U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 October 2017

Case No.: 2017-LCA-00011

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

RITES LLC,
Respondent.

Appearances: Avni J. Amin, Esq.
Counsel for the Administrator

Bruce C. Allen, Esq.
Counsel for Respondent

Before: Monica Markley
Administrative Law Judge

DECISION AND ORDER

This case arises from a request for hearing filed by the Respondent in the above-captioned matter, which involves the enforcement of an H-1B Labor Condition Application by the Administrator, Wage & Hour Division, United States Department of Labor ("Administrator") under the Immigration and Nationality Act, 8 U.S.C. § 1182(n), as amended ("the Act").

Procedural History

Respondent Rites LLC ("Respondent") is an IT consulting company located in Richmond, Virginia. On March 30, 2012, the Department of Labor's Wage and Hour Division (the "Wage and Hour Division") issued a letter notifying Respondent that it was the subject of an investigation to "determine compliance with the H-1B Labor Condition Application (LCA) provisions of the Immigration and Nationality Act (INA)." The investigation involved 27 employees, including Usha Kiran Danda.

On September 18, 2015, Respondent and the Secretary of Labor, United States Department of Labor (the "Secretary") entered into a Back Wage Compliance and Payment

Agreement (the "Agreement").[1] The Agreement stated that "[a]s a result of th[e] investigation monetary violations were found resulting in 26 employee(s) due back wages in the amount of $61,595.92." Mr. Danda was not listed among the 26 employees covered by the Agreement or otherwise addressed by the Agreement. On March 2, 2017, the Administrator, Wage and Hour Division (the "Administrator") issued a determination letter, which stated the determination that Respondent committed four violations, that no civil money penalty was assessed, and that Responded owed back wages to the 26 H-1B nonimmigrants.

By letter dated March 9, 2017, Mr. Danda requested a hearing on the March 2, 2017 determination letter. Mr. Danda's letter stated:

> Based on my complaint (Case No: 1643036) the DOL has conducted an investigation on Rites LLC. The DOL has concluded the investigation and determined Rites LLC owes back wages in the amount of $134,029.86 to me and $61,595.92 to 26 other H-1B employees. However, Rites LLC has not agreed to pay me the back wages owed.

Based on Mr. Danda's request for a hearing on the Administrator's March 2, 2017 determination letter, a case was docketed with the Office of Administrative Law Judges (the "OALJ") and was assigned OALJ case number 2017-LHC-00010. On March 17, 2017, Chief Administrative Law Judge Stephen R. Henley issued a Notice of Docketing and Order to Show Cause Why This Matter Should Not Be Held in Abeyance. In response to this Order, Counsel for the Administrator filed a letter on March 21, 2017, arguing that Mr. Danda did not have standing to appeal the March 2, 2017 determination letter because the determination letter did not include any back wages assessed on behalf of Mr. Danda. The Administrator noted that "the list of LCAs that were attached to the determination letter d[id] not include Mr. Danda's LCA number." *Id.* The Administrator explained that a "determination letter with respect to Mr. Danda is forthcoming." *Id.*

On March 23, 2017, the Administrator issued a second determination letter to Respondent. The March 23, 2017 determination letter stated that "it has been determined that your firm committed the following violations":

> failed to pay wages as required in violation of 20 C.F.R. § 655.731…. failed to provide notice of the filing of LCA(s) in violation of 20 C.F.R. § 655.734…. failed to maintain documentation, as required by 20 C.F.R. § 655.731(b), 20 C.F.R. § 655.738(e), 20 C.F.R. § 655.739(i) and/or 20 C.F.R. § 655.760(c)…. and failed to comply with the provisions of subpart H or I in violation of 20 C.F.R. § 655.735(c).[2]

As to the remedy for the violations, the letter stated: "Your firm owes back wages in the amount of $134,029.86 to one (1) H-1B nonimmigrant, Usha Kiran Reddy Dandy."

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[1] Respondent and the Secretary reached this Agreement on September 18, 2015, and the parties' representatives signed the Agreement in October 2015.

[2] These are the same violations that were identified in the March 2, 2017 determination letter.

By letter dated March 30, 2017, Mr. Danda asked to withdraw his request for a hearing on the March 2, 2017 determination letter. Chief Judge Henley granted Mr. Danda's withdrawal of his request for a hearing in OALJ case number 2017-LHC-00010, and by Order dated April 17, 2017, dismissed the case without prejudice as to Mr. Danda's back wages complaint, and with prejudice as to the back wages owed to the other H-1B employees.

