U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 May 2008

CASE NO.: 2008-LCA-00010

In the Matter of

MAHMOUD ASHRAF GALAL,
Prosecuting Party/Complainant,

v.

Z & A INFOTEK CORPORATION,
Respondent.

Appearances:

Mahmoud Ashraf Galal, Pro se
For Prosecuting Party/Complainant

Sandesh A. Shetty, Pro se
For Respondent

Before: Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

I. JURISDICTION

This is a proceeding pursuant to 20 C.F.R. Part § 655, et seq., promulgated to implement the H-1B provisions of the Immigration and Nationality Act ("the Act", hereinafter), 8 U.S.C. §§ 1101(a)(15)(H)(i)(B) and 1182(n), and in accordance with 29 C.F.R. Part 18 (the Rules of Practice and Procedure of the Office of Administrative Law Judges).

Under the Act, an employer may hire nonimmigrant workers from other countries to work in the United States in "specialty occupations" for prescribed periods. 8 U.S.C. § 1101(a)(15)(H)(i)(B). Such workers are issued H-1B visas by the Department of State upon approval by the Immigration and Naturalization Service ("INS"). 20 C.F.R. §655.705(b). In order for the H-1B visa to be issued, the employer must file a Labor Condition Application ("LCA") with the Department of Labor ("DOL"), and describe the wage rate and working conditions for the prospective employee. 8 U.S.C. § 1182(n)(1)(D); 20 C.F.R. §§ 655.731 and

732. Once DOL certifies the LCA, INS can then approve the nonimmigrant's H-1B visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. §§ 655.700 (a)(3).

II. PROCEDURAL HISTORY

On January 11, 2008, the Administrator of the Wage and Hour Division ("Administrator", hereinafter) issued a Notice and Determination that Z & A Infotek Corporation ("Respondent", hereinafter) had failed to pay employees, Mahmoud Ashraf Galal and Manoj Kumar Kurmi, the required wage rate pursuant to 20 C.F.R. § 655.731, failed to provide notice of the filing of LCAs as required by 20 C.F.R. § 655.734, and failed to comply with the provisions of subpart H or I pursuant to 20 C.F.R. § 655.730. Administrator ordered Respondent to pay back wages to two H-1B nonimmigrant workers in the amount of $7,440.00. No civil penalties were assessed.

By letter on January 20, 2008, Complainant requested a hearing on Administrator's determination arguing that Administrator calculated the back wage based on an incorrect salary and that he is entitled to additional monies for expenses incurred during his employment and for return travel after his separation from Respondent's employ. By letter dated January 25, 2008, Respondent requested a hearing on the wage determination for Manoj K. Kurmi arguing that no back wage was owed to Kurmi. Respondent also stated that back wages were paid to Galal as per Administrator's determination. On February 20, 2008, the Administrator advised that he wished to withdraw from the scheduled hearing because he was no longer pursuing a back wage claim for Kurmi and Respondent had satisfied the amount of back pay that the Administrator found the Respondent owed to Claimant. On February 20, 2008, Complainant requested a Decision and Order on the record. By Order dated February 22, 2008, I granted Administrator's request and dismissed the Administrator's claim with prejudice. I also granted Complainant's request for a Decision and Order on the record and cancelled the February 26, 2008 hearing. I granted the parties thirty days to submit documents and written argument in support of their case. Complainant entered ten (10) exhibits into evidence[1] and Respondent entered twelve (12) exhibits into evidence.[2] This Decision and Order is based upon the evidence of record, the arguments of the parties and an analysis of law.

III. THE PARTIES' CONTENTIONS

Complainant contends that the back wages computed by the Administrator were incorrectly calculated. He asserts that Respondents agreed to increase his salary from $65,000 to $90,000 per year and as such, his back wages should be calculated based on a yearly salary of $90,000. Complainant also asserts that he is entitled to reimbursement for his travel from the United States to Canada because he was terminated involuntarily. Complainant avers that his travel expenses totaled approximately $500. Finally, Complainant contends that he is owed business expenses for travel incurred in the course of his employment totaling $205. Complainant raises other complaints relating to conditions of his employment that are not pertinent to this adjudication, and which I have not addressed.

