U.S. Department of Labor

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

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In the Matter of

RAVISHANKER BALAKRISHNA
Prosecuting Party

Date Issued: 12/22/00
Case No: 2000-LCA-0006

v.

SEYMOUR ELECTRIC, INC.
Respondent
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Before: Thomas M. Burke
Associate Chief Judge

DECISION AND ORDER

Statement of the case

This matter arises under the Immigration and Nationality Act, as amended by the Immigration Act of 1990 and amended in 1991, 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), (Act) and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I. Prosecuting Party, Ravishanker Balakrishna ("Alien"), filed a complaint with the Wage and Hour Division of the Employment Standards Administration, United States Department of Labor, asserting that he was not paid the prevailing wage rate by Seymour Electric Inc. ("Respondent"), as required by a Labor Condition Application ("LCA"} and 20 C.F.R. § 655.731.

The Act defines various classes of aliens who may enter the United States for prescribed periods of time and for prescribed purposes under various types of visas. 8 U.S.C. § 1101(a) (15). One class of aliens, known as "H-1B" workers, is allowed entry to the United States on a temporary basis to work in "specialty occupations." 8 U.S.C. § 1101(a)(15)(H)(i)(B); 20 C.F.R. § 655.700. An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the U.S. Department of Labor ("Department") by filing an LCA before the alien is given an H-1B visa by the Department of State.

An LCA filed by an employer must set forth, *inter alia*, the prevailing wage rate, working conditions, including hours, shifts, vacation periods, and fringe benefits. 20 C.F.R. §§ 655.731 and 655.732. Upon certification of the LCA by the Department, the employer is required to pay the prevailing wage and implement the working conditions set forth in the LCA. *Id.*

The Alien is a native of India who at the time the LCA was filed was residing in the United States on an H-1B visa for temporary employment. His employer was either Anne Tahim, an accountancy corporation, or American Family Development, Inc. Both entities are listed in the Petition for Nonimmigrant Worker as H-1B employers of the Alien during 1996 and 1997.[1]

The Alien's complaint was filed pursuant to 20 C.F.R. Section 655.805(d) which provides that any aggrieved person may file a complaint alleging a violation by an H-1B employer of the provisions of subparagraph (a) which include failing to pay the wage rate required by § 655.732, which is the wage rate set forth in the LCA. The Administrator, in the person of the Assistant District Director, Wage and Hour Division of the Employment Standards Division, pursuant to § 655.815 found no violation. *See* June 21, 2000 letter from Assistant District Director, Wage and Hour Division, to Respondent. Alien appealed the determination to the Office of Administrative Law Judges on July 3, 2000. *See* § 655.820. By Notice dated July 18, 2000, a hearing was scheduled for September 8, 2000 in Long Beach, California. Alien's request that he be permitted to participate by telephone conference was granted by Order dated August 31, 2000. The Administrator has not sought to intervene in this process although subsection (b)(1) of § 655.820 provides the Administrator with the discretion to intervene as a party or an *amicus curiae*.

Findings of Fact

Testimony was received from the Alien and from Jeff Seymour, President of Respondent. The only matter agreed to by the parties is that Respondent filed with the Department an LCA requesting that an H-1B nonimmigrant be hired to work for Respondent as a Financial Analyst/Accounting Specialist from December 10, 1996 to December 9, 1999, at a rate of pay of $41,600 per year. The prevailing wage was listed on the LCA as $32,000, the source of which was noted as a U.S. News & World Report Wage Survey. The occupation was described in Part 5 of the Petition for a Nonimmigrant Worker as accounting and analyses of costs, variances and budgets; design and implement a financial data base using Oracle & Access.[2]

Alien testified that he learned about the position with Respondent when he answered a newspaper advertisement for the position of programmer with the Respondent about November or December of 1996. According to the Alien's testimony, he was told at that time by Seymour that Respondent would be able to procure for him an H-1B visa. Subsequently Respondent filed the LCA and obtained the certification from the Department of Labor, permitting the Alien to start work about the middle of January, 1997 under an H-1B visa. (Tr. 7, 8) Alien testified that he was hired by Respondent as a professional programmer. "I joined Seymour as a professional programmer. The agreement was that while the employer tried to get me on a project, he would also like me as a financial officer and double as an accountant because of my strong background in finance." (Tr. 7) Alien also

[1]Page 3 of Prosecuting Party Exhibit 1.

[2]Page 3 of Prosecuting Party Exhibit 1.

testified that Seymour promised him a salary of $800.00 per week. An $800 a week salary would be equivalent to the $41,600 yearly salary provided for by the LCA.

