U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 02 November 2004

.....
In the Matter of:

ADMINISTRATOR, WAGE AND HOUR
DIVISION, U.S. DEPARTMENT OF LABOR
Prosecuting Party,

Case No.: 2004-LCA-00017

v.

AT CAFÉ, LLC,
Respondent.
.....

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act H-1B visa program, 8 U.S.C. § 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 At Café, LLC ("Respondent") on January 30, 2004, asserting that Respondent failed to pay wages as required in the amount of $26,535.64 to Alvaro Fernaud, an H-1B non-immigrant. *ALJx 1.*[1]

On February 8, 2004, 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. Mr. Angel Peche, Director of Finance for Respondent, appeared on behalf of the Respondent. The decision in this matter is based on the testimony at the hearing and all documentary evidence admitted into the record at the hearing.

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

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

higher of its actual wage or the locally prevailing wage, in order to protect U.S. workers and their 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)(i)(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 operated an internet café in Miramar, Florida. *Tr. 69*. In 2000, Peche contacted Fernaud, his wife's cousin, who then resided in Venezuela, and offered him the General Manager position at the café. *Tr.* 84. Fernaud accepted Peche's offer and came to the United States of America on January 3, 2001. *Gx. 10*. Fernaud also served as a shareholder of At Café. *Tr. 11 and Gx. 13.*

On May 15, 2001, Respondent filed a LCA for an Operations Manager. *Gx. 1*. The LCA listed the actual rate of pay as $29,350 per year and the prevailing wage as $29,328 per year. *Gx. 1*. Fernaud's H-1B status was approved on August 29, 2001. *Gx. 4.*

Before the café opened in February 2002 (*Tr. 69*), Fernaud performed several tasks for Respondent. Fernaud met with a variety of food and beverage suppliers, a web designer, a plumbing and gas company, architects, installed fixtures at the café site, took a service examination given by the Florida Restaurant Association, and surveyed the area to determine the café's clientele. *Tr. 59-69.* In a shareholder's meeting held on September 9, 2001, Fernaud reported on the status of construction and business operations. *Gx. 13.* After the café opened in February 2002, Fernaud greeted and served the customers, ran the cash register, and acted as a waiter, busboy, and kitchen assistant. *Tr. 70 and 77.* Fernaud quit working for Respondent on September 15, 2002 because Respondent had not paid him any wages since June 2002. *Tr. 50.*

On October 2, 2002, Fernaud filed a complaint with the Department's Wage and Hour Division stating that Respondent failed to pay him the required wage. *ALJx. 1.* The Administrator began an investigation and determined that Respondent owed Fernaud back wages in the amount of $26,535.64. *ALJx. 1.* Respondent contests the Administrator's determination. Respondent asserts that it was not required to pay Fernaud the required wage because Fernaud did not present the proper INS documentation required for employment. Respondent contends Fernaud worked as a consultant and shareholder rather than as an employee. Consequently, Respondent claims it was not obligated to pay Fernaud the required wages was because he was not an employee.

DISCUSSION

There is no dispute that Fernaud worked for Respondent. It is irrelevant whether Fernaud was acting as a shareholder, consultant, or employee of the Respondent. By filing a LCA for an Operations Manager, Respondent made certain representations and attestations. Specifically, Respondent attested that it would pay Fernaud $29,350 per year, the required wage. *Gx. 1.* Fernaud, however, was not paid the required wage for his work.

Respondent admits to filing the LCA but denies the LCA has any binding effect. *Tr. 10.* Instead, the Respondent claims that it was obligated to pay Fernaud the required wage only if Fernaud left the country and had his passport stamped with an H-1B indication upon re-entry. *Tr. 103-104.* Thus, Respondent assigns no consequence to the INS Approval Notice granting Fernaud H-1B status. *Gx. 4.* The law, however, recognizes the significance of H-1B status. 20 C.F.R. §655.731(c)(6) mandates that the H-1B nonimmigrant worker "shall receive the required pay beginning on the date when the nonimmigrant "enters into employment" with the employer." Section 655.731(c)(6)(i) defines "enters into employment" as when the nonimmigrant worker "makes him/herself available for work or otherwise comes under 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."

Fernaud's H-1B status was approved on August 29, 2001 and was valid until June 1, 2004. *Gx. 4.* The record contains evidence establishing that Fernaud entered into employment by meeting with various suppliers and contractors on behalf of Respondent prior to approval of

his H-1B status. *Gx. 9 and 12*. Respondent is not required to pay Fernaud the required wage listed on the LCA for work prior to Fernaud attaining H-1B status. See 20 C.F.R. §655.731.

Fernaud continued to work for Respondent after attaining H-1B status; Respondent is required to pay him the required wage listed on the LCA for this work. On September 9, 2001, Fernaud presented a status report on the construction and operations plans for the café. *Gx. 13 and Tr. 65-66.* He continued meeting with various suppliers and contractors on behalf of Respondent. *Gx. 9 and Gx. 11.* He took on the duties of a Kitchen Assistant at a rate of $7.00 per hour in addition to his duties as an Operation Manager. *Rx. 1.* Therefore, on a daily basis, Fernaud's duties included greeting and serving customers, running the cash register, and acting as a waiter, busboy, and Kitchen Assistant. *Tr. 70 and 77.* Regardless of the position or title Fernaud held with the café, Respondent was obligated to pay him the required wage. 20 C.F.R. §655.731(c)(6) and (8).

Respondent sporadically paid Fernaud various amounts, none equaling the required wage. *Gx. 5.* The required wage is the greater of the actual or prevailing wage listed on the LCA. 20 C.F.R. §755.731(a). In Fernaud's case, the required wage is $29,350 per year, listed on the LCA as the actual wage. *Gx. 1.* Leann Dunbar of the Department's Wage and Hour Division improperly concluded that the required wage was $29,328 per year, the prevailing wage, because Fernaud was the only Operations Manager employed by Respondent. *Tr. 39.* The regulations consider this possibility, stating that in instances where there are no other employees in the same position with similar experience and qualifications, the wage paid to the H-1B immigrant is the actual wage. 20 C.F.R. §655.731(a)(1). Thus, the required wage in Fernaud's case is $29,350 per year, or $1222.92 paid semi-monthly.

Fernaud should have received a total of $30,573 for his work from September 1, 2001 through September 15, 2002. Fernaud only received $4,014.36. Hence, Respondent owes Fernaud $26,558.64 in back wages.

ORDER

IT IS HEREBY ORDERED THAT:

Respondent shall pay Alvaro Fernaud back wages in the amount of $26,558.64 in accordance with the Administrator's instructions contained in the determination letter dated January 30, 2004.

A
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.