U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE: 10-14-93

CASE NO: 93-LCA-0004

IN THE MATTER OF

Eva Kolbusz-Kijne,
Complainant

v.

Technical Career Institute,
Respondent

Counsel:

Dr. Hugo J. Kijne, Esq.
For the Complainant

Janet A. Savrin, Esq,
For the Respondent

Before: CHARLES P. RIPPEY
Administrative Law Judge

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act, Pub. L. 102-232, 105 stat. 17333 (8 U.S.C. 1101) from the complaint of Eva Kolbusz-Kijne that the Respondent, Technical Career Institute, untruthfully stated on three Labor Condition Applications filed with the U. S. Department of Labor for H-1B Nonimmigrants that notice of the filing of the application had been provided to the bargaining representative of workers in the occupations in which the H-1B workers would be employed. Copies of the three applications are in evidence and were filed on January 9, 1992, January 12, 1993, and February 19, 1993.

A hearing in this matter was held on August 10, 1993 at which the Complainant was present and all parties were represented.

Both the Complainant and all nonimmigrant aliens hired under the applications that are the subject of this complaint were teachers of English as a second language and, at all times

pertinent hereto, were represented by District 65, United Auto Workers of America, affiliated with the American Federal of Labor/Congress of Industrial Organizations.

The regulations at 29 CFR 507.730(d) require that an employer's labor condition application shall contain the labor condition statements referenced in paragraphs (e) through (h) which provide that no alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employee has filed with the Secretary of Labor an application stating, among other items, that [as provided in subsection (4)(i)] that, "The employer, at the time of filing the labor condition application has provided notice of the filing of the labor condition application to the bargaining representative of the employer's employees in the occupational classification in the area of intended employment for which the aliens are sought."

The complaint was filed with the Wage and Hour Division of the Employment Standards Administration in New York City. In ruling on the complaint, Thomas Kelly, the District Director of the Division merely found, "Based on evidence obtained in the recently concluded Wage and Hour Division investigation of Technical Career Institutes (TCI), under the H-1B provision of the INA, as amended, it has been determined that Technical Career Institutes is operating in compliance." The question, of course, was not whether TCI was operating in compliance at the time of the investigation, but, rather, whether there had been, in the past, a violation, as alleged by the Complainant. Mr. Kelly's determination did not address the specific violation that was the basis of the complaint.

The Respondent admitted that each of the applications in question asserted that the union had been notified, when, in fact it had not been notified, but asserted several defenses, each of which will be addressed separately:

1. The Respondent asserted that the application filed on January 9, 1992 was "invalid" because it had never been approved by the Department of Labor's Certifying Officer. This objection is misplaced. The misstatement on the application constitutes the violation, and is not affected by whether or not the application was approved.

2. The Respondent asserts that one of the applications was for a part-time employee, and, therefore, hiring of the alien could not have interfered with any rehiring of the Complainant. Again, this objection is misplaced. Whether or not the hiring of the alien would have interfered with the rehiring has no bearing on the question of whether the misstatement in the application was a violation of the regulations.

3. The Respondent asserts that it had informally been advised of a "grace period" during which violation of the regulations would be excused. No one has the authority to institute any such grace period. The applicable regulations became effective on January 13, 1992. Although the January 9, 1992 application was four days prior to the effective date of the regulations, the application was for a period entirely covered by the new regulations, from January 15, 1992 through January 15, 1993, and is, therefore, covered by the regulations.

The three violations that were the subject of the complaint in this case have each been clearly established.

Sec. 507.810 of the regulations provides that upon determination that the employer has committed any violation described in §507.805(a), the Administrator may assess a civil money penalty not to exceed $1,000 per violation. In determining the amount of civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors. The factors which may be considered include, but are not limited to:

1. Previous history of violation, or violations by the employer under the INA and subparts H or I.

2. The number of workers affected by the violation or violations.

3. The gravity of the violation or violations.

4. Efforts made by the violator in good faith to comply with the provisions of 8 U.S.C. 1182(n) and subparts H and I.

5. The violators explanation of the violation or violations.

6. The violator's commitment to future compliance.

7. The extent to which the violator achieved a financial gain due to the violation, or the potential financial gains, potential injury or adverse effect with respect to other parties.