[1] The citations "CX-1" through "CX-10" denote Complainant's exhibits.
[2] The citations "RX-1" through "RX-12" denote Respondent's exhibits.

Respondent contends that it paid Complainant's back wages in compliance with the Administrator's determination. Additionally, Respondent asserts that it is not responsible for Complainant's return travel expenses because Complainant terminated his employment voluntarily. Finally, Respondent contends that Complainant has offered no evidence to support his claim for travel expenses or work related expenses.

IV. ISSUES

The issues presented for adjudication are:

(1) Has Respondent paid the full amount of back pay owed to Complainant for the period Complainant was working at Z&A Infotek?

(2) Is Respondent obligated to reimburse Complainant for work-related business expenses and/or return travel expenses following Complainant's employment termination?

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of H-1B Process

Pursuant to the Act and its implementing regulations, certain classes of aliens who are not considered "immigrants" may work in the United States for prescribed periods of time and prescribed purposes. 8 U.S.C. § 1101(a)(15). One class of such aliens, known as "H-1B workers" are issued specific visas to work on a temporary basis in "specialty occupations." 8 U.S.C. § 1101(a)(15)(H); 20 C.F.R. § 655.700(c)(1). A "specialty occupation" is one that requires theoretical and practical application of highly specialized knowledge and attainment of a bachelor's degree or higher in the specialty. 8 U.S.C. § 1184(i); 20 C.F.R. § 655.715. Visas issued to such workers are limited to a six-year period of admission and are restricted in number in any fiscal year. 8 U.S.C. § 1184(g).

INS identifies and defines the occupations covered by the H-1B category and determines an individual's qualifications. The U.S. Department of Labor ("DOL") administers and enforces the labor conditions applications ("LCA") relating to the alien's employment. 20 C.F.R. § 655.705. Employers who seek to hire individuals under an H-1B visa must first file a LCA with DOL, and certification of the application is required before INS approves the visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); see also 20 C.F.R. Part 655, Subparts H and I. In the LCA, the employer must represent the number of employees to be hired, their occupational classification, the actual or required wage rate, the prevailing wage rate, and the source of such wage data, the period of employment and the date of need. 20 C.F.R. §§ 655.730 -734; 8 U.S.C. § 1182(n).

After the LCA is certified, the employer submits a copy of the certified LCA to the INS along with the non-immigrant alien's visa petition to request H-1B classification for the worker. 20 C.F.R. § 655.700. If the visa is approved, the employer may hire the H-1B worker. Employers are required to pay H-1B workers beginning on the date when the nonimmigrant first is admitted to the United States pursuant to the LCA. 20 C.F.R. § 655.731(c)(6). Employers are required to pay H-1B employees the required wage for both productive and non-productive time.

Employment-related nonproductive time, or "benching," results from lack of available work or lack of the individual's license or permit. 8 U.S.C. § 1182(n)(2)(c)(vii); 20 C.F.R. § 655.731(c)(7)(i). The employer's duty to pay the required wage ends when a bona fide termination occurs, but if the employer rehires the "laid off" employee, a bona fide termination is not established. 20 C.F.R. § 655.731(c). An employer need not pay wages for H-1B visa workers in nonproductive status at their voluntary request or convenience. Id. The employer must notify the INS that it has terminated the employment relationship so that the INS may revoke approval of the H-1B visa, and cancel any visa petition that has been filed. 8 C.F.R. § 214.2(h)(11); 20 C.F.R. § 655.731(7)(ii); 8 C.F.R. § 214.2(h)(4)(iii)(E).

