U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 21 March 2008

CASE NO.: 2008-LCA-00008

In the matter of

NIKESH K. JAIN
Complainant

v.

EMPOWER IT, INC.
d/b/a INFOBAHN TECHNOLOGIES
Respondent

Appearances:

Nikesh K. Jain, Stamford, Connecticut,
Pro se

Sally L. Adams, Milton, Massachusetts,
For the Respondent

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER

I. Statement of the Case

On August 1, 2007, Nikesh K. Jain (the "Complainant" or "Jain") filed a complaint with the United States Department of Labor's Wage and Hour Division alleging that Empower It, Inc., d/b/a Infobahn Technologies (the "Respondent" or "Infobahn") committed violations of H-1B Labor Condition Applications under section 212(n) of the Immigration and Nationality Act (the "INA"), 8 U.S.C. § 1182(n), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart 1. On November 8, 2007, the Administrator, Wage and Hour Division (the "Administrator") issued a determination letter stating that based on evidence obtained in the investigation of the complaint, it had been determined that there was no violation. By letter dated December 19, 2007, which was received by the Chief Administrative Law Judge on December 26, 2007, the Complainant requested a hearing pursuant to 20 C.F.R. § 655.820 on the Administrator's determination. A notice of hearing and pre-hearing order was issued by this ALJ on January 10, 2008, setting the hearing for February 13, 2008.

Because the Complainant's request for hearing was not received by the Chief Administrative Law Judge within 15 calendar days after the date of the Administrator's determination as required by 20 C.F.R. § 655.820(d), the Complainant was ordered to show cause why his request for hearing should not be dismissed as untimely. The Complainant responded to the show cause order by stating that he was out of the United States for one month and was unable to receive the November 8, 2007 determination letter that had been sent to him by certified mail. The Complainant further stated that he contacted the Wage and Hour Division upon his return to the United States and that a second copy of the November 8, 2007 determination letter was mailed to him on December 12, 2007. In an order issued on January 16, 2008, the Complainant's hearing request was accepted as timely filed based on a finding that the regulatory limitation period for requesting a hearing was tolled until December 12, 2007 by the extraordinary circumstance that the Complainant, who is not represented by counsel, was prevented from timely receiving the determination letter while he was outside of the United States.

Thereafter, the Respondent moved for reconsideration of the January 16, 2008 order accepting the Complainant's hearing request as timely filed, averring on information and belief that the Complainant had returned to the United States well before December 11, 2007 when he contacted the Wage and Hour Division. Alternatively, the Respondent argued that (1) an attorney who was representing the Complainant in a related state court action had actual notice of the Administrator's determination and (2) the hearing that had been scheduled is prohibited by the applicable regulations because it would be conducted more than 60 days from the date of the administrator's determination contrary to 20 C.F.R. § 655.835(c). The Respondent also moved for a continuance of the hearing.

In an order issued on January 31, 2008, it was noted the Respondent did not previously have an opportunity to challenge the Complainant's unsubstantiated claim that his absence from the country prevented him from receiving the Administrator's November 8, 2007 determination letter prior to December 11, 2007. Accordingly, the Complainant was ordered to respond specifically to the Respondent's charge that he returned to the country well before December 11, 2007. The Complainant responded by submitting an affidavit supported by airline itineraries and boarding passes as well as copies of his passport entry stamps and visas which confirmed that left the United States on November 13, 2007 and returned on December 8, 2007. In addition, the Complainant provided photocopies of the delivery slips left by the Postal Service documenting unsuccessful attempts to deliver the Administrator's Determination letter. In an order issued on February 11, 2008, I found that the Complainant's evidence was sufficient to rebut the Respondent's unsupported allegation that he returned to the United States and actual notice of the Administrator's determination well before December 11, 2007. I also rejected the Respondent's alternative arguments that (1) notice of the Administrator's determination received by an attorney who was not representing the Complainant in this matter commenced the running of the 15-day period for requesting a hearing established by 20 C.F.R. § 655.820(d) and (2) that the hearing was prohibited by 20 C.F.R. § 655.835(c) because it was scheduled more than 60 days after the Administrator's determination. However, the hearing was continued to March 7, 2008, and the date for filing pre-hearing reports was extended to February 29, 2008.[1]

[1] The February 11, 2008 order also denied the Complainant's request to change the hearing location from Boston, Massachusetts to Stamford, Connecticut.

