



In the Matter of

**U.S. DEPARTMENT OF LABOR,
ADMINISTRATOR, WAGE & HOUR
DIVISION, EMPLOYMENT STANDARDS
ADMINISTRATION,**

ARB CASE NO. 01-080

ALJ CASE NO. 2001-LCA-8

PETITIONER,

DATE: November 25, 2003

v.

**PRISM ENTERPRISES OF CENTRAL
FLORIDA INC., d/b/a FUTURE AUTOMATION,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Steven J. Mandel, Esq., Paul L. Frieden, Esq., Joan Brenner, Esq.,
U. S. Department of Labor, Washington, D.C.

For the Respondent:

James R. Lavigne, Esq., *LaVigne, Coton & Associates, Orlando, FL*

FINAL DECISION AND ORDER

This case concerns the obligations of an employer to a nonimmigrant employee working in the United States under the H-1B visa program of the Immigration and Nationality Act of 1952 (INA), as amended, 8 U.S.C.A. §§1101, 1182, and 1184 (West 1999 & Supp. 2003). After completing a complaint investigation, the Administrator of the Wage and Hour Division (Administrator) determined that Prism Enterprises (Prism) violated the applicable regulations, inter alia, by failing to pay the required wage to Robert Blake (Blake), its H-1B employee. The Administrative Law Judge (ALJ) adopted the Administrator's findings with slight modifications. With the exceptions noted below, we affirm the ALJ's decision.

BACKGROUND

A. Statutory and Regulatory Framework

An H-1B visa allows an alien to obtain temporary admission to the United States to perform services in a specialty occupation. *See* 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700(c) (2000). An employer seeking to hire an alien on an H-1B visa must first obtain certification by filing a Labor Condition Application (LCA) with the U.S. Department of Labor (Department). 20 C.F.R. § 655.730(a). On the LCA, the employer must provide specific information including the number of aliens to be hired, the occupational classification, the required wage rate to be paid, the prevailing wage, the source of such wage data, the date of need and the period of employment. 20 C.F.R. § 655.731. Only after the employer receives Department certification will the employee be issued the documents needed to obtain the H-1B visa. *See* 20 C.F.R. § 655.700(b).

The employer is required to pay an H-1B worker a wage rate which is at least the higher of its actual wage rate and the locally prevailing wage for the occupation. *See* 8 U.S.C.A. § 1182(n)(1)(A); 20 C.F.R. § 655.731(a). The “wage rate” is the remuneration (exclusive of fringe benefits) to be paid to the H-1B employee, stated in terms of amount per hour, day, month, or year. *Id.* at § 655.715.

B. Procedural History

Robert Blake, a British citizen, is a computer engineer. He and his family came to Florida for a vacation in November 1998. ALJ’s Decision and Order (D. & O.) at 9. Through First Point, an organization that assists aliens to obtain employment in the United States, Blake met with Shallander Moman (Moman) in Florida during Blake’s vacation period. *Id.* Moman is the president of Prism Enterprises, a computer services company located in Winter Garden, Florida. *Id.* at 3-4. Blake and Moman discussed Blake’s possible employment at Prism as well as Blake’s possible investment in and eventual partnership with Moman in Prism. *Id.* at 7, 9.

After returning to England, Blake and Moman exchanged e-mails, phone calls, and various draft agreements regarding the nature of their possible work relationship. *Id.* at 4; *see* Exhs. 1-14, R21. The parties agreed that Blake should come to the United States under an H-1B visa. *See* D. & O. at 3-4. Therefore, during the March-April 1999 period, Moman signed and filed the LCA and other necessary documents to obtain an H-1B visa for Blake. *Id.* Blake received his visa in May and arrived in the United States in September 1999. Exh. R20 at p. 11; Tr. 48. He immediately began work for Prism as a computer engineer, and upon reporting to work, Blake gave Moman a check for \$30,000. D. & O. at 6; Tr. 48.