Meanwhile, on April 4, 2017, Respondent filed a request for a formal hearing before the OALJ regarding the March 23, 2017 determination letter. Based on that request, the present case was docketed with the OALJ and was assigned OALJ case number 2017-LHC-00011. The present case was assigned to me on May 5, 2017, and the formal hearing initially was scheduled for May 22, 2017. In a telephone conference with counsel for both parties on May 10, 2017, Respondent's counsel moved for a continuance of the hearing date, and counsel for the Administrator agreed to a continuance to a date certain for a hearing in Newport News, Virginia. I issued an Order granting the continuance, and the formal hearing was rescheduled for July 31, 2017, in Newport News, Virginia.

On July 14, 2017, Respondent served a Motion for Dispositive Action upon the Administrator,[3] seeking dismissal of this case on the grounds that the court lacks jurisdiction to adjudicate this case, the present case is barred by the doctrine of accord and satisfaction, and the doctrine of *res judicata* precludes a second judgment in this matter. The Administrator timely filed a brief in opposition to Respondent's motion on July 28, 2017. On August 1, 2017, Respondent filed a Motion for Leave to File Reply Brief and submitted its brief with the motion. By Order dated August 2, 2017, I granted Respondent's motion, and the reply brief was accepted and filed. I denied Respondent's motion by Order issued August 9, 2017.

In a telephone conference held July 25, 2017, counsel for both parties agreed that a live hearing was no longer necessary. While preserving his arguments in the Motion for Dispositive Action, Respondent's counsel offered to stipulate to several disputed issues, and the parties agreed that the remaining issue presents a legal question that can be resolved without an evidentiary hearing. The parties requested that the hearing be cancelled, that Respondent's motion to dismiss be addressed, and that any issues which survived the Motion for Dispositive Action be decided on the record based on stipulations and exhibits to be submitted by the parties. I granted this request in an Order Cancelling Hearing and Granting Joint Request for Decision on the Record issued July 26, 2017. The parties' Joint Stipulations were filed on August 17, 2017, and both the Administrator and Respondent timely filed a brief with attached exhibits on August 21, 2017. This matter is ripe for adjudication.

Stipulations and Initial Findings

In the Parties' Joint Stipulations filed August 17, 2017, the parties stipulated as follows:

1. Rites is a Limited Liability Company organized under the laws of the State of Virginia on July 17, 2006.

[3] Respondent's Motion for Dispositive Action was received by OALJ and filed on July 17, 2017.

2. Rites LLC ("Rites" or "Respondent") was at all relevant times an Information Technology consulting company. Rites provided consultants to third party customers or clients to fulfill short term or long term needs for specific information technology skills, such as computer systems analysts or computer programmers. The consultants would remain the direct employees of Rites while working at third party sites. Rites would attempt to make a profit by charging its customers a higher hourly rate than the amount paid to the employees.

3. On March 24, 2008, LCA I-08084-4088411 was certified. The period of employment stated on the LCA is September 23, 2008 to September 22, 2011.

4. The prevailing wage stated on the LCA is $45,843.00.

5. Rites paid its employees on a monthly basis. The monthly salary corresponding to the prevailing wage stated on the LCA is $3,820.25.

6. Usha Kiran Reddy Danda is a citizen of India. He originally came to the United States as a foreign student. He earned the degree of Master of Business Administration from the University of Akron, in Akron, Ohio, in August 2006. Following graduation, he was employed by a company known as Vayu Inc., and subsequently applied for a position with Rites.

7. Rites filed an H-1B petition on behalf of Mr. Danda for the position of Business Systems Analyst in Case EAC0824851095. USCIS received this petition on September 18, 2008. The petition was supported by LCA I-08084-4088411. The petition was approved with validity dates from January 8, 2009 to September 22, 2011. The petition and LCA were signed by Mr. Rumy Mohta.

8. At the time Mr. Mohta signed the I-129 petition and LCA, he and Anil Vakkalanka were co-owners of the company. Both owners were responsible for the day-to-day operations of the company.

9. LCA I-08084-4088411 provided for the hiring of up to 17 business systems analysts. Although used to support the petition for Usha Danda, the LCA was not filed for the specific purpose of hiring Usha Danda.