Upon receipt of the parties' pre-hearing reports, a pre-hearing conference was conducted by telephone on February 29, 2008 at which time the Respondent's attorney raised multiple objections to the issues and evidence outlined in the Complainant's pre-hearing report. Specifically, the Respondent objected that several issues listed by the Complainant in his pre-trial report were time-barred and / or outside the scope of the allegations raised in his complaint. The Respondent also objected to a witness listed by the Complainant for the purpose of presenting testimony of similar violations by the Respondent in connection with the witness's employment. In addition, the Complainant orally moved for reconsideration of the February 11, 2008 order insofar as it denied his motion for a change in hearing location. The Respondent opposed any change in the hearing location, arguing that the majority of witnesses are located in the Boston area. At the conclusion of the February 29, 2008 pre-hearing conference, the hearing was continued to March 24, 2008, the Respondent was directed to file a motion setting forth its objections by March 5, 2008, and the Complainant was allowed until March 12, 2008 to answer the Respondent's motion. These time frames were confirmed by order issued on March 3, 2008. The Complainant's motion for reconsideration of the order denying his request for a change in hearing venue was taken under advisement pending a ruling on the Respondent's motion.

On March 5, 2008, the Respondent filed a motion to dismiss the Complainant's request for hearing, and the Complainant filed a reply in opposition on March 12, 2008. The Complainant also filed a formal motion to transfer venue. The parties' motions were addressed in a March 14, 2008 which denied the Complainant's motion to transfer hearing venue and denied the Respondent's motion to dismiss with respect to Issues (1) (alleged failure to pay prevailing wages), 3, 4, 5, 8 and 9 listed in the Complainant's pre-trial report. The order took under advisement the Respondent's motion to dismiss with respect to Issues 1 (alleged LCA misrepresentations), 2, 6, 7, 10, 11, 12, 13 and 14 listed in the Complainant's pre-trial report, and the Complainant was given until 5:00 p.m. EDT on Friday, March 21, 2008 to supplement his answer to the Respondent's motion to dismiss with an affidavit or other evidence. The order explained that in the absence of any evidence that these issues were raised in his complaint and investigated by the Wage and Hour Administrator, the Respondent would be entitled to summary decision as there is no jurisdiction to review claims that have not been investigated and made the subject of a determination by the Administrator. The March 14, 2007 order further advised the Complainant that failure to supplement his answer would result in entry of summary decision against him dismissing the allegations set forth in Issues 1 (alleged LCA misrepresentations), 2, 6, 7, 10, 11, 12, 13 and 14 of his pre-trial report. Finally, the order took the Respondent's objection to the testimony of the Complainant's witness under advisement.

In response to the March 14, 2008 order, the Complainant filed an affidavit on March 18, 2008 with supporting documentation that included a "H1B Narrative" from the Wage and Hour Division investigator summarizing the investigation of the complaint. That same day, the Respondent filed a renewed motion for summary judgment asserting that the investigator's "H1B Narrative" clearly establishes that the sole issue investigated by the Administrator, and properly before the ALJ for hearing, is whether the Complainant was paid the prevailing wage between July 31, 2006 and July 30, 2007. The Respondent thus argued that it is entitled to summary judgment on all other issues raised by the Complainant as they were not investigated by the Administrator. *Id.* In addition, the Respondent asserted that it is entitled to summary judgment

on the prevailing wage issue that was investigated by the Administrator because the undisputed facts establish that the Complainant was paid more than the prevailing rate during the July 31, 2006 to July 30, 2007 period. *Id.*

In light of these developments which were triggered by the Complainant's own evidence, another order was issued on March 19, 2008 allowing the Complainant an opportunity to file a further affidavit and any documentary evidence showing that there is a genuine issue of material fact warranting a hearing on the issue of whether he was paid at the applicable prevailing rate for the period of July 31, 2006 to July 30, 2007. The March 19, 2008 order further advised the Complainant that if he continued to maintain that any of the other issues raised in his pre-trial report were investigated by the Wage and Hour Division, notwithstanding the investigator's narrative stating otherwise, his further affidavit and additional evidence must show why a hearing is warranted with respect to any such issue. The Complainant responded to this order with an affidavit and additional documents on March 20, 2008.