B. Summary of the Evidence

Complainant's Documents

Complainant submitted a copy of a "letter and employment agreement" from Respondent dated April 19, 2005, that constituted an offer of employment with Respondent. The stated salary offered was $65,000 per year, to be paid on a monthly basis. The agreement is signed by Sandesh A. Shetty, Respondent's CEO, and Complainant. CX 1.

Complainant submitted an email from Respondent's representative, Jay Shukla, dated March 31, 2006. The entirety of the email reads, "[a]s per our conversation I am writing you an email we have agreed to a salary of $90,000 per annum." CX 2.

Complainant submitted emails exchanged between himself and Jay Shukla. On April 25, 2006, Jay Shukla emailed Complainant stating, "[a]s of today April 25th, 2006 you will be ending your employment with Z&A Infotek. Please vacate company premises such as guesthouse today." Complainant responded with an email dated April 27, 2006 indicating he expected his salary to be deposited into his account and provided his bank account information. Complainant wrote that he calculated his salary for work from April 2, 2006 to April 25, 2006 as $6,000.00. Complainant also wrote that he was owed reimbursement for expenses in the amount of $132 for the "Boston trip" and $73 for the "Philadelphia trip." Finally, Complainant stated, "[b]y law, you have to pay me the ticket back home and you know how much it costs." CX 3.

Additional Complainant's Exhibits

Email from Complainant to Sandesh Shetty dated November 11, 2005 informing Respondent that Complainant's name was wrong "in all the document [sic]." CX 4.

Form 1797B Petition for a Non-immigrant worker dated January 30, 2006. CX 5.

Social Security Administration, Social Security number verification. CX 6.

Complainant's 2007 W-2. CX 7.

March 31, 2006 employment letter. CX 8.

Emails between Complainant and Jay Shukla regarding travel from New York to Boston. CX 9.

Travel confirmation for flight from Toronto, Canada to Newark, New Jersey on January 7, 2006. CX 10.

Respondent's Exhibits

Payroll records showing proof of payment of back wages pursuant to the Administrator's Determination Letter. RX 1.

H1B Approval Notice, Form I-129, Employer letter, Summary of terms of Oral Agreement, Itinerary, approved LCA, and Academic Equivalency Evaluation. RX 2.

March 31, 2006 Employment Letter. RX 3.

April 25, 2006 email from Jay Shukla to Respondent. RX 4.

Summary of Unpaid Wages from the Department of Labor. RX 5.

Wage Transcription and Computation Sheet. RX 6.

April 27, 2006 email from Complainant to Jay Shukla. RX 7.

April 20, 2005 letter offering employment as a Sr. Systems Analyst at $65,000 per year, signed by Complainant and Sandesh Shetty. RX 8.

Email communication between Complainant and Sandesh Shetty regarding travel arrangements. RX 9.

Travel Confirmation for flight from Toronto, Canada to Newark, New Jersey on January 7, 2006. RX 10.

Email communication from Complainant to Sandesh Shetty regarding travel arrangements and employment contract. RX 11.

Email from Amit Shah, a client of Respondent, reading "Ashraf Galal did not work out." RX 12.

C. Discussion

The first issue concerns the amount of back pay owed to Complainant. An employer is required to pay an H-1B nonimmigrant the wages set forth in the approved LCA. See 8 U.S.C. 1182 (n)(1)(A)(i); 20 C.F.R. § 655.731(a). The wage requirement is established by ascertaining the higher of the actual or prevailing wage. Id. The Administrator determined that Complainant was owed $3,690.00 in back pay for the period of April 8, 2006 to April 29, 2006 based on a

prevailing wage of $63,960. RX 6. Respondent does not dispute the prevailing wage or the calculation of back pay and has reimbursed Complainant per the Administrator's Determination Letter.