10. Mr. Danda entered into an eight week training course at Rites beginning no later than October 1, 2008.

11. Rites attempted to find a client assignment for Mr. Danda, including reviewing client requirements and arranging for interviews. However, Rites was not successful in finding a suitable assignment for Mr. Danda.

12. Mr. Danda moved to Ohio on March 27, 2009.

13. Although he had moved to Ohio, Mr. Danda remained available for work for Rites throughout the validity period of the petition.

14. Mr. Danda was physically present in the United States from January 23, 2008 until November 13, 2011.

15. From time to time, Rites would forward approval notices to USCIS along with a letter stating the employees named in the notices were no longer with the company. However, there is no evidence that such a letter was ever sent notifying USCIS that Usha Danda was no longer an employee. Further, USCIS records indicate the petition was never revoked.

16. In addition, there was no unequivocal communication to Mr. Danda that his employment had been terminated. Also, Rites did not offer to pay Mr. Danda's travel expense to return to India.

17. Consequently, the parties agree that there was no "bona fide" termination of Mr. Danda's employment as this term has been used in the applicable regulations and case law.

18. The parties agree that based on these factual stipulations and the applicable law, Mr. Danda is entitled to back pay at the rate of $3,820.25 per month from January 8, 2009 through September 22, 2011. The parties further agree that Mr. Danda received $2,500 during the course of his employment that should be credited toward the back pay. This would result in an award of $121,511.19.

19. The Administrator further contends that Mr. Danda is also due back pay prior to the effective date of the I-129 petition, beginning October 1, 2008. If correct, the parties agree this would result in back pay of $134,029.86 including the credit of $2,500.

20. The parties have agreed to allow the ALJ to determine the appropriate start date for back wages through the submission of separate exhibits and briefs on this issue.

21. The parties further agree that the facts of the case as applied to Usha Danda establish two violations of the LCA regulations, specifically: (a) failure to pay wages as required by 20 C.F.R. §655.731, and (b) failure to maintain required documentation, specifically, failure to maintain complete copies of complete payroll records per 20 C.F.R. §655.731(b).

22. The Administrator has not assessed any civil monetary penalties for these violations, there has been no finding of a willful violation, and there has been no violation that would result in debarment.

23. These stipulations are not intended as a settlement of this case, and both parties reserve the right to appeal any adverse finding.

I accept these stipulations and find these matters as fact.

Issue in Dispute

The parties dispute the start date of the back wage assessment for Mr. Danda. The Administrator contends the start date should be October 1, 2008, and Rites contends the start date should be January 8, 2009, the first day of the validity period on Rites' I-129 petition.

Parties' Arguments and Evidence

The Administrator filed a brief with the following exhibits attached:[4]

- Exhibit A: Excerpt of the transcript of the deposition of Mr. Danda
- Exhibit B: Excerpt of the transcript of the deposition of Anil Vakkalanka, co-owner of Rites LLC
- Exhibit C: Email dated 9/24/08 from "roger@ritesinc.com" to 2 recipients
- Exhibit D: Email dated 9/17/08 from "roger@ritesinc.com" to 2 recipients
- Exhibit E: 8 pages of emails and email excerpts dated October through December 2008
- Exhibit F: Email exchange between Respondent's counsel and the Wage and Hour Division investigator dated June through August 2012

In his brief, the Administrator argues that Mr. Danda had entered into employment with Rites by October 1, 2008, because he moved to Richmond, Virginia to work for Rites on September 8, 2008; he made himself available for work and came under the company's control when he began a training course sometime in September 2008; and he began receiving job postings from Rites in September 2008. The Administrator contends that Mr. Danda would have participated in interviews if selected from the job postings sent by Rites, and would have begun working if hired following the interviews. Therefore, the Administrator argues Mr. Danda had entered into employment with Rites by October 1, 2008, and Rites was obligated to pay him the prevailing wage specified in the LCA as of October 1, 2008. In response to Rites' reliance on the January 2009 approval date of the I-129 petition, the Administrator asserts that Mr. Danda was eligible to work for Rites prior to the approval of the I-129 petition under the H-1B portability provisions, which allow an H-1B nonimmigrant to begin work for a new employer upon the filing of the I-129 petition, rather than upon its approval. Because the I-129 was filed on September 18, 2008, Mr. Danda could begin working for Rites as of that date. Accordingly, the Administrator seeks back wages for Mr. Danda beginning on October 1, 2008.

