



In the Matter of

UNITED STATES DEPARTMENT
OF LABOR

Date: January 31, 1995

Case No. 94-LCA-12

Complainant

v.

ANALYTICAL TECHNOLOGIES, INC.

Respondent

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

DECISION AND ORDER

This action arises under a portion of the Immigration and Nationality Act of 1952, as amended by the Immigration Act of 1990 and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (hereinafter referred to collectively as the "INA"), 8 U.S.C. § 1182(n), and its implementing regulations, which are located at 29 C.F.R. § 507.700 *et seq.* At issue is the interpretation and application of certain regulatory provisions which govern the circumstances under which non-immigrant aliens may be issued visas known as H-1B visas.

STATEMENT OF THE CASE

The United States Department of Labor, pursuant to statutory authority, conducted an investigation of the Respondent, Analytical Technologies, Inc. ("Anatec"), in order to determine whether Anatec was in compliance with certain Labor Condition Applications ("LCAs") it had filed in order to employ non-immigrant aliens ("NIAs") in temporary employment in the United States. On July 25, 1994, the Department of Labor, through the Administrator, Wage and Hour Division (the "Administrator"), issued a Determination Letter charging Anatec with six violations of the INA and its implementing regulations. Anatec filed a timely Request for Hearing, and this appeal followed.

The parties have voluntarily settled their differences concerning five of the six alleged violations charged by the Administrator in her Determination Letter. As to the final alleged violation, violation number three in the Determination Letter, Anatec does not dispute the findings of fact made by the Administrator.

The only remaining dispute concerns the remedy ordered by the Administrator for violation number three, specifically that Anatec post certain required notices at all worksites where its NIA H-1B visa status employees ("H-1B employees") perform work.

This matter is presently before me on the cross-Motions for Summary Decision, together with simultaneous briefs, filed by the parties. Pursuant to an agreement between the parties, the parties have submitted a stipulated record, consisting of both stipulations of fact and documentary evidence. The regulations governing these proceedings¹ provide, in relevant part:

The administrative law judge may enter summary judgement for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact and that a party is entitled to summary decision.

29 C.F.R. § 18.40(d). In deciding a motion for summary decision, the court must consider all the materials submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). A court shall render summary judgement when there is no genuine issue as to any material fact, the moving party is entitled to judgement as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. See LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir. 1993); United States v. TRW, Inc., 4 F.3d 417, 423 (6th Cir. 1993), cert. denied 114 S.Ct. 1370 (1994).

ISSUES

The primary issue for determination in this case is whether the Administrator has the statutory authority to require the posting of a Notice of Filing of an LCA at the employee worksites, *i.e.*, the locations where its H-1B employees are to be physically employed. Assuming that such power exists, a question is then presented as to whether the Administrator, upon finding that such postings were not properly made prior to the submission of an LCA, may order such postings to be carried out after the fact.

STIPULATIONS

The parties submitted an agreed entry containing the following stipulations²:

¹ The regulations provide that administrative proceedings concerning H-1B Visas before the Department of Labor are governed by the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges", 29 C.F.R. Part 18, except to the extent they conflict with more specific H-1B regulations. 29 C.F.R. § 507.825(a).

² Only substantive, factual stipulations are noted herein. The parties also submitted additional stipulations, concerning the settlement of various alleged violations and remedies, which are not so forth
(continued...)

1. Analytical Technologies, Inc. (Anatec) is a computer consulting company that is engaged in the business of providing systems integration, software services and business process consulting services to governmental and business entities;
2. The 90% stock owner and Chief Executive Officer of Anatec is Al Schornberg. The 10% stock owner and President of Anatec is James Barbour. Anatec had an annual dollar volume of business of \$16,000,000 for 1993 and has an estimated annual dollar volume of business of \$21,000,000 for the fiscal year 1994;
3. Anatec has a principal place of business located at 30200 Telegraph Road, Suite 200, Bingham Farms, Michigan 48025;
4. Anatec has four branch offices at the following locations: (1) 20515 SH 249 No. 330, Houston, Texas 77070; (2) 888 Keystone Crossing, Suite 1300, Indianapolis, Indiana 46250; (3) 8400 Normandale Lake Boulevard, Suite 920, Bloomington, Minnesota 55437; and (4) a branch office at the same location as the main office: 30200 Telegraph Road, Bingham Farms, Michigan 48025;
5. Anatec employs computer analysts to perform software services for customers either in-house, at its principal place of business and branch offices, or at customer worksites located in various cities within the United States;
6. Anatec has customers such as Chrysler Corporation with various Detroit area locations and Compaq Computer Company which has work locations in Houston, Texas;
7. Anatec employs H-1B employees to work as computer analysts performing software services in-house and at different job sites of customers of Anatec (these are customer worksites);
8. H-1B employees employed by Anatec perform work at customer worksites located in such states as Michigan and Texas;
9. Anatec employs approximately 250 to 260 employees;
10. Approximately 240 of the 260 employees are computer analysts;
11. Approximately twenty-three (23) of the 240 computer analysts are H-1B employees for whom Anatec submitted LCAs to the Department of Labor;
12. These H-1B employees constitute approximately 10% of Anatec's workforce;

(...continued)
above.