In February 2000, Blake resigned from Prism and filed a complaint with the Department alleging that Prism had not paid him the proper wages. D. & O. at 6, 9. The Administrator investigated Blake’s allegations, and by letter dated January 11, 2001, notified Prism that it had violated the H-1B regulations by, among other things, failing to pay Blake the “required wage rate.” D. & O. at 2. To remedy the matter, the Administrator ordered Prism to pay back wages to Blake in the amount of \$41,488.79. *Id.* Prism denied the charges and requested a hearing

before a Department Administrative Law Judge. *Id.* The ALJ held the hearing on March 8, 2001, in Orlando, Florida. *Id.* By Order dated June 22, 2001, the ALJ ordered Prism to pay Blake back wages but in an amount significantly reduced from that ordered by the Administrator. D. & O. at 16. The Administrator petitioned this Board to review the ALJ's decision.¹

DISCUSSION

A. Jurisdiction and Standard of Review

This Board has jurisdiction to review ALJ decisions in H-1B cases. *See* 20 C.F.R. § 655.830.

Under the Administrative Procedure Act, the Board has plenary power to review an ALJ's factual and legal conclusions de novo. *See* 5 U.S.C.A. § 557(b) (West 1996); *Yano Enterprises v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-0001, slip op. at 2 (ARB Sept. 26, 2001).

B. Issues

The Administrator determined that Prism had committed four violations:

- a. Willfully failed to pay the required wage rate;
- b. Failed to post notice of the filing of an LCA;
- c. Willfully misrepresented a material fact on the LCA; and
- d. Failed to maintain the documentation used to establish the prevailing wage.

D. & O. at 2. As a remedy for these violations, the Administrator determined that Prism should pay Blake \$41,488.79. *Id.* The \$41,488.79 represents \$11,488.78 in unpaid wages and a return of Blake's initial \$30,000 payment to Prism. *Id.* In addition, the Administrator assessed Prism \$7500 in civil money penalties because the violations were held to be willful. *Id.*

Unpaid Wages - In calculating unpaid wages, the Administrator multiplied the number of weeks Blake worked by the prevailing wage rate² and then reduced that figure by the amount Prism paid to Blake. D. & O. at 3, 13. The parties stipulated that Blake worked 22.5 weeks and that Prism had paid Blake \$4,936.21. *Id.* at 3. Using the LCA's prevailing wage rate of \$730/week, the Administrator determined that for 22.5 weeks of work, Prism should have paid Blake \$16,425. *Id.* at 13. By deducting the amount paid to Blake from the amount owed, the

¹ Prism also petitioned for review of the ALJ's decision. However, by Order of September 28, 2001, the Board withdrew its acceptance of the company's petition because Prism's opening brief was untimely filed without just cause.

² The Administrator used the "prevailing wage" rate in calculating the back wages. No "actual wage" figure was determined for Blake's job because, as the ALJ stated, Prism's only other staff consisted of "two short term" employees. D. & O. at 13; Exh. C2.

Administrator determined that Prism had underpaid Blake by \$11,488.79. *Id.* The ALJ agreed with the Administrator with respect to the payment of the unpaid wages and ordered Prism to pay Blake the \$11,488.79. *Id.* at 13, 16.

\$30,000 Payment - The Administrator further determined that the \$30,000 Blake paid Prism when he began working for the company had to be returned to him. *Id.* at 13. Prism argued that the \$30,000 payment did not involve wages but instead was Blake's "good will" payment or an "opportunity cost." D. & O. at 7, 10, 13. The Administrator rejected this argument and instead deemed the payment to be an unauthorized deduction from wages. *See* 20 C.F.R. § 655.731(c)(9); D. & O. at 10, 13. As the regulations explicitly prohibit unauthorized deductions from wages, the Administrator ordered Prism to return the \$30,000 to Blake. D. & O. at 13. As discussed further below, the ALJ reversed the Administrator's order that the sum be repaid.³

Civil Money Penalties - Because he deemed two of Prism's four violations willful violations, the Administrator also assessed \$7,500 in civil money penalties against the company. D. & O. at 9-11. Using the seven-factor analysis set out in the regulations, the Administrator determined that Prism had willfully failed to pay the required wage rate and had willfully misrepresented a material fact on the LCA. *Id.*; *see* 20 C.F.R. § 655.810. For each of these violations, the Administrator imposed a penalty of \$3,750. *Id.* No money penalties were assessed for the other two violations. *Id.*