Rites filed a brief with the following exhibits attached:

- Exhibit A: two excerpted pages from the Administrator's investigative report
- Exhibit B: the I-129 *Petition for a Nonimmigrant Worker* filed by Rites on behalf of Mr. Danda
- Exhibit C: the I-797A *Notice of Action* from U.S. Citizenship and Immigration Services ("USCIS") stating the I-129 petition had been approved

[4] The following abbreviations are used to refer to the parties' exhibits: PX for the Prosecuting Party's exhibits (the Administrator's exhibits), and RX for the Respondent's exhibits.

- Exhibit D: Excerpts of the transcript of the deposition of Mr. Vakkalanka

In its brief, Rites argues that the regulations provide for payment to an "H-1B nonimmigrant," and an employee does not become an "H-1B nonimmigrant" prior to approval of the H-1B petition. Rites argues that the regulations do not contemplate payment of the prevailing wage "prior to approval of the H-1B petition merely because the employee chooses to 'make himself available to work.'" Rites asserts that under 20 C.F.R. § 655.731(c)(6)(ii), an H-1B nonimmigrant is eligible to work, and thus eligible for H-1B wages, on the later of the date of need stated in the petition (October 1, 2008) or the date of adjustment of status by DHS. Rites contends the portability provision of the Immigration and Nationality Act (INA) do not change this conclusion, because (1) the INA provision relates to the legal authorization for a nonimmigrant to accept new employment, not to the applicability of a particular Labor Condition Application or an employer's obligation to pay wages under the LCA; (2) there is no evidence in the record that Mr. Danda was eligible for portability; and (3) while the portability provision permits a nonimmigrant to accept new employment prior to approval of the petition, the statutes and regulations do not require an employer to allow it, and "[t]he record is unambiguous that Rites did not consider Usha Danda an employee until approval of the petition." For these reasons, Rites asserts that back wages are due to Mr. Danda beginning on January 8, 2009, the approval date of the I-129 petition.

Applicable Law

The statutory requirements for Labor Condition Applications for H-1B nonimmigrants are addressed in 8 U.S.C. § 1182(n). Subsection (1) sets forth the employer's requirements for a Labor Condition Application, and subsection (2) provides for the investigation of violations. Subsection (2)(C)(vii) provides:

> It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H–1B nonimmigrant designated as a full-time employee on the petition filed under section 1184(c)(1) of this title by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

8 U.S.C. § 1182(n)(2)(C)(vii)(I).

The wage requirements under a Labor Condition Application (LCA) are described in 20 C.F.R. § 655.731. That regulation provides, in relevant part:

> **(a) Establishing the wage requirement.** The first LCA requirement shall be satisfied when the employer signs Form ETA 9035 or 9035E attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H-1B nonimmigrant(s) ….

(b) Documentation of the wage statement.

(1) The employer shall develop and maintain documentation sufficient to meet its burden of proving the validity of the wage statement required in paragraph (a) of this section and attested to on Form ETA 9035 or 9035E. The documentation shall be made available to DOL upon request….

(c) Satisfaction of required wage obligation.

(1) The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section….

* * *

(6) Subject to the standards specified in paragraph (c)(7) of this section (regarding nonproductive status), an H-1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant "enters into employment" with the employer.

(i) For purposes of this paragraph (c)(6), the H-1B nonimmigrant is considered to "enter into employment" when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.

(ii) Even if the H-1B nonimmigrant has not yet "entered into employment" with the employer (as described in paragraph (c)(6)(i) of this section), the employer that has had an LCA certified and an H-1B petition approved for the H-1B nonimmigrant shall pay the nonimmigrant the required wage beginning 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition, or, if the nonimmigrant is present in the United States on the date of the approval of the petition, beginning 60 days after the date the nonimmigrant becomes eligible to work for the employer. For purposes of this latter requirement, the H-1B nonimmigrant is considered to be eligible to work for the employer upon the date of need set forth on the approved H-1B petition filed by the employer, or the date of adjustment of the nonimmigrant's status by DHS, whichever is later. Matters such as the worker's obtaining a State license would not be relevant to this determination.

(7) Wage obligation(s) for H-1B nonimmigrant in nonproductive status -

(i) **Circumstances where wages must be paid.** 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 the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA.