Although the award of back wages is permitted under the regulations in cases where the employer has filed to pay wages required by the regulations, there is no provision for the award of wages to employees who were laid off because of the employment of aliens, and, therefore, the penalties in this situation are limited to civil money penalties, payable to the Wage and Hour Division of the U. S. Department of Labor.

Sec. 507.805 contains the note that Federal criminal statutes provide penalties of up to $10,000 and/or imprisonment of up to 5 years for knowing and willful submission of false statements to the Federal Government as provided in 18 U.S.C. 1001 and 1546.

In this case, the employer does not have a history of previous violations. The number of workers possibly effected by the violation is under ten. The Respondent could understandably be confused regarding the application made a few days prior to the effective date of the regulations. The Respondent stated that the violations were inadvertent, although it seems more likely to me that it knew the union would probably object if it found out about the applications. Nevertheless, the Respondent has promised future compliance. The Respondent did not receive a financial gain from the misstatement from anything that appears in the record. Its explanation was, "It was an oversight. I think we have to understand what happened in those days. People came in with paper work from attorneys, put them in from of administrators, and said please sign this or I'm going to

be deported, essentially is what they said. And this was done out of acts of kindness and not capriciousness to prevent Americans from getting hired." I have no basis to question that motivation. The effect, however, was to unfairly deprive Americans of work, which was a serious adverse effect upon other parties.

Considering the above factors, I will excuse the first violation because the application was actually filed prior to the effective date of the regulations, and assess a $500.00 civil money penalty for each of the two remaining violations, for a total civil money penalty in this case of $1,000.00.

The Complainant also asserts that she was laid of f because the Respondent hired workers as a result of the applications containing the misrepresentations that are the subject of her complaint. That matter is not explored here because the Department of Labor regulations contain no provision for a remedy to her in this situation of which I am aware or which was brought to my attention in this matter. Because of the Administrator's ruling on the complaint in this matter, he did not consider the possibility of any such remedy.

It is my strong view that the law should provide that an employer who uses nonimmigrant aliens hired under an application containing misstatements to displace United States workers should be obligated to make the United States workers whole, and that the legislation should be amended to provide that remedy. Accordingly, I call the Secretary's attention to this matter as worthy of his attention.

ORDER

The decision of the Administrator in this matter is vacated, and the Respondent is guilty of three misstatements of fact when it indicated that the union representing its workers had been notified of the filing of a Labor Condition Application for H-1B Nonimmigrants on January 9, 1992, January 12, 1993, and February 19, 1993. A civil money penalty of $1,000.00 is hereby imposed upon the Technical Career Institute and it is directed to remit that amount by certified check or money order payable to the order of "Wage and Hour Division, Labor" which shall be delivered or mailed to the District Director of the Wage and Hour Division at the address shown on the Service Sheet of this Decision and Order.

The parties are hereby informed that the Administrator, Wage and Hour Division, pursuant to §507.855, will notify the Employment Training Administration, U.S. Department of Labor and the Attorney General of the United States of the occurrence of the violation by the Respondent found in this Decision and Order, and the Administrator of directed to make the required notification.

This matter is remanded to the Administrator of the Wage and Hour Division for his consideration of whether the Department of Labor has any authority to direct a remedy for the Complainant if her layoff was caused by the hiring of nonimmigrant aliens under the applications containing the misrepresentations.

This Decision shall be effective 30 calendar days from its date of issuance unless within that time a petition for review has been filed with the Secretary of Labor.

CHARLES P. RIPPEY
Administrative Law Judge

NOTICE TO PARTIES The Administrator of the Wage and Hour Division or any party to this proceeding desiring review of this Decision and Order may petition the Secretary of Labor to review this Decision and Order. To be effective, such petition shall be received by the Secretary within 30 calendar days of the date of this Decision and Order. Copies of the petition shall be served on all parties and on the Administrative Law Judge. Provisions regarding review rights are set forth at 29 CFR 507.845.

Washington, D.C.