Upon review, I conclude that there are no genuine issues of material fact and that the Respondent is entitled to summary decision affirming the Administrator's determination of no violation and dismissing the Complainant's request for hearing. My findings of fact and conclusions of law with respect to all material issues are set forth below.

II. Findings of Fact and Conclusions of Law

On August 1, 2007, the Complainant filed his complaint with the Wage and Hour Division on a "H-1B Nonimmigrant Information Form" (ESA Form WH-4). The complaint form filed by the Complainant contains a section 4 ("Description of Alleged H-1B Violations") with 17 subsections, labeled (a) through (q), which can be checked to indicate a specific type of violation.[2] In this section on the WH-4 filed by the Complainant, the following violation categories are checked:

> (b) Employer failed to pay H1-B worker(s) the higher of the prevailing or actual wage.
>
> (d) Employer made illegal deductions from H-1B worker's wages (e.g., for H1-B petition processing; for food and housing expenses while the worker is traveling on employer's business; for tools and equipment necessary to perform employer's work).
>
> (i) Employer required H1-B worker(s) to pay all or any part of $500/$1000 filing fee.

See Complainant's Mar. 18, 2008 Aff. at Tab A. A fourth box on the WH-4 ("Employer retaliated or discriminated against an employee, former employee, or job applicant for disclosing information, filing a complaint, or cooperating in an investigation or proceeding about a

[2] The 17 subsections in the WH-4 form track the 16 categories of H1-B violations described at 20 C.F.R. § 655.805(a)(1)-(16) and adds a 17th – "Other."

violation of the H1-B laws and regulations (i.e., whistleblower)") appears to have been checked and then crossed out. *Id.* The WH-4 Form filed by the Complainant contains the following additional sections which were not completed with any information: 5 ("Date of Alleged Violation(s)"), 6 ("Location of Worksite(s) where Alleged Violation(s) occurred"), 7 ("Basis of Knowledge of Alleged Violation(s)"), and 8 ("Description of facts and circumstances which support allegations in items 4 (a) through (q). Use additional sheets of paper, if necessary."). *Id.*

Prior to filing WH-4 form on August 1, 2007, the Complainant signed an "Employee Personal Interview Statement which is dated July 30, 2007 and witnessed by the Wage and Hour Division investigator.[3] In this statement, the Complainant related the following with respect to his employment by the Respondent:

(1) He was employed by Infobahn as a programmer from March 20, 2006 to January 31, 2007;

(2) He arrived in the United States on February 7, 2006, was picked up by Infobahn and taken to an apartment;

(3) He was available to begin work on February 8, 2006 as he already had a Social Security number from previous work in the United States;

(4) Infobahn sent him on interviews but did not pay him until March 1, 2006 when he received an annual salary of $45,000.00;

(5) He began working on March 20, 2006 in Stamford, Connecticut;

(6) Infobahn gave him $1,000.00 upon his arrival in the United States and then recouped this amount in two $500.00 deductions from his first paychecks;

(7) Health insurance deductions in amounts ranging from $100.00 to $400.00 per month were made from his paychecks, and Infobahn deducted different amounts for the same health insurance from different workers;

(8) While in India, he paid Infobahn $1,000.00 for the H1-B visa, and Infobahn told him that it would repay this amount once he commenced employment but never did so; and

(9) Infobahn told him that it would pay his air fare from India to the Unites States but failed to do so despite paying air fare for other H1-B workers.

See Complainant's Mar. 18, 2008 Aff. at Tab A.

[3] The Complainant filed the July 30, 2008 statement with his March 19, 2008 affidavit in response to the March 18, 2008 order.

At the conclusion of the investigation, the Wage and Hour investigator prepared a "H1B Narrative" containing the investigator's summary of the investigation and recommendation. In relevant part, the Investigator's H1-B Narrative states,

> STATUS OF COMPLIANCE: The investigation of the firm was initiated as the result of a complaint by Nikesh Jain, former H1B worker, alleging that he did not receive the prevailing rate. His complaint was not substantiated. The investigation was limited to this single worker.
>
> The window is 7/31/06 to 7/30/07. Mr. Jain received a yearly salary of $70,000 during that period. The prevailing wage was $54,496 per year. The LCA for Mr. Jain for this period is number 1-06360-2953679 and 1-06079-2307269.
>
> The firm did not violate any of the provisions of §655 relative to this worker during the window.
>
> The JRC form and the determination letter were prepared and reviewed by Mary Dodds and the NO. The determination letter was approved.
>
> lnv. recommends that the determination letter be sent and the file be closed.