(ii) **Circumstances where wages need not be paid.** 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 (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), then the employer shall not be obligated to pay the required wage rate during that period, provided that such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601et seq.) or the Americans with Disabilities Act (42 U.S.C. 12101et seq.). 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 (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

20 C.F.R. § 655.731.

The "portability" provision of the Immigration and Nationality Act provides:

(n) Increased portability of H–1B status

(1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(b) of this title is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a). Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

(2) A nonimmigrant alien described in this paragraph is a nonimmigrant alien—

(A) who has been lawfully admitted into the United States;

(B) on whose behalf an employer has filed a nonfrivolous petition for new employment before the date of expiration of the period of stay authorized by the Attorney General; and

(C) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition.

8 U.S.C. § 1184(n).

The regulation at 20 C.F.R. § 655.705 provides, in relevant part:

§ 655.705 What Federal agencies are involved in the H-1B and H-1B1 programs, and what are the responsibilities of those agencies and of employers?
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. The employer also has continuing responsibilities under the process. This section briefly describes the responsibilities of each of these entities.

* * *

(c) Employer's responsibilities. This paragraph applies only to the H-1B program; employer's responsibilities under the H-1B1 and E-3 programs are found at § 655.700(d)(4). Each employer seeking an H-1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities, as described more fully in this subpart and subpart I of this part, including:

(1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035E or Form ETA 9035 in the manner prescribed in § 655.720. By completing and submitting the LCA, and by signing the LCA, the employer makes certain representations and agrees to several attestations regarding its responsibilities, including the wages, working conditions, and benefits to be provided to the H-1B nonimmigrants (8 U.S.C. 1182(n)(1)) ….

* * *

(4) The employer shall not allow the nonimmigrant worker to begin work until DHS grants the alien authorization to work in the United States for that employer or, in the case of a nonimmigrant previously afforded H-1B status who is

> undertaking employment with a new H-1B employer, until the new employer files a nonfrivolous petition (Form I-129) in accordance with DHS requirements.

20 C.F.R. § 655.705.

Discussion

The sole issue in this case is the start date for Rites' obligation to pay back wages to Mr. Danda. There is no dispute that Mr. Danda became employed by Rites, never obtained an assignment but was not validly terminated, and therefore is entitled to back wages for his employment. The parties agree on the rate of pay for the back wages and that wages are due through September 22, 2011. They disagree only as to the start date for the payment of back wages.

An employer is required to pay full wages to an H-1B nonimmigrant, even if the worker is in nonproductive status for lack of assigned work, "after the nonimmigrant has entered into employment with the employer." 8 U.S.C. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i). An H-1B worker "enters into employment" with an employer "when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter." 20 C.F.R. § 655.731(c)(6)(i).

The Administrator argues that Mr. Danda entered into employment with Rites by October 1, 2008, because he moved to Richmond, Virginia, in September 2008 to work for Rites; began an eight-week training class for Rites sometime in September 2008; and began receiving job postings from Rites and marketing himself to Rites' clients or customers in September 2008. Rites counters that the training class was open to the public; that the purported job posting emails do not clearly relate to available positions and do not establish that any job opportunities had a start date prior to January 8, 2009; that the Administrator has not produced any direct documentation of employment, such as W-2s, I-9s, timesheets, or similar documents; and that its co-owner, Mr. Vakkalanka, unambiguously stated that Mr. Danda was not an employee of the company prior to approval of the petition in January 2009. Rites also argues that in any event, the obligation to pay wages is not triggered "merely because the employee chooses to make himself available to work," but rather depends on when the employee becomes eligible to work through approval of the petition.

I find that Mr. Danda made himself available to work for Rites when he moved to Richmond, Virginia, and began participating in Rites' training class. Rites is located in Richmond, Virginia (RX-B), and Mr. Danda moved from Akron, Ohio, to Richmond on September 8, 2008. (PX-A at pp. 22-23.[5]) Mr. Mohta, one of Rites' co-owners, met Mr. Danda at the airport upon his arrival in Virginia, and they drove "straight to the office of Rites" where Mr. Danda was introduced to Mr. Vakkalanka and the other office employees, and then "was taken to the apartments." (PX-A at p. 23.) Mr. Danda participated in an eight-week training session with Rites (Joint Stipulation No. 10), which began within a week to ten days of his

[5] The page citations to the transcript excerpts refer to the transcript pagination.

arrival in Virginia. (PX-A at pp. 23-24; RX-D at p. 24.) Although Mr. Vakkalanka stated that the training was also available to non-employees who "just came off the street and wanted to take the training" (RX-D at p. 24), I find that the training was not optional for employees of Rites. The training was for "Business Analysts" – the position for which Rites hired Mr. Danda and would attempt to place him with an outside employer – and was based on "the knowledge of BABOK, which is Business Analyst Body of Knowledge." (RX-D at p. 25.) Mr. Vakkalanka testified that all Rites employees are "encouraged" to take the training to "enhance their skills," but also testified that Rites was not actively trying to place Mr. Danda with an outside employer prior to January 2009 because he was "finishing his training."[6] (RX-D at pp. 26, 29.) The testimony that Mr. Danda would not be placed in a job before the training was complete undercuts the assertion that the training was voluntary and a choice made by Mr. Danda outside of Rites' direction or control. I find that Rites considered the training to be a required initial step in its job placement process for its employees. I find that Rites used the training to increase its employees' marketability and job performance. I therefore conclude that Mr. Danda's participation in the training was not an optional choice he made, but rather was a required step in Rites' job placement process. Accordingly, Mr. Danda had "come under the control of the employer, such as by … reporting for orientation or training," when he began his participation in Rites' training course.[7]

While the evidence is not clear as to when the training class began – Mr. Danda testified that it was the same week or the next week after he arrived in Virginia, and Mr. Vakkalanka testified that it was a week to ten days after Mr. Danda's arrival – the parties have stipulated that the class began no later than October 1, 2008. Rites' stated date of intended employment on the I-129 petition was October 1, 2008. I find that Mr. Danda made himself available for work with Rites, and was under Rites' control, as of October 1, 2008. Therefore, I find that Mr. Danda entered into employment with Rites as an H-1B nonimmigrant worker as of October 1, 2008.

Rites asserts that Mr. Danda could not validly enter into employment as an H-1B nonimmigrant until the I-129 petition was approved. The Administrator responds that, because Mr. Danda had already been approved as an H-1B nonimmigrant for a different employer, the portability provision of the H-1B program made Mr. Danda eligible for new employment as of the date of *filing* of the I-129 petition, not the date of its *approval*. Rites counters that the

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[6] I note that Mr. Danda's eight-week training course began sometime in September 2008, and would have been completed in November 2008, not January 2009. (*See, e.g.*, PX-B at p. 24.)

[7] I also reject Mr. Vakkalanka's testimony that if anyone sent job postings to Mr. Danda on behalf of Rites prior to January 2009, it was done in "error" because the recruiter did not know Mr. Danda's "petition [wa]s not approved yet." (See RX-D at p. 29.) I find that Mr. Vakkalanka is not credible, as his testimony was internally inconsistent and contradicted by other evidence. As discussed *infra*, Mr. Danda was authorized to work for Rites under the H-1B program after the I-129 petition was filed in September 2008. A Rites employee named Roger sent several emails to Mr. Danda in the months of September through December 2008. (See PX-C, PX-D, PX-E.) While Rites is correct that the purpose of some of the emails is vague (for example, the September emails appear to provide tips for resume preparation, but lack clear direction), other exchanges are not vague. On October 13, 2008, Roger sent a job description for a Business Analyst position, and Mr. Danda responded with a resume for the position. (PX-E.) On October 27, 2008, Roger sent an email to Mr. Danda informing him that his resume had been sent for a Business Analyst position, and he may get a telephone call from the recruiter at the vendor company ("Basha"). (PX-E.) Therefore, contrary to Mr. Vakkalanka's testimony, Rites was actively trying to place Mr. Danda in a position with an outside employer prior to January 2009.

portability provision is inapplicable and does not override the definition of "eligibility to work" in 20 C.F.R. § 655.731(c)(6)(ii), which it asserts is the later of the date of need in the petition or the date of adjustment of status by DHS.

The portability provision states that a "nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status … is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant …. Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease." 8 U.S.C. § 1184(n).

