U.S. Department of Labor

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Issue Date: 17 November 2004.....

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR
DIVISION, U.S. DEPARTMENT OF LABOR
Prosecuting Party, Case No.: 2004-LCA-00012

v.

AMERICAN TRUSS,
Respondent.
.....

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act H-1B visa program, 8 U.S.C. Sec. 1101 (a)(15)(H)(I)(b) ("Act") and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I, 20 C.F.R. § 655.700 et seq.

The Administrator of the Wage and Hour Division ("Administrator") issued a determination letter pursuant to 20 C.F.R. §655.815 to EAS, Inc. d/b/a American Truss ("Respondent") on December 9, 2003, asserting that Respondent failed to pay wages as required in the amount of $74,958.08 to five H-1B non-immigrants. *ALJx 1.*[1]

On December 23, 2003, the Respondent requested a hearing in accordance with 20 C.F.R. §655.820. A hearing was held in Miami, Florida on June 24, 2004. Post hearing briefs were received from the Administrator on August 24, 2004 and from the Respondent on August 25, 2004. The decision in this matter is based on the testimony at the hearing, all documentary evidence admitted into the record at the hearing, and the post hearing submissions by the parties.

Statutory Framework

The H-1B visa program permits employers to temporarily employ non-immigrants to fill specialized jobs in the United States. The Act requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage, in order to protect U.S. workers and their

[1] The documentary evidence admitted at the hearing includes an Administrative Law Judge Exhibit (ALJx. 1), Joint Exhibits (*Jx.*), Government Exhibits (*Gx.*), and a Respondent Exhibit (*Rx.*). Parties also submitted Joint Stipulations (*Js.*). The transcript of the hearing is cited as "*Tr.*" and by page number.

wages. 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. The Act defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. § 1184(i)(1). To receive permission from the DOL, the Act requires an employer seeking permission to employ an H-1B worker to submit a Labor Condition Application ("LCA") to the DOL. See 8 U.S.C. §1182(n)(1); *In the Matter of Eva Kolbusz-Kline v. Technical Career Institute,* Case No. 93-LCA-004, 1994 WL 897284, at *3 (July 18, 1994). Only after the employer receives the Department's certification of its LCA may the INS approve an alien's H-1B visa petition. 8 U.S.C. § 1101(a)(15)(H)(1)(B); 20 C.F.R. § 655.700.

The Act provides that the LCA filed by the employer with the Department must include a statement to the effect that the employer is offering to an alien provided status as an H-1B non-immigrant wages that are at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is higher, based on the best information available at the time of filing the application. 8 U.S.C. § 1182(n)(1)(A).

The Act directs the Department of Labor to review the LCA only for completeness or obvious inaccuracies. Unless the Department finds that the application is incomplete or obviously inaccurate, the Department shall provide the certification described by the Act within seven days of the date of the filing of the application. 8 U.S.C. § 1182(n)(1) and 20 C.F.R. § 655.740.

The Department has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation of the required wages. See 20 C.F.R. Part 655 Subpart H. The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid, debarment of the employer from future employment of aliens, civil money penalties, and other relief that the Department deems appropriate. 20 C.F.R. § 655.810 and § 655.855.

Statement of the Case

Respondent manufactures roof and floor trusses for houses and commercial buildings. *Tr. 12.* Respondent has approximately forty employees. *Tr. at 13.* At various times from 1999 to 2003, Respondent employed the five H-1B non-immigrant workers at issue. *Jx. 1 and Gx. 1.*

After receiving a complaint from Cosay Altug, one of the five H-1B non-immigrant workers, the Administrator initiated an investigation of Respondent. *Js. 6.* The Administrator's investigation concluded that Respondent owed back wages to Ismail Akyuz, Oguz Ertan, Ahment Gunaydin, Huseyin Seckin, and Cosay Altug. *ALJx. 1.* Respondent and Administrator jointly stipulated that Respondent owes back wages to Ismail Akyuz in the amount of $2,912.84, to Oguz Ertan in the amount of $38,010.16, to Ahment Gunaydin in the amount of $376.94, and

to Huseyin Seckin in the amount of $19,705.42. *Js. 4.* Respondent contests the Administrator's determination that it owes Cosay Altug back wages in the amount of $13,952.72. *Gx. 2.*

Altug, a truss system engineer, began working for Respondent as an H-1B worker in October 1996. *Js. 8.* His H-1B status would expire on September 16, 1999. *Jx. 3.* Thus, on July 20, 1999, Respondent filed a LCA for a truss system engineer for the period of September 17, 1999 through September 16, 2002. *Jx. 2.* The time period at issue in determining whether Altug is owed back wages is from September 17, 1999 to February 15, 2002.[2] The LCA listed both the actual wage rate and the prevailing wage rate for the position at $18.47 per hour. *Jx. 2.* The State Employment Security Agency (SESA) provided the prevailing wage rate. The Department certified the LCA on August 5, 1999. *Jx. 2.*

On July 20, 1999, Respondent filed a Petition for a Nonimmigrant Worker Form I-129 (I-129) with the Immigration and Naturalization Service (INS) for Altug. *Jx. 3*. The I-129 requested an extension of Altug's stay until September 17, 2002. Part 5 of the I-129 contains basic information about the proposed employment and employer. In this part, Altug's wages are listed as $38,418 per year. The INS approved the Petition on September 27, 1999. *Jx. 5.*

CompuPay administers Respondent's payroll. Respondent's employees noted their work hours on time cards. *Tr. 19 and 75.* Respondent's administrative staff reported the number of hours Respondent's employees worked to CompuPay. *Tr. 17-19*. Employees other than the administrative staff did not contact CompuPay to report their work hours. *Tr. 136-137.*

During the September 17, 1999 to February 15, 2002 time period, CompuPay's records show Altug worked as few as 2.64 hours during the week of August 25, 2000 and as many as 80 hours during the week of February 15, 2002.[3] *Gx. 1*. Respondent stipulates that Altug should have been paid at least $18.47 per hour as stated on the LCA. *Js. 7.* The CompuPay records show Altug's highest pay rate was $15.00 per hour for regular hours. *Gx. 1 and Jx. 6.* Altug was compensated at a time and a half rate for hours CompuPay records show as overtime. *Gx. 1 and Jx. 6.* The CompuPay records classified hours as overtime applying no apparent criteria. There are multiple examples of hours being classified as overtime hours despite regular hours being fewer than 40. Additionally, there are a few examples of regular hours exceeding 40 before hours were classified as overtime.

The record contains copies of eleven of Altug's timecards from 1999. *Rx. B.* The hours on these time cards correspond to the regular hours on the CompuPay records. *Rx. B and Gx. 1.* The CompuPay records also show a number of overtime hours that are not reflected on these timecards.

Ustan Atac, President and owner of Respondent corporation, testified that Respondent provided its employees "the chance to make extra money [by completing] piecework." *Tr. 104.* Altug testified that he took advantage of this opportunity. *Tr. 75.* Upon completing a piecework assignment, Altug would meet with Atac to discuss the piecework, and Atac would do his own

[2] Altug received his Green Card on February 15, 2002, taking him out of H-1B status. *Tr. 80.*
[3] CompuPay's records show Altug was paid for 120 hours of vacation on two occasions: the week of September 1, 2000 and July 27, 2001. *Gx 1.*

calculation and give Altug overtime. *Tr. 75.* Atac testified that pay for the piecework was similar to a commission. *Tr. 105.* Atac did not testify as to how the payroll records would reflect the piecework payments.

Discussion

The Administrator and Respondent have made several joint stipulations, leaving the issue of Altug's back wages as the sole issue in this case. Central to deciding whether the Administrator correctly determined that Respondent owes Altug back wages are two issues: whether the wage stated on the LCA or on the I-129 is controlling and whether the number of hours on the CompuPay records accurately reflects the number of hours Altug worked for Respondent.