13. During the period June 14, 1993 to June 14, 1994, Anatec submitted LCAs to the Employment and Training Administration (ETA) of the Department of Labor to employ approximately 28 NIAs under the H-1B program;

14. Anatec did not post a notice containing the statement "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor" for various of its LCAs in two or more conspicuous locations at the customer worksites where H-1B employees employed by Anatec actually worked; and,

15. Anatec posted LCAs at its four branch offices listed above. These LCAs did not contain the statement "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor."

Due to the fact that the parties have submitted stipulations as to the factual background of the case, together with a stipulated record, I find that there is no genuine issue as to any material fact. Therefore, based upon the record developed by the parties, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Meaning of "Place of Employment":

At its core, the disputed issue between the parties to this case concerns the proper interpretation of the phrase "place of employment." The parties agree that the INA and its implementing regulations require an employer to post a Notice of Filing of an LCA at the place of employment. Due to the nature of Anatec's business, however, many of its computer analysts, including some H-1B employees, although employed by Anatec, actually perform their work on a permanent basis at the place of business of various of Anatec's customers (Stip. 5-8, supra). The Administrator contends that as a result of Anatec's employment scheme, Anatec must make the required postings at each job location where the H-1B employees actually perform their work. To the contrary, Anatec contends that it need only make the required postings at Anatec establishments, i.e., its headquarters and branch offices, regardless of whether the H-1B persons it seeks to employ will work at those locations, or solely and exclusively at the site of an Anatec customer.

The relevant statutory provision provides as follows:

No alien may be admitted or provided status as a nonimmigrant . . . in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

* * *

(C) The employer, at the time of filing the application--

(i) has provided notice of the filing . . . to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or

(ii) if there is no such bargaining representative³, has posted notice of filing in conspicuous locations at the place of employment.

8 U.S.C.A. § 1182(n)(1) (Supp. 1994)⁴.

The statute further provides that the Secretary of Labor shall be responsible for ensuring that employers submitting LCAs fulfill all conditions specified in the LCA, and that such LCAs do not contain material misrepresentations of fact. *Id.* at § 1182(n)(2)(A). If the Secretary finds that an employer has substantially failed to fulfill the statute's notice of filing requirements, he or she is required to notify the Attorney General of his finding. The Attorney General shall then, in turn, deny the employer's applications to employ certain alien employees for a period of at least a year. *Id.* at § 1182(n)(2)(C). In addition, the statute also grants the Secretary the power to impose "such other administrative remedies (including civil monetary penalties in an amount not to exceed \$1,000 per violation) as the Secretary determines to be appropriate." *Id.*

In carrying out his statutory enforcement duty, the Secretary has promulgated a series of implementing regulations. These regulations closely track the statutory language, providing, in part, that:

³ Although not explicitly stated in the stipulations submitted by the parties, it is clear from the materials and briefs submitted that the employment classifications at issue are non-union, professional positions. *See, e.g.,* Respondent's Brief in Support of Motion for Summary Decision ("Respondent's Brief"), at 9. Therefore, the sole means by which Anatec could comply with the statute's notice requirement's would be by posting notices of the LCAs, or in the alternative, copies of the LCAs themselves.

⁴ Neither the statute nor its legislative history provide a definitive explanation of the meaning of "place of employment." The legislative history of the H-1B notice provisions, however, reveals that Congress intended for the Secretary to have some leeway in dealing with employers whose employees work at scattered locations. The conference report states that:

The notice provisions in the Conference report provide that when a labor certification is filed, the employer must notify the bargaining representative (if any) of the employer This means, for example, if an employer has three sites situated in a particular area (**as defined by the Department of Labor**), the employer is required to notify the bargaining representative at each of its locations. However, if there is no bargaining representative . . . the employer is required only to post the notice at the facility in conspicuous locations.