The ALJ agreed with the Administrator's finding that Prism had committed four regulatory violations, two of which were willful. D. & O. at 13-16. However, she modified the penalty amount ordered by the Administrator. By weighing the seven-factors differently than the Administrator had weighed them, the ALJ determined that the civil penalties should be limited to \$2,500 per willful violation. *Id.* Accordingly, she reduced the money penalties from \$7,500 to \$5,000 and ordered Prism to pay this amount. *Id.* at 16

C. Analysis

Blake's eventual employment at Prism was the culmination of a series of e-mails, letters and phone calls between Moman and Blake over the nine months between December 1998 and September 1999 when Blake started work at Prism. D. & O. at 4; Exhs. R1-14, 21. The parties agreed that "the eventual goal of both parties is to form an equal partnership when the time is right." Exh. R21. The parties memorialized their intentions in a signed agreement. Although various drafts of the agreement were prepared, the ALJ found that the version which "most likely sets forth the understanding" of the parties was the version dated June 3, 1999.⁴ Dec. and Ord. at 5-6; Exh. R21. Because the ALJ had an opportunity to observe the parties' demeanor, and thus better judge credibility, we defer to the ALJ's determination.

³ The only issue the Administrator appealed was the ALJ's determination that the \$30,000 need not be repaid. Admin'r. Petition for Review, July 23, 2001.

⁴ Blake disputed that this was the final version of the agreement and proffered a considerably shorter version which also contained the signature of both parties. D. & O. at 5-6.

In the June 3, 1999, version, Moman states, inter alia, that he is looking for a partner, that he is creating this opportunity for Blake to work alongside him, and that Blake will “receive 30% of the profits from the work created through his efforts.” Exh. R21. Blake agrees that he will join the company as soon as possible and that he will pay Prism \$30,000 as an “opportunity cost.” *Id.* The ALJ correctly determined that Blake’s \$30,000 payment was made pursuant to the June 3 agreement. D. & O. at 13-14. Accordingly, because it was “under a separate agreement and was not related to the wages required to be paid under the LCA,” the ALJ found that the \$30,000 did not constitute an unauthorized deduction from wages within the meaning of the regulations. *Id.* We affirm the ALJ’s ruling that the \$30,000 was not a wage deduction because we too find that the agreement regarding this sum was separate and apart from the H-1B wage requirements. *See* 20 C.F.R. § 655.731(c)(7)-(10).

We further find that the ALJ erred in calculating the amount of back wages Prism owes Blake. The ALJ permitted Prism to offset the total wages owed Blake by the payments it made to him during his tenure. D. & O. at 13. The monies Prism paid Blake, however, were not H1-B wages, but rather they were payments of his share of the profits. *See* Tr. 52, 57, 153-154. We conclude that, like the \$30,000 payment from Blake, the \$4,936.21 profit payment to Blake was made pursuant to the terms of the voluntary agreement, and therefore, that payment too was separate and apart from the H-1B wage requirements. Accordingly, we find that the ALJ erred by deducting the \$4,936.21 profit payment from the total wages due Blake under the LCA. We order Prism to pay the back wages due Blake in the amount to \$16,425 (22.5 weeks of work at the prevailing wage rate of \$730/week).

Finally, inasmuch as the Administrator has not contested it, we affirm the ALJ’s reduction of the civil money penalties to \$5000.

CONCLUSION

We affirm the ALJ’s determination that the \$30,000 payment Blake gave to Prism was made pursuant to a voluntary and separate agreement, was not related to H-1B wage requirements, and therefore, the Act does not require Moman to return it. We also affirm the ALJ’s finding that Prism owes civil money penalties in the amount of \$5000. Finally, we reverse the ALJ’s determination that the monies paid Blake during his employment were wages, and order that Prism pay Blake the full amount of unpaid wages, namely, \$16,425.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge