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: 11 December 2006

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In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION
Complainant
v.
GEYSERS INTERNATIONAL, INC.
Respondent

Case No. 2006 LCA 00005

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Decision and Order

This matter arises pursuant to a complaint filed by the Wage and Hour Division, U.S. Department of Labor, which alleges that Respondent, Geysers International, violated the Immigration and Nationality Act, (INA), 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) and 1182(n), and the regulations promulgated and published by the Department of Labor at 20 C.F.R. 655.731(c) to implement the Act. Specifically, the complaint alleges that Respondent failed to pay required wages to Harvinder Singh Dua, a citizen of India, it sponsored under the H-1B program to work in America as a computer network systems administrator. Tr.26. According to Complainant, Respondent owes Dua $4,781.73 in back wages.[1] Geysers disputes the allegations in the complaint and insists that it owes Dua nothing.

Findings of Fact

Geysers International is an employee leasing company that specializes in information technology consulting work and operates out of Jacksonville, Florida. Manivannan Nallapillai is the president and owner of the company. Tr. 25-26. In 2000, Geysers recruited Harvinder Dua to work as a systems administrator. Tr. 26; DX 2; Tr. 43, and sponsored him for an H-1B visa. Tr. 28; DX 8, 9; Tr. 42. Dua entered the U.S. on September 29, 2000. Tr. 44. Nallapillai testified that Dua's

[1] The corporate respondent was represented at the hearing by its president, Manivannan Nallapillai, and in accordance with the ARB's decision in Dale v. Step 1 Stairworks, 2002 STA 30 (ARB March 31, 2005), the corporate respondent was treated as a party appearing *pro se* in this proceeding. Tr. 5.

prevailing wage was $56,000 per year, and that he was paid the prevailing wage plus $550.00 per month for per diem, which was included in his pay check beginning on November 16, 2002. Tr. 38; 75-76, 78. After working briefly, for Geysers in Jacksonville, Dua was seconded to Precision Data where he worked as a systems administrator until June 29, 2005. Tr. 30; Dx 10; Tr. 44. Pursuant to this assignment, Dua actually performed the worked in Brooklyn, N.Y. at a company called SIAC. Tr. 31; 44. Dua submitted his timesheets to Geysers, and Geysers invoiced Precision Data for his work. Tr. 31-32. He was paid on bi-weekly basis and received a per diem. Tr. 29. Customarily, Geysers paid its employees three weeks after the close of a pay period. Tr. 30. For the pay period ending June 4, 2005, Dua was paid on June 24, 2005. Tr. 30. He submitted four timesheets in June, 2005, one for each week, and Geysers billed Precision Data for the hours reflected in Dua's June timesheets. Tr. 32; DX 3, DX 4; Tr. 45. Precision Data paid the bill, Tr. 32; however, Dua was not paid for his work during this period. Tr. 45.

On June 29, 2005, Dua sent Nallapillai an email advising him that he was leaving Geysers effective July 1, 2005. DX 3; Tr. 33; Tr. 47. Dua testified that he had been advised that his assignment with Precision Data was ending. Tr. 56. Thereafter, he submitted his time sheets for two pay periods in June, 2005, but was not paid for his last month's work. Tr. 49. Geysers did, however, bill Precision Data for Dua's work in June of 2005, and Precision paid Geysers' invoice.

By 2005, Dua's prevailing wage was $57,450.00. Geysers produced pay records that showed Dua was paid for 26 weeks or 13 pay periods in 2005, and received a total of $29,260.09. RX 1. This amount excluded the first payday in 2005 that covered work performed during the last pay period in 2004, Dx 11; Tr. 29-30, and on a weekly basis, this exceeded Dua's prevailing wage.

Nallapillai testified that, in early June, 2005, he sent a letter to the INS notifying it the agency that he had terminated Dua. Tr. 17. Apparently, Dua had requested a pay increase in February or March, 2005, Tr. 32-33, and Nallapillai decided to let him go in June. Tr. 18. The record was held open to afford Geysers an opportunity to supplement the record, but the letter allegedly sent to the INS was not offered into evidence. Whether the INS was actually notified is in question, but the record clearly confirms that Nallapillai did not notify either Dua or Precision Data that Dua was no longer employed by Geysers. Tr. 33; Tr. 48; Tr. 109-110. When an employee is terminated both the employee and the INS must be notified. Tr. 88.

The record shows that Dua's health insurance continued through mid-July, 2005. Geysers generally deducted about $700.00 per month for his insurance, Tr. 61-62; 68, and he testified that it appeared Geysers paid the health insurance premium for the months of June and July, 2005. Tr. 62-64. Dua thought he would be paid for the month of June by the July 22, 2005 pay day, DX 5, with deductions for insurance, but when he asked when his insurance would terminate, he received no reply from Geysers. Tr. 64-65. Geysers claims a credit for $1400 in health care benefits paid in June and July, 2005. Tr. 103. Dua received a paycheck on June 24, 2005, and health insurance was deducted. Tr. 104. Dua was offered a continuation of his insurance after he left Geysers. Tr. 49; DX 6.

According to Nallapillai, after leaving Geysers, Dua went to work for Precision in violation of a non-compete clause in his employment contract. Tr. 20-21.

Nallapallai testified that Dua received his last pay check on June 24, 2005, for the pay period ending June 4, 2005. Tr. 34; Tr. 50; DX 12. Initially, he contended that the money he withheld from Dua for the work performed in June was a "kind of" liquidated damage for the breach of the non-compete provision. Tr. 19, 21-22; but when he learned from DOL that he had to pay Dua for his last month's work, he "converted" $5,100 or $5,200 that he previously paid Dua in per diem to salary. Tr. 34, 36, 40-41.[2] He also explained that, although Precision Data paid him for the hours Dua worked in June, 2005, and although he did not pay Dua for those hours, he was justified in keeping the money because Precision Data hired Dua in July, 2005, without his permission. Tr. 22-23.

Steve Marlowe, a compliance officer, with the Wage and Hour Division, testified at the hearing. Tr. 79. He investigated Dua's complaint against Geysers, and interviewed Nallapillai. Tr. 81. He testified that Nallapillai admitted that he had not paid Dua for the work he performed in June of 2005, but he intended to convert previously paid per diem to salary, as Geysers had been permitted to do in resolution of a prior complaint the Wage and Hour Division had previously investigated. Tr. 81.

Marlowe testified that his investigation revealed that Geysers was paying Dua 95% of the prevailing wage, which beginning March 8, 2005, was insufficient, and that he calculated the difference between the prevailing wage and the actual

[2] Nallapillai testified that many aliens prefer to receive a portion of their wages in the form of a per diem in order to avoid paying taxes. Tr. 38.

wage for the months of March, April, and May, 2005, as a $362.49 defficiency. Tr. 83. He then calculated the wages due for June, 2005, by dividing the prevailing wage of $57,450 by 52, multiplied by the 4 weeks in June, 2005, Dua worked. As calculated, the back wage owed for June amounted to $4,419.24. Tr. 84. Based upon these calculations, he concluded that Geysers owed Dua total back wages in the amount of $4,781.73. Tr. 84.

Marlowe testified further that Geysers would have been accorded a credit for per diem converted to salary for the months of March, April, and May, 2005, had Geysers provided documentation that it had actually converted the per diem to wages and actually paid required taxes; but documentation that it paid the required taxes on the converted $362.49 per diem was not forthcoming. Tr. 84, 89.

In contrast, for the month of June, 2005, Marlowe explained that credit for per diem could not be accorded, because Dua received no payment at all, let alone per diem, during the month of June, 2005. Tr. 84-85. Differentiating the per diem conversion credit the Wage and Hour Division permitted Geysers to take in resolution of the prior complaint, Marlowe explained that the previous situation involved an employee who regularly received his salary and per diem, but the amount paid as salary was less than the prevailing wage. Under those circumstances, Geysers was permitted to convert the per diem to salary to cover the prevailing wage. Tr. 85. The previous situation, Marlowe testified, did not involve the conversion of previously paid per diem to cover pay periods in which work was performed but no wage or per diem was paid. Tr. 85, 91-92.

Nallapillai argued that he terminated Dua on June 4 or 6, 2005, but he did not return the money Precision paid him for Dua's work in June, 2005. Tr. 96. Although he did not notify Dua that he was terminated, and did not tell Precision that he had terminated Dua, he argued at the hearing that "I wasn't aware that he was an employee of ours or not until he sent the time sheet. They don't tell us anything." Tr. 97. Nevertheless, Nallapillai billed Precision for the hours Dua worked in June, because "…they were supposed to pay me for a lot of other things in the prior contract so that's why I billed them." Tr. 98-99, 101. Nallapillai admitted that he represented to Precision that Dua's employment status with Geysers remained unchanged and that Geysers was entitled to payment for the hours in June, 2005, that Dua worked, Tr. 102, even though Nallapillai contended that Dua had been fired on June 4 or 6, 2005.