Source of Required Wage

When Respondent filed the LCA on July 20, 1999, it made certain representations and attestations. Most notably in this case, Respondent attested that it would pay the H-1B worker who held the position of truss system engineer the required wage, that is, the higher of the actual wage rate or the prevailing wage rate listed on the LCA. 20 C.F.R. §655.715. Here, both the actual wage rate and prevailing wage rate were $18.47 per hour. Thus, Respondent attested it would pay Altug the required wage of $18.47 per hour. *Jx. 2.* Respondent stipulated that Altug was a truss system engineer that should have been paid at least $18.47 per hour as stated on the LCA. *Js. 7.*

Despite its stipulation, Respondent claims that the wage listed on the I-129, $38,418 per year, is controlling rather than the wage listed on the LCA. Thus, Respondent argues that it complied with 8 U.S.C. § 1182(n)(1)(A) requiring the payment of the prevailing wage every year that it paid an annual wage of $38,418 even if Altrug was compensated at an hourly rate of less than $18.47.

While $38,418 equals $18.47 multiplied by 40 hours multiplied by 52 weeks, or 2080, the LCA is controlling. 20 C.F.R. §§ 655.731 and 655.732 provide that the LCA filed by the employer must set forth the prevailing wage, the source of the prevailing wage rate and the working conditions for the H-1B employee. The I-129 itself states that by filing the I-129, the signatory agrees to the terms of the LCA. *Jx. 3.* The Department and INS regulations also state that the filing of the I-129 serves to reaffirm the attestations made in the LCA and is not a superseding source for the required wage. 20 C.F.R. §655.705(c)(1) and 8 C.F.R. §214.2(h)(4)(iii)(B)(2). Thus, Respondent's claim that it was required to pay Altug only $38,418 per year is without merit.

Number of Hours Worked

As an hourly-wage employee, Altug should have been paid the $18.47 required wage for all hours worked. 20 C.F.R. §655.731(c)(5). CompuPay's records show Altug was paid for a

total of 6968.54[4] hours from the week of September 24, 1999 through the week of February 15, 2002. *Gx. 1.* Altug received $114,741.99 for his 6968.54 hours of work. *Gx.1 and Gx. 2.*

As the employer, Respondent bears the burden of establishing it complied with the LCA requirement to pay Altug $18.47 for all hours worked. 20 C.F.R. §705(c)(5) and 20 C.F.R. §655.731(b)(1)(v). Respondent's attempts to fulfill this burden with conjecture fall short. Respondent claims Altug did not work for Respondent for 6968.54 hours, but that he somehow inflated his work hours. Respondent offers no evidence to support its claim that Altug inflated his work hours. Instead, Respondent argues that an average of 55.31 hours worked per week over a 126 week time period with hours worked per week ranging from 2.64 to 80 is simply too excessive to accurately represent Altug's hours. Respondent fails to provide any information regarding what it believes to be an appropriate number of hours for Altug.

Respondent could not find Altug's timecards at its office. Respondent suggests that the timecards were stolen by Altug to conceal a two and a half year plot to inflate his work hours. Respondent offers little to support its claim. It offers copies of eleven of Altug's timecards from 1999 that it received from Altug's former attorney as evidence of Altug's theft and hour inflation. Respondent argues that Altug's possession of the copies of the eleven timecards shows that he obtained them by theft. Altug testified that he never stole time cards but rather made copies of his time cards while they were in his possession. *Tr. 95, 96.*

The hours on these time cards correspond to the regular hours on the CompuPay records. *Rx. B and Gx. 1.* The CompuPay records also show a number of overtime hours that are not reflected on these timecards. Both Altug and Atac testified that Respondent's employees could complete piecework to make extra money. *Tr. 75 and Tr. 104.* Altug testified that Atac would review the piecework and calculate the employee's overtime. *Tr. 75.* Atac did not testify as to how payment for piecework was made, testifying only that it was similar to a commission. *Tr. 105.* As Respondent has offered no evidence to question Altug's testimony that payment for piecework was classified as overtime, the overtime hours on Altug's CompuPay records cannot be found to be the result of some dubious plan by Altug as Respondent suggests.

Atac's own testimony and actions provide the most telling evidence to discredit Respondent's hour inflation argument. Atac testified that Respondent's engineers often remain at work after the traditional eight hour day is over and that half of the engineers work every Saturday. *Tr. 111.* Additionally, Atac explained that he allowed Altug to return to work after Altug apparently quit upon receipt of his Green Card because Respondent was busy with work that needed to be done. *Tr. 125.* At this point, Atac knew, after two and a half years, exactly how many hours Altug had worked for Respondent. It is implausible to think Respondent would allow Altug to return to work after learning for the first time that Altug had been paid nearly $32,000 for overtime hours he allegedly did not work. Rather, it is entirely plausible that Altug did work the hours reflected on the CompuPay records and that Respondent was aware of those hours throughout the time period. In any event, Respondent's speculative arguments relying on the "impossibility" of Altug working the number of hours the CompuPay records reflect simply do not coincide with the facts of this case.