I find that the portability provision applies in this matter. USCIS had investigated Mr. Danda and granted him H-1B status with employer Vayu Inc.,[8] and investigated and approved Rites' petition, based on a "[c]hange of employer," to "[a]mend the stay of the person(s) since they now hold this status." (RX-B at 1.) The approval by USCIS is evidence that Mr. Danda had been lawfully admitted into the US; that the petition was not frivolous; and that Mr. Danda had not been employed without authorization prior to the filing of Rites' petition. Therefore, I find and conclude that the portability provision applied to him.

Rites argues that while the portability provision permits a nonimmigrant to accept employment prior to approval of the petition, the law does not require an employer to allow it, and the record is "unambiguous" that Rites did not consider Mr. Danda an employee until approval of the petition. Rites points to Mr. Vakkalanka's deposition testimony as proof that Rites did not consider Mr. Danda an employee prior to January 2009. As stated in footnote 7, *supra*, I find that Mr. Vakkalanka is not credible, and I give little weight to his testimony that Mr. Danda was not an employee prior to January 2009. As discussed above, I find that the training course provided by Rites was required of new employees, and I find that Mr. Danda was an employee of Rites after he moved to Virginia and began the training course. Moreover, through its employee Roger, Rites began working with Mr. Danda on his resume, and by October 2008, Rites began sending Mr. Danda's resume to potential job placements. Further, the DOL investigator stated in the report of investigation: "Mr. Vakkalanka recollects [Mr. Danda] started work on 11/1/2008 and … the employee completed the W-4 and other employment forms around the same date." (RX-A; *see also* PX-F at 2 (stating that Mr. Danda signed his W-4 form on November 3, 2008).) I find that contrary to its argument, Rites considered Mr. Danda an employee of the company prior to approval of the I-129 petition; further, as discussed above, Mr. Danda entered into employment with Rites as of October 1, 2008. Consequently, this argument is unavailing.

Rites further argues that the portability provision does not override the definition of "eligibility to work" in 20 C.F.R. § 655.731(c)(6)(ii), and that Mr. Danda was not eligible to work under that regulation until the later of the date of need in the petition or the date of adjustment of status by DHS. This argument relies on a misreading of the regulation. Section

[8] The I-129 Petition filed by Rites states that Mr. Danda's date of last arrival in the United States was January 23, 2008, and that Mr. Danda's then-Current Nonimmigrant Status was "H1B." (RX-B at 2.) The parties stipulated that Mr. Danda "was employed by a company known as Vayu Inc., and subsequently applied for a position with Rites." (Joint Stipulation No. 6.)

731(c)(6) provides that "an H-1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant 'enters into employment' with the employer." Subsection 731(c)(6)(i) provides that "the H-1B nonimmigrant is considered to 'enter into employment' when he/she first makes him/herself available for work or otherwise comes under the control of the employer …." As discussed above, I have found that Mr. Danda entered into employment with Rites as of October 1, 2008; therefore, under 20 C.F.R. § 655.731(c)(6), Mr. Danda was entitled to the required pay as of October 1, 2008.

Subsection 731(c)(6)(ii) applies to nonimmigrants who have not yet "entered into employment" with the employer, and provides:

> Even if the H-1B nonimmigrant has not yet "entered into employment" with the employer (as described in paragraph (c)(6)(i) of this section), the employer that has had an LCA certified and an H-1B petition approved for the H-1B nonimmigrant shall pay the nonimmigrant the required wage beginning 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition, or, if the nonimmigrant is present in the United States on the date of the approval of the petition, beginning 60 days after the date the nonimmigrant becomes eligible to work for the employer. For purposes of this latter requirement, the H-1B nonimmigrant is considered to be eligible to work for the employer upon the date of need set forth on the approved H-1B petition filed by the employer, or the date of adjustment of the nonimmigrant's status by DHS, whichever is later. Matters such as the worker's obtaining a State license would not be relevant to this determination.

By its own terms, this provision applies only if the nonimmigrant has not yet entered into employment with the employer. In that circumstance, the employer's obligation to pay the required wages nevertheless begins (notwithstanding that employment has not begun), either 30 days after the nonimmigrant enters the country, or for nonimmigrants already in the country, 60 days after the nonimmigrant becomes eligible to work for the employer. Rites relies on the definition of "eligible to work" in this provision to argue that no wages could be due to Mr. Danda prior to the later of the date of need or the date of adjustment of status. Because Mr. Danda had already "entered into employment" with Rites, however, his entitlement to wages is controlled by subsection (i), and not by subsection (ii).