H.R. Conf. Rep. No. 101-955, 101st Cong., 2nd Sess. 121-22, reprinted in 1990 U.S.C.C.A.N. 6784, 6786-87 (emphasis added).

Where there is no collective bargaining representative, the employer shall, no later than on or before the date the labor condition application is filed with the ETA, provide a notice of the labor condition application to its employees by posting a notice in at least two conspicuous locations at the place of employment.

29 C.F.R. § 507.730(h)(1)(ii).

Anatec cites BLACK'S LAW DICTIONARY, which defines the term "employ" as "to engage in one's service; to hire" (Respondent's Brief, at 8). Based upon that definition, Anatec further argues that the "plain meaning" of the term "place of employment" is where the employee is hired, rather than where the work is actually performed. Anatec's argument, however, overlooks a number of more specific and relevant references which indicate just the opposite.

The most obvious such reference is contained in the regulations themselves. The pertinent definitional section of the H-1B regulations provides that the phrase "place of employment" "means the worksite or physical location where the work is performed." 29 C.F.R. § 507.715. This definition makes it clear that the Secretary intended to require an employer to post the required notice at the location or locations where its employees actually perform their everyday work.

A second such reference is contained in the regulations which further address the posting requirement. That section provides that "[t]he notice shall be of sufficient size and visibility, and shall be posted in two or more conspicuous places so that the employer's workers at the place(s) of employment can easily see and read the posted notice(s)." 29 C.F.R. § 507.730(h)(1)(ii)(A). The Secretary's use of the plural "place(s) of employment" reveals that he intended the phrase to include more than simply a single location where an employee's hiring took place.

More generally, BLACK'S LAW DICTIONARY also contains a definition of the phrase "place of employment", which it defines in part as: "a place where active work, either temporary or permanent, is being conducted in connection with a business for profit." BLACK'S LAW DICTIONARY 1034 (5th ed. 1979). To the extent such a definition is relevant to this determination, it stands to reason that the definition of the exact phrase at issue is to be preferred over the definition of a related, but distinct, word.

Finally, the interpretation urged by the Administrator is more consistent with the purposes of the H-1B statutory scheme, one of which is to protect the wages and working conditions of American workers from being adversely affected by the employment of H-1B workers. See 57 Fed. Reg. 1,316 (1992). In situations where employees are permanently assigned to work at customer worksites, and rarely, if ever, travel back to the employer's main headquarters, posting notice of the LCA filing would be of little use or effectiveness.

Anatec's main problem with the posting requirements placed upon it by the Administrator seems to be the potential for employee unrest, in light of the fact that H-1B NIA computer analysts at Anatec are apparently paid more than their American counterparts. While unfortunate from a business standpoint, Congress undoubtedly considered such consequences in crafting the complaint-driven system by which employers' compliance with the terms of its LCAs is monitored. Effective notice to similarly-situated

employees is critical to such a system. For all of these reasons, I find that the interpretation of the phrase "place of employment" urged by the Administrator is correct.

II. Limits of the Secretary's Authority:

Essentially, the balance of Anatec's contentions fall into two main categories. First, Anatec contends that the Secretary lacks the authority to require the posting of LCA's at the worksites themselves, particularly where such worksites are located on the property of Anatec's customers. Secondly, Anatec contends that even if the Secretary's interpretation is valid, the Secretary lacks the remedial authority to order the LCA's to be posted, and that any attempt to do so constitutes an unlawful attempt to apply regulations retroactively.

The first of these arguments is, at base, a challenge to the regulations promulgated by the Secretary. As noted above, the definition of "place of employment" contained in the regulations is not vague. Its explicit reference to the "worksite" clearly reflects an intent to adopt the interpretation of "place of employment" urged by the Administrator in this case. This being the case, I affirm the Administrator's finding of a violation on the part of Anatec.

As to Anatec's more general challenge to the regulatory definition of "place of employment" adopted by the Secretary, I find that such a challenge is not appropriate at this level. The Supreme Court, in Chevron, applied a two-step procedure for making such determinations:

First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron v. Natural Resources Defense Counsel, 467 U.S. 837, 842-43 (1984). The Administrative Procedure Act ("APA") places the authority to make such determinations in the "courts of the United States", but only after final agency action has been taken. 5 U.S.C.A. §§ 704, 706(2)(C) (1990). With this limitation in mind, the regulations governing these proceedings provide that "[t]he Administrative Law Judge shall not render determinations as to the legality of a regulatory provision or the constitutionality of a statutory provision." 29 C.F.R. § 507.840(d). Therefore, any challenge to the regulations themselves at this stage in the proceedings is premature⁵.