[4] The .77 hour difference between this figure and that accomplished by John Norris of the Wage and Hour Division on Form WH-55 is discussed *infra*.

Respondent argues that the after-acquired evidence doctrine set forth in *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352 (1995), applies to this case to deny Altug any back pay. The after acquired evidence doctrine allows an employer to avoid back pay or other remedies by coming forward with after acquired evidence of an employees' misconduct if the employer can prove that it would have fired the employee for the misconduct. However Respondent has submitted no evidence to support its allegations of misconduct by Altug, of either improperly inflating his hours or of stealing documents. Furthermore, even if Respondent had established any wrongdoing on behalf of Altug, it failed to establish that Respondent would have fired Altug as a result of the misconduct. To the contrary, Respondent allowed Altug to return to work after Respondent learned of his alleged wrongdoing. Moreover, Atac testified that had he learned of Altug's alleged conduct earlier, Altug would not have been fired. *Tr. 127-128.*

There is no evidence to support the claim that the CompuPay records are inaccurate.

Calculation of Back Wages Owed

The CompuPay records from the week of September 24, 1999 to February 15, 2002 show Respondent paid Altug $114,741.99 for 6968.54 hours of work. *Gx. 1.* Had Respondent complied with the LCA, Altug would have received $128,708.93. Form WH-55, prepared by John Norris of the Department's Wage and Hour Division, concludes that Altug was paid for 69677.77 hours of work. *Gx. 3.* Norris apparently transferred the year to date totals of hours and wages paid for 2000 and 2001 from the CompuPay records onto Form WH-55. As only portions of 1999 and 2002 are at issue, Norris was unable to use the same methodology for determining the hours and wages paid during these years. A review of Norris's calculations for 1999 and 2002 reveals two errors. The CompuPay records show Altug worked 62.84 hours during the week of October 1, 1999. *Gx. 1.* Form WH-55 lists 62.87 hours for the same week. *Gx. 2.* Thus, Norris credited Altug with .03 more hours than he worked. Conversely, Norris did not credit Altug with enough hours for the week of February 1, 2002. CompuPay records show Altug worked 51.6 hours during this week. *Gx. 1.* Form WH-55 lists 50.8 hours for the same week. *Gx. 2.* With these corrections, Altug's total number of hours worked is 6968.54. Respondent should have paid Altug $128,708.93 for these hours not $114,471.99. Thus, Respondent owes Altug $13,966.94 in back wages. 20 C.F.R. §655.810.

Respondent argues that the minor errors in calculating Altug's back wages necessitates a recalculation of the Administrator's back wage determinations for the other four claimants. Respondent, however, has already stipulated that it owes Ismail Akyuz $2,912.84, Oguz Ertan $38,010.16, Ahment Gunaydin $376.94, and Huseyin Seckin $19,705.42 in back wages. *Js. 4.* The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges found at 29 C.F.R. Part 18 apply in this case. 20 C.F.R. §655.825. Accordingly, when Respondent stipulated to the amounts owed each H-1B worker, that stipulation became binding. 29 C.F.R. §18.51. Therefore, the Administrator need not recalculate the back wage determinations for Mr. Akyuz, Mr. Ertan, Mr. Gunaydin, and Mr. Seckin.

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondent shall pay Cosay Altug back wages in the amount of $13,966.94;

2. Respondent shall pay Ismail Akyuz back wages in the amount of $2,912.84;

3. Respondent shall pay Oguz Ertan back wages in the amount of $38,010.16;

4. Respondent shall pay Ahmet Gunaydin back wages in the amount of $376.94;

5. Respondent shall pay Huseyin Seckin back wages in the amount of $19,705.42; and

6. In making the above payments, Respondent shall follow the Administrator's instructions contained in the determination letter dated December 9, 2003; and

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THOMAS M. BURKE
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, D.C. 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within thirty calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.