Complainant alleges that back pay should be calculated based on his actual wage, which he contends was $90,000 per year. The evidence does not clearly establish Complainant's actual wage. Both parties submitted an employment agreement dated April 19, 2005, which offers Complainant a position as a Senior Systems Analyst at an annual salary of $65,000. CX 1. The agreement is signed by Complainant and Mr. Shetty. Complainant also submitted an email dated March 31, 2006 from Mr. Shukla stating, "we have agreed to a salary of $90,000 per annum." CX 2. The Labor Condition Application ("LCA") specifies a salary of $48,734. RX 2. Respondent submitted a "Summary of Terms of Oral Agreement under which Beneficiary Will Be Employed" which is dated May 18, 2005 and states "[t]he Employee shall be compensated at the rate of $48,734 per annum for 40 hours per week." RX 2 at 6. Respondent also submitted emails from Complainant to Sandesh Shetty wherein, on February 24, 2006, Complainant requested a copy of the "contract" stating Complainant's annual salary was to be $65,000. RX 11. On February 25, 2006, Complainant emailed Sandesh Shetty stating that he found a copy of the contract. RX 11.

The Department of Labor's enforcement authority arises within the scope of the INA and applicable regulations. 20 C.F.R. § 655.800. The Department's enforcement power is limited to the terms contained within the LCA, and does not extend to enforce private contractual agreements, such as the terms, or subsequent change in terms, of an offer letter. See Mao v. George Nasser, d/b/a Nasser Engineering & Computing Services, 2005-LCA-36, at 21 (ALJ May 26, 2006) (citing Rajan v. Int'l Business Solutions, Ltd., 2003-LCA-12 (ALJ April 30, 2003), aff'd in part, modified in part by Rajan v. Int'l Business Solutions, Ltd., ARB No. 03-104 (ARB Aug. 31, 2004)). In the instant matter, the agreements between the parties, including the March 31, 2006 email referring to an agreement on a salary of $90,000 per year, constitute a dispute involving a private contract between the parties, which falls outside the scope of the enforcement authority of the Department of Labor. I decline to give consideration to the employment agreements between Complainant and Respondent. The parties have not alleged error in the Administrator's determination of the prevailing wage. Accordingly, I affirm the Administrator's determination that Respondent failed to pay to Complainant $3,690.00 in required wages.

The second issue concerns reimbursement of work-related expenses and travel expenses for Complainant's return trip to Canada following termination of his employment. Complainant asserts that he is entitled to $500 reimbursement for his travel and $205 reimbursement for work-related expenses. The prevailing regulations provide that employer business expenses are a part of the required wage calculation. In addition, there is a prohibition against charging employer expenses to the employee if deducting the expenses reduces the salary below the required wage. The regulations state:

> where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expenses, the Department will consider the amount to be

> an unauthorized deduction from wages even if the matter is not shown in the employer's payroll records as a deduction.

20 C.F.R. § 655.731(c)(12).

Complainant has submitted no evidence in support of the alleged expenses. In his request for appeal, Complainant asserted that he is due reimbursement for $205 in business expenses, but he admitted that he does not have any documentation to support the expenses that he allegedly incurred. Complainant submitted an email dated April 27, 2006 in which he requested Respondent reimburse him for $132 for "Boston trip" and $73 for "Philadelphia trip." This is the only documentation submitted by Complainant referring to unreimbursed expenses. Similarly Complainant has submitted no documentary evidence relating to the costs of his return trip to Canada. The record contains no receipts or other documents in support of Complainant's contention. As the prosecuting party, Complainant bears the burden of proving his allegations. I find Complainant's evidence insufficient to establish by a preponderance that his wages were depressed by $705 in expenses.

VI. CONCLUSION

For the foregoing reasons, I affirm the Administrator's determination that Respondent, Z&A Infotek Corp., failed to pay $3,690.00 in required wages to H1-B non-immigrant, Mahmoud Ashraf Galal. Respondent has complied with the Administrator's Determination Letter. Accordingly, no further action by Respondent is necessary.

I dismiss Complainant's allegation that his wages were depressed by unreimbursed expenses.

ORDER

Complainant's claim is DENIED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. See 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. See 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 655.840(a).