Seymour's testimony is directly contrary to that of the Alien on the Alien's relationship with Respondent and the procurement of the H-1B visa. Seymour does not dispute that Respondent did not pay the Alien the wage rate stated in the LCA. The thrust of his testimony is that, notwithstanding his signature on the LCA, Respondent never had any intention of employing the Alien or any other person under the H-1B immigration program. Seymour testified that he signed the LCA as a favor to the Alien by assisting him with "his visa immigration." (Tr. 31) Seymour argues that the party responsible for the filing of the LCA with the Department was the Alien, himself; that Respondent is a small electrical contracting company employing between six and eight people that has neither the need nor the ability to pay $41,600 per year for a professional programmer. (Tr. 34, 35)

Seymour testified that Respondent's initial contact with the Alien was in November of 1996 when the Alien reported to Respondent's place of business as a temporary worker from Accountants Overload, a temporary employment agency. Respondent had a temporary need for an accountant to assist with Respondent's transition to a corporation from a sole proprietorship. (Tr. 34) The Alien worked for Respondent as an employee of Accountants Overload for three days starting on November 12, 1996.[3] Respondent paid Accountants Overload for the Alien's services. Seymour testified that after the Alien's temporary employment with Accountants Overload ended, Respondent permitted the Alien to use its office, telephone and computer to search for further employment. The Alien's search was unsuccessful, and he asked Seymour to assist him with his visa immigration by signing the LCA. According to Seymour's testimony, the LCA was prepared by one Nicholas A. Petty, an immigration attorney hired by the Alien, but with whom Respondent never had any contact. (Tr. 32) "Never met the guy. Never spoken with the guy." (Tr. 45) Seymour also testified that the newspaper advertisement for the position of Oracle Programmer/Financial Analyst at Seymour Electric Inc. was not placed by Respondent. Seymour first saw the ad when it was shown to him by the Wage and Hour investigator who investigated the Alien's complaint.

Seymour's testimony is credited over that of the Alien as the Alien's testimony is replete with contradictions. The Alien testified that he never heard of Accountants Overload, the employment agency that, according to Seymour's testimony, placed the Alien with the Respondent. However, a statement from Overload confirms that it placed the Alien with Respondent in November, 1996. The LCA was prepared by Nicholas Petty, an immigration attorney. Seymour testified that he has never met Petty. Alien initially testified that Petty was not his attorney and that he did not know Petty personally, (Tr. 38, 39) but later acknowledged that Petty did file an LCA petition for him with the Department of Labor, albeit, for a different employer. (Tr. 48, 49)

Alien's testimony regarding the work for which he was hired is internally inconsistent as well as being inconsistent with Seymour's testimony. Alien initially testified that he was hired as a professional

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[3]See Exhibit 12 to Respondent's Closing Brief which is a Job Order Description attached to subpoena served on Accounts Overload

programmer, but that Respondent could not get him on any project and as a result terminated his employment. (Tr. 7) Alien subsequently testified that he did do programming for the Respondent, in that he designed a data base for Respondent for "contractor's estimation" using the Oracle program. (Tr. 42) However, in response to Seymour's testimony that Respondent does not have Oracle, and in fact, Seymour doesn't know what it is, the Alien testified that he did not design the program at Respondent's office but on his computer at home. (Tr. 58, 59) Seymour, testified that he never would have hired the Alien as a programmer since Respondent had no need for a programmer. (Tr. 34, 56) Thus, the sum of the Alien's testimony regarding being hired as a programmer is that Respondent filed an LCA for a programmer, and hired the Alien as a programmer, but that the only programming he performed was to set up a contractor's estimation program by use of his home computer. Alien's account is simply unbelievable, particularly in light of Seymour's testimony that his income as owner of the company was only $50,000 in 1997 and he could not afford a programmer for whom he had no work at a salary of $41,000.

Conclusions of Law

Respondent argues that this claim by the Alien is barred by the doctrine of *res judicata.* The Alien previously filed a claim with the Department of Industrial Relations, Division of Labor Standards for the State of California requesting the payment of purported unpaid wages from the Respondent from November 18, 1996 to October 31, 1997. In a decision dated December 8, 1998 after a hearing in which the Respondent failed to appear, the Labor Commissioner entered an award in favor of the Alien. The Commissioner based his decision on §§ 201, 202 and 203 of the California Labor Code which provides generally that whether an employee is discharged or willfully leaves employment, all unpaid wages are due and payable. Respondent filed an appeal with the Orange County Superior Court who issued a Memorandum of Decision in favor of Respondent. The Alien's appeal therefrom was dismissed as being in default. Respondent argues that since the Alien's case was dismissed by the Orange County Superior Court, the Alien cannot "try yet another forum for his meritless claim." Respondent asserts that the case before Orange County Superior Court and the present case are between the same parties and involve the same claim.

The doctrine of *res judicata* bars a litigant from re-litigating a claim when (1) the former action was decided on the merits; (2) the matter contested in the second action was or could have been decided in the first; and (3) the two actions are between the same parties or their privies. *Ozark v. Kais*, 184 Mich. App. 302 (1990); *Admiral Merchants Motor Freight, Inc. v. Dep't of Labor*, 149 Mich. App. 344, 350; (1986). *Westwood Chem. Co. v. Kulick*, 656 F-2d 1224, (6th Cir. 1981). "It bars re-litigation on every issue actually litigated or which could have been raised with respect to that claim" *Westwood*, 656 F. 2d at 1227. "To constitute a bar there must be an identity of the causes of action--that is, an identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Id*. "A cause of action consists of a core of operative facts that give rise to a remedy, (citing cases)." *Ray v. Tennessee Valley Authority*, 667, F.2d 818, 821 (11th Cir. 1982), cert. denied, 459 U.S. 1147 (1983): "The principal test for determining whether the causes of action are the same is whether the primary right and duty or wrong are the same in each case."; *"Wickham Contracting Co. v. Board of Education*, 715 F.2d 21 (2d Cir. 1983); *Restatement (Second) of Judgments* §§ 24 (1980).