See Complainant's Mar. 18, 2008 Aff. at Tab A. Based on the investigator's recommendation, the Wage and Hour Division District Director, acting on behalf of the Administrator, notified the Respondent by letter dated November 8, 2007 that it had been determined that there was no violation.

Issues not Investigated

While the Complainant maintains that he discussed many of the issues raised in his pre-trial report with the Wage and Hour investigator, he has presented no evidence to show that the Administrator investigated any issue other than whether he was paid at the prevailing rate between July 31, 2007 and July 30, 2007 as set forth in the investigator's H1-B narrative. Indeed, he concedes in his most recent affidavit that none of these other issues were investigated. Complainant's Mar. 18, 2008 Aff. at ¶¶ 5, 10. In the absence of any evidence that these issues were investigated by the Wage and Hour Administrator, which is a pre-requisite to a hearing, the Respondent is entitled to summary decision as there is no jurisdiction to review claims that have not been investigated and made the subject of a determination by the Administrator. *See Watson v. Electronic Data Systems Corp.*, ARB Nos. 04-023, 04-029, 04-050, 2005 WL 1359126*5 (ARB May 31, 2005) (nothing in the INA or its implementing regulations permits an ALJ to determine whether the Administrator abused his discretion to determine whether an investigation is warranted). *See also Watson v. IBM Corp*., USDOL/OALJ Reporter, No. 2006-LCA-31 (ALJ Oct. 3, 2006) at 3-4.

Alleged Failure to Pay Prevailing Rate

In its renewed motion for summary judgment, the Respondent contends that it is entitled to summary judgment on the prevailing rate issue because the undisputed facts establish that the Complainant was paid more than the prevailing rate during the July 31, 2006 to July 30, 2007 period that was investigated. In this regard, the Respondent states,

> The Complainant consistently has acknowledged that the Respondent paid him at the rate of $70,000 beginning July 1, 2006. See Complainant's Request For Hearing ("Infobahn revised my salary on 1-Jul-2006..."); Complainant's proposed Exhibit D (a true and accurate copy of the second page of Complainant's Exhibit List including a chart showing that he was paid no less than $5,833.33 per month, or $70,000 annualized, from July 2006 through January 2007, is provided at Tab C). Even accepting the Complainant's claim that he should have been paid at a Level 2 prevailing wage rate of $67,891, *see* Complainant's Pre-Trial Report at 2, rather than the Level 1 prevailing wage rate of $54,496 determined by the Wage and Hour Administrator for the period from 7/31/2006 to 7/30/2007, *see* H1B Narrative, it is beyond dispute that the Complainant was paid no less than $5,833.33 per month, or $70,000 annualized, from July 2006 through January 2007 when he terminated his employment.

Respondent's Renewed Mot. for S.J. at 3-4. In his affidavit responding to the Respondent's renewed motion for summary judgment, the Complainant states that he never requested an investigation of "issues for the period from 31-Jul-2006 to 30-Jul-2007," and he does not challenge the Respondent's statement that the evidence shows that he was paid in excess of the applicable prevailing rate for the period of July 31, 2006 to July 30, 2007 that was investigated by the Administrator. Complainant's Mar. 18, 2008 Aff. at ¶ 4. As the Complainant has not alleged any facts contradicting the Respondent's assertion that he was paid more than the prevailing rate during the July 31, 2006 to July 30, 2007 period that was investigated by the Administrator, I conclude that there is no genuine issue of material fact. Consequently, the Respondent is entitled to summary decision affirming the Administrator's determination of no violation. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986); 20 C.F.R. § 655.840(b).

III. Order

Based on the foregoing findings and conclusions, the Respondent's motion for summary judgment is **GRANTED**, the Administrator's November 8, 2007 determination is **AFFIRMED**,

the Complainant's request for hearing is **DISMISSED,** and the hearing scheduled for March 24, 2008 is **CANCELED**.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judges

Boston, Massachusetts

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).