Discussion

Respondent argues in this proceeding that it owes the alien, Narvinder Dua, no back wages. To the contrary, Respondent's president, Manivannan Nallapillai, insisted that he had terminated Dua in early June, 2005, by letter of notification sent to the INS. Alternatively, and assuming Respondent is liable for the work performed by the alien after the termination notice was communicated to the INS, Nallapillai contended at the hearing, and again in his post-hearing brief, that Dua actually received wages which exceeded his prevailing wage for work performed up until the day of his resignation on July 1, 2005. Specifically, Respondent emphasized that it paid Dua $29,260.09 in 2005, but his prevailing wage for the 26-week period he worked amounted to only $28,725.00.[3] In addition, Respondent claimed that it paid $2,769.50 in health insurance premiums for the months of June and July, 2005; and it should, therefore, be accorded a credit for that amount against any amount the alien may be due.

Termination Notice to the INS

Initially, it should be noted that Respondent's contention that it was not responsible to pay the alien's wages in the month of June, 2005, because it had terminated his employment on June 4 or 6, 2005, when it allegedly notified that INS that it had fired him is without merit. Apparently, Dua had communicated to Nallapillai in February or March of 2005, that he thought a pay raise was warranted. According to Nallapillai, he, thereafter, was uncertain whether Dua was still working for Geysers, notwithstanding the timesheets Dua submitted for this period; but Nallapillai decided to formally terminate him in early June. In accordance with the applicable regulations, Nallapillai was free to terminate the alien without cause.

The record shows, however, that Dua was indeed working for Geysers in March, April, and May of 2005. It further shows that, although Respondent claimed that it notified the INS that it had terminated him, no such notification letter was adduced at the hearing. Beyond that, however, it is undisputed that Respondent never notified either Dua or Precision Data, the company to which

[3] At the time of the alien's arrival in the U.S., the prevailing wage on the LCA was $56,000 or $1076.92 per week. This later increased to $57,450 or $1,104.81 per week. In addition, the alien received a per diem in lieu of wages in the amount of $550.00 per month or a total of $4,969.24 per month. Pursuant to Geysers contract to provide consulting services to Precision Data, which consisted principally of "supplying the services of Mr. Harbinder (sic) Singh Dua … to perform said consulting services," Precision Data paid Geysers $640.00 per consulting day, $3,200.00 per 5-day workweek or $12,800.00 per month for providing the alien's services.

Nallapillai had assigned Dua, that Dua had been terminated. To the contrary, Nallapillai testified not only that he allowed Dua to perform his work believing that he was still employed by Geysers throughout June of 2005, but that Geysers invoiced Precision Data for Dua's work in June, 2005, and accepted Precision's payment for Dua's work. Nallapillai justified this attempt to deceive and misrepresent Dua's employment status on the grounds that the alien subsequently went to work for Precision Data in violation of a non-compete clause in his contract and because Precision Data owed Nallapillai for "other things," including stealing his employee. Although it is difficult to accept Nallapillai's assertion that Precision Data lured away a valued Geysers' employee when Nallapillai insisted that he fired Dua a month before Precision hired him, Geysers' attempts to deceive were otherwise unjustified. The record contains no evidence of a non-compete clause in Dua's employment agreement. Yet, the attempt to deceive failed to achieve its desired outcome. Aside from the fact that the record contains neither a letter to the INS nor an employment contract containing a non-compete clause, the alleged termination on June 4 or 6, 2005, was otherwise insufficient to end Geysers' liability for the alien's wages.

Thus, the ARB recently held, under circumstances similar to those involved here, that in order to effect a bona fide termination, an employer need not establish a valid basis or good cause, but pursuant to 20 C.F.R. § 655.731(c)(7), it must establish three elements – (1) notice to the employee, (2) notice to the INS (now DHS), and (3) payment of the alien's transportation home. Amtel Group of Florida, Inc. v. Yongmahapakorn, 2004-LCA-6 (ARB Sept. 29, 2006). In this instance, Respondent's president conceded that the alien was not notified that his employment was terminated. Respondent, therefore, failed to effectuate a "bona fide termination" under 20 C.F.R. § 655.731(c)(7)(ii) (2004), and, as a consequence, it remained liable for the alien's wages until he resigned effective July 1, 2005. Amtel Group, *supra*.

Back Wages
March, April, and May, 2005

The Wage and Hour Division calculated two periods in which it deemed back pay due to Dua; a three-month period during which the alien received pay checks but in amounts less than the prevailing wage, and a second period involving one month in which the alien was not paid at all for work actually performed. We consider the three-period first.

During the three months in question, beginning March 8, 2005, and including April and May of 2005, the prevailing wage was $57,450.00 per year, but the alien was paid at a wage rate of $56,000 per year. As such, he was paid $362.49 less than the prevailing wage required by the H-1B Visa Reform Act of 2004. Pub. L. 108-156, 117 Stat.1944 (2003). Respondent argues, however, that it paid Dua a per diem in the amount of $550.00 per month and that it converted per diem to wages in October, 2005, thereby vitiating any wage underpayment during the three-month period in question.