Here, the parties are the same but the issues litigated are not. The Orange County Superior Court defined the issue as the interpretation of an oral agreement between the parties. The Court based its decision entering judgement in favor of the Respondent on its finding that the Alien failed to meet his burden of proving the terms of the oral employment contract. Interestingly, the Court considered the LCA filed with the Department by Respondent but found it only to be evidence of the terms of an oral employment contract. The Court held that the LCA was not intended to "essentially memorialize the terms of the agreement between Plaintiff and Defendant." The issue here does not involve breach of an employment contract but rather the requirements of Department regulations governing H-1B visas and sanctions for noncompliance therewith. An employer is required to comply with the terms and conditions set forth in an LCA notwithstanding any side agreement he might have with the nonimmigrant alien employee. The alien's present claim is not precluded by the doctrine of *res judicata.*

Nevertheless, it is determined that the Alien is not entitled to the relief provided for under § 655.810, that is, back wages equal to the difference between the amount set forth in the LCA and the amount actually paid by Seymour. The purposes of the H1-B visa program would be defeated by an order requiring back pay to the Alien. The program permits nonimmigrant aliens to fill, on a temporary basis, those specialty occupations for which there are a lack of qualified U.S. workers available. 20 C.F.R. § 655.0 The requirement that the H1-B employer pay prevailing wages is intended to protect the jobs and wages of American workers, *See National Association of Manufacturers v. United States Department of Labor*, 1996 WL 420868 (D.D.C.). The provision allowing an alien to file a complaint for back wages if he is paid less than the LCA wages is to protect the prevailing wage requirement and to compensate the victim of wrongdoing. Here, the Alien is not a victim. Respondent and the Alien conspired to file the documentation necessary to allow the Alien to gain an H-1B visa. Respondent, the H1-B employer, never intended to locate and hire a nonimmigrant Alien into a specialty occupation. There was no intent to hire a programmer. Seymour testified that he had no need of a programmer, and the Alien's testimony that he did some programming work for Seymour on an at home computer is simply not believable. Moreover, the Alien is not a victim but the wrongdoer. The position of programmer was concocted by the Alien for the sole purpose of obtaining an H-1B visa. The Alien can not seek vindication under the Act for an asserted injury caused by his own malfeasance. In *Cenco Incorporated v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982) the Court held that a participant in a fraud cannot also be a victim entitled to recover damages, for he cannot have relied on the truth of the fraudulent representations, and such reliance is an essential element in the case of fraud. 686 F. 2d at 455. To allow the Alien to gain a benefit from his wrongdoing would be perverse and contrary to the purpose of the Act. In *Noriega-Perez v. United States of America*, 179 F. 3d 1165 (9th Cir. 1999) the Court noted that the purpose of § 1324c of the Immigration and Naturalization Act, which assesses civil penalties and reimburses the government for enforcement expenditures, is to ensure that persons committing fraud do not profit from their acts.

Moreover, an alien should not be able to sustain a claim for payment of the prevailing wages set forth in the LCA if the alien's H-1B visa, which is the reason for the existence of the LCA, was procured by fraud. See, for example, *Mwongera v. Immigration and Naturalization Service*, 187 F.3d 323 (3rd Cir. 1999), wherein the Court of Appeals for the Third Circuit sustained the Board of

Immigration Appeals' finding that where an alien engaged in willful misrepresentation of material facts in his B-1 visa application, the B-1 visa must be considered to be invalid as procured by fraud. *See also United States v. Lindert*, 907 F. Supp. 1114 (N.D. Ohio 1995), where the Court interpreted 8 U.S.C. § 1101(f)(6) as requiring that if a court finds that a defendant gave false testimony for the purpose of obtaining immigration benefits or citizenship, it must find that the defendant procured the citizenship illegally and revoke the defendant's citizenship.

Accordingly, the Alien's action in this case, conspiring with Respondent to submit an application for labor certification which misrepresents the employer's need for the specialty occupation in order to procure an H-1B visa for the Alien, precludes the Alien's claim for relief under § 655, that is, payment of the wages set forth in the LCA.

ORDER

In consideration of the above, **IT IS HEREBY ORDERED THAT:**

1) The complaint by Ravishanker Balakrishna asserting that he be compensated for back wages because he was not paid the wage rate by Respondent, Seymour Electric Inc., required by a Labor Condition Application ("LCA"} and 20 C.F.R. § 655.731 is denied; and

2) This matter is forwarded to the Immigration and Naturalization Service for appropriate disposition in light of the action of Ravishanker Balakrishna and Seymour Electric Inc. in this matter.

THOMAS M. BURKE
Associate Chief Judge

Washington, D.C.