⁵ Similarly, I decline to address any of the various constitutional challenges raised by Anatec in its brief. Issues of constitutionality are beyond the jurisdiction of administrative agencies. Oestereich v. Selective Service System Board No. 11, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); Public Utilities Comm'n (continued...)

The remaining contentions of Anatec relate to a portion of the remedy ordered by the Administrator in response to her finding that the LCA postings made by Anatec were inadequate. Specifically, the Administrator ordered Anatec to re-post the required notices for a period of ten days at each place where a NIA whose H-1B LCA is at issue is currently employed. See Stipulated Record, Exhibit A. Anatec's argument on this point is based, in large part, upon a recently published proposed rule which would amend the H-1B regulations with a specific provision addressing the posting of LCA notices at "job contractor worksites." See 58 Fed. Reg. 52,156 (1993). Anatec contends that the Administrator is attempting to retroactively apply the proposed regulation to the instant case.

To the contrary, nowhere in the materials submitted to the undersigned does the Administrator attempt to justify a finding of violation, or a proposed remedy, upon the proposed regulations. Rather, the Administrator has argued, and I agree, that Anatec's failure to post notice of the LCA filings at the various worksites constitutes a violation of the regulations as they currently exist. Anatec's argument places undue significance on the fact that changes to the existing regulations have been proposed. The Secretary's proposals are aimed at clarifying any uncertainty in the regulations as they currently exist. Such an attempt, without more, does not establish that present regulations fail to require posting at the H-1B employee worksites.

If the regulations currently in effect did not require posting at employee worksites, and the Administrator attempted to order such postings based upon the proposed regulations, Anatec's retroactivity argument would have merit. Such is not the case here, however. The Administrator's finding, affirmed herein by the undersigned, that the posting performed by Anatec was insufficient to comply with the regulations as they currently exist, raises no issue of retroactivity.

Concerning the Administrator's re-posting order, I note initially that the INA provides that where the Secretary finds a "substantial" failure on the part of the employer to comply with the posting requirements, he or she shall notify the Attorney General of such finding, and, in addition, may "impose such other administrative remedies . . . as the Secretary determines to be appropriate." 8 U.S.C.A. § 1182(n)(2)(C) (Supp. 1994). See also 29 C.F.R. § 507.810(d). Anatec contends that since no such re-posting remedy is explicitly mentioned in the regulations, any attempt to order such posting in this case would be retroactive in nature.

Like statutes, regulations, by their nature, cannot possibly address every one of the innumerable possible factual variations which may arise in their administration. Consequently, Congress explicitly chose to allow the Secretary some discretion in fashioning remedies for violations of the H-1B regulations. As a result of Anatec's failure to post the required notices at the actual worksites of its employees, many of its similarly-situated employees failed to receive notice of the filing of the LCAs at issue. The Administrator's re-posting remedy attempts to remedy that shortcoming, and arises out of the discretion delegated by Congress to the Secretary, and in turn, to the Administrator.

(...continued)

v. United States, 355 U.S. 534, 539 (1959). Thus, the validity of the INA and its implementing regulations has been assumed by the undersigned, and this issue is decided in favor of the Complainant.

Anatec argues that since the goal of the posting requirement is to notify persons who may wish to file a complaint, an order requiring re-posting where there has already been a complaint would be an "illogical redundancy" (Respondent's Brief, at 5). However, such an argument fails to address Congress' desire that all potentially aggrieved parties receive notice of the filing. If an employer could simply partially comply, and thereby preclude having to engage in full notification as a result of any subsequently filed complaint, many of the affected employees would remain permanently without notice of the filing.

To the extent Anatec contends that the Administrator's re-posting remedy exceeds the authority granted to the Secretary by Congress, such a challenge is beyond the jurisdictional authority of an administrative law judge, and must await determination after final agency action has been taken. 5 U.S.C.A. § 704 (1990).

Therefore, in evaluating all of the materials submitted by the parties in connection with their Motions for Summary Decision, I find that there exists no genuine issue as to any material fact, and that the Complainant is entitled to judgement as a matter of law. In light of the foregoing,

IT IS HEREBY ORDERED that the Complainant's Motion for Summary Decision is GRANTED. The Respondent's Motion for Summary Decision is hereby DENIED.

IT IS FURTHER ORDERED that the determination of the Administrator concerning the sole remaining issue contested by the parties is AFFIRMED. The portions of the Administrator's determination which has not been contested remain in effect, except to the extent they have been previously modified by mutual agreement of the parties.

DANIEL J. ROKETENETZ
Administrative Law Judge