In *Chelladurai v. Infinite Solutions, Inc.*, ARB Case No. 03-072, 2006 WL 1151942 (Apr. 26, 2006), Chelladurai entered the United States on an H-1B visa and worked for other H-1B employers before moving to Sacramento, California, in January of 2001 to work for Respondent ISI. ISI filed a petition on Chelladurai's behalf on December 14, 2000, which stated that her then-current immigration status was "H1B1." The petition certified that ISI needed the services of Chelladurai from January 2, 2001, until October 31, 2003. It was approved on April 12, 2001. Meanwhile, Chelladurai moved to Sacramento on January 2, 2001, to work for ISI, and completed a computer course at ISI, sent out her resume, interviewed, and otherwise marketed herself for contracting work at ISI's prompting or direction. Chelladurai never found any work, and ISI terminated her employment effective May 21, 2001. The ARB addressed the applicability of the portability provision, and when Chelladurai "entered into employment" with

ISI. First, the ARB held that "the applicability of the 'portability provisions' is not dependent on whether ISI had 'work' available for Chelladurai to perform. Rather, the 'portability provisions' apply by operation of law where certain requirements are met, such as in the instant case." *Id.* at *4. Because Chelladurai previously had been issued an H-1B visa, she was authorized to accept employment with ISI upon ISI's filing of a petition on her behalf, under the portability provisions of the H-1B program. *Id.* Second, the ARB held that it was error to find that ISI's obligation to pay Chelladurai did not start until the first full pay period following approval of ISI's petition. *Id.* at *5. Instead, under the portability provisions, Chelladurai was "eligible for employment with ISI at any time after ISI's December 14, 2000 *filing* with the INS of its petition; her eligibility for employment was not dependent on INS *approval* of the petition." *Id.* (citing 8 U.S.C.A. § 1184(n) and 20 C.F.R. § 655.705(c)(4); emphasis in original). Because Chelladurai moved to Sacramento on January 2, 2001 and made herself available for work or otherwise came under ISI's control as of January 3, 2001, the ARB held that she "entered into employment" with ISI as of that date and was entitled to wages as of January 3, 2001, notwithstanding that she had no assigned work and was in nonproductive status much of the time. *Id.*

As in *Chelladurai*, the applicability of the portability provision in this case does not depend on whether Rites had work available for Mr. Danda to perform. Instead, it applies by operation of law when its requirements are met. As in *Chelladurai*, Mr. Danda already had H-1B status (as discussed above), and he was authorized to accept employment with Rites upon Rites' filing of the I-129 petition on September 18, 2008. Rites' obligation to pay wages to Mr. Danda, like ISI's obligation to pay wages in *Chelladurai*, was not dependent upon approval of the I-129 petition; instead, it began when Mr. Danda entered into employment with Rites. Because I have found that Mr. Danda entered into employment with Rites as of October 1, 2008, Rites' obligation to pay wages begins on that date.

Conclusion

Based upon the foregoing, I find and conclude that the portability provision applies here, and thus Mr. Danda is entitled to back wages from the first date that he "entered into employment" with Rites following the date of filing of Rites' I-129 petition. 8 U.S.C. § 1184(n); 20 C.F.R. § 655.731(c)(6). Rites filed its I-129 petition on September 18, 2008 (Joint Stipulation No. 7), and as discussed above, I find that Mr. Danda entered into employment with Rites as of October 1, 2008. Therefore, Mr. Danda is entited to back wages as of October 1, 2008.

ORDER

The parties' Joint Stipulations are adopted and incorporated herein by reference.

Based upon the parties' Joint Stipulations, I find that the facts of the case as applied to Mr. Usha Danda establish two violations of the LCA regulations, specifically: (a) failure to pay wages as required by 20 C.F.R. § 655.731, and (b) failure to maintain required documentation, specifically, failure to maintain complete copies of complete payroll records per 20 C.F.R. § 655.731(b).

Based upon the findings set forth in this Decision and Order, and the parties' Joint Stipulation No. 19, Respondent is ordered to pay back wages to Mr. Usha Danda for the period beginning October 1, 2008 and ending September 22, 2011, in the total amount of $134,029.86 including the credit of $2,500.00.

SO ORDERED.

MONICA MARKLEY
Administrative Law Judge

MM/jcb
Newport News, VA

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.