.g., *No Good Deed*, WICKED (2003, Stephen Schwartz).

(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.