The record shows that the Wage and Hour Division permits conversion of per diem to reach prevailing wage rates under circumstances in which both wages and per diem were paid during the pay period, and the total of the two meet or exceed the prevailing wage. Indeed, Geysers was permitted to make just such a conversion in resolution of prior investigation of its compliance with the INA; however, the circumstances here are distinguishable. In this instance, Respondent has failed to establish that it satisfied all of the criteria necessary to implement a valid conversion of per diem to wages. Pursuant to the regulations published at 20 CFR §655.731(C)(2)(ii) and (iii), to convert per diem to wages the employer must pay all of its appropriate taxes. Since Respondent here has not documented its payment of taxes, it can not avail itself of a credit for conversion of per diem to wages for the period March, April and May, 2005.

Back Pay
June, 2005

Respondent offered a number of reasons for its failure to pay Dua any wages or per diem for the month of June, 2005. For the reasons which follow, however, its excuses are neither credible nor legally sufficient to justify its actions. The record shows that Dua received a pay check on June 24, 2005, for wages earned through June 4, 2005. His timesheets indicate, however, that he continued to work through the month of June and submitted his June timesheets on July 1, 2005. Respondent, in turn, billed Precision for Dua's work in June, but paid him nothing. Respondent's initial excuse for the failure to pay June wages was the alleged discharge of Dua earlier that month. As discussed above, however, no bona fide termination was implemented.

Nallapillai next suggested that the pay Dua earned in June was withheld as a sort of liquidated damage for Dua's alleged breach of a non-compete provision in an employment contract. Yet, it produced no such contract provision in this proceeding. Finally, Respondent argued that it was entitled to convert all of the per

diem in excess of prevailing wage it paid Dua from January through May of 2005, as an offset against wages it failed to pay in June.

As noted above, the Wage and Hour Division will allow conversion of per diem for the pay period in which it was paid, but it does not permit conversion of per diem as a credit against wages unpaid in subsequent pay periods. The record shows that no wage or per diem was paid when due in accordance with the Employer's payroll schedule for work performed by the alien in June of 2005. Accordingly, Respondent violated Section 655.731(c)(1) of the regulations; and no conversion of per diem paid in earlier pay periods can permissibly be claimed as a credit against the prevailing wage requirement for work performed in June, 2005.

Deductions From Wages

Respondent also contended at the hearing, and again in its post-hearing brief, that Dua owed Geysers money that it was entitled to deduct from his back wages. At the hearing, Nallapillai vaguely suggested that Dua owed Respondent for attorney's fees Geysers paid for professional assistance in securing Dua's visa and that Dua was liable for some form of liquidated damage or penalty imposed because he ceased employment prior to an agreed date. Expenses of this type, however, are not recoverable by an employer under the applicable regulations. *See*, Section 655.731(c)(9)(iii)(C) and (c)(10)(i)(A) and (B); Administrator v. Mohan Kutty, 2001 LCA 025(ARB, 2005).

Respondent also argued that it is entitled to a credit in the amount of $2,769.50 for health insurance premiums paid on Dua's behalf in June and July of 2005. Dua testified that Geysers typically paid half of his health insurance premium, and a deduction was taken from the paycheck he received on June 24, 2005 for work performed in May, 2005. The Wage and Hour Division argued in its post-hearing brief that valid deduction from wages are permissible only upon compliance with the requirements set forth in Section 655.731(c)(9)(iii) of the regulations, and in this instance, Respondent failed to adduce any proof that the alien voluntarily authorized any deductions in writing in accordance with Section 655.731(c)(9)(iii)(A).

The record shows that the letter of acceptance Dua signed offered employment with the benefits outlined in an attached schedule, among which Geysers offered health insurance as part of its benefits package. RX 2. At some point, Dua may have changed his health benefits plan, *see*, RX 6; but, despite the opportunity provided to the *pro se* employer to supplement the record post-hearing,

the Wage and Hour Division observes correctly that no written evidence of a voluntary deduction from salary to pay for the plan was presented for consideration in this record. In addition, the record indicates that a health insurance premium deduction was taken from the paycheck Dua received on June 24, 2005, but Respondent failed to establish whether or not the premium was paid in advance for coverage through mid-July. Accordingly, the deduction Respondent seeks is unavailable under Section 655.731(c)(9)(iii). Yano Enterprises, Inc. v. Administrator, 2001 LCA 001 (ARB, 2001).

Accordingly, for all of the foregoing reasons;

ORDER

IT IS ORDERED that the determination of the Administrator, Wage and Hour Division, be, and it hereby is, affirmed and that Harvinder Singh Dua be, and hereby is, awarded back wages in the amount of $4,781.73.

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Stuart A. Levin
Administrative Law Judge