U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive - Suite 300
Newport News, VA 23606

Date: February 16, 2001

Case No. 2001-LCA-0001

In the Matter of

ADMINISTRATOR, WAGE AND
HOUR DIVISION,
Prosecuting Party
v.

YANO ENTERPRISES, INC., d/b/a
SHOGUN JAPANESE STEAK HOUSE,
Respondent

Appearances:

Rafael Batine, Esq., for Prosecutor
Robert H. Grizzard, II, Esq., for Respondent

Before:

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This matter arises under § 212(n) of the *Immigration and Nationality Act* of 1990 and amended in 1991, 8 U.S.C. 1182(n) (Act) and the regulations promulgated thereunder at 20 C.F.R. § 655.800, *et seq*. 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 a Labor Conditions Application ("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 instant case arises because an investigation by the U.S. Department of Labor Wage and Hour Division determined that Respondent, Yano Enterprises, misrepresented a material fact on an LCA, willfully failed to pay the required wage rate, substantially failed to comply with notification, failed to make available for public examination the application and necessary documents, and failed to comply with the regulations. A civil money penalty of $1,750.00 was assessed and back wages in the amount of $92, 297.00 were ordered paid to one H-1B non-immigrant. The Respondent requested a hearing pursuant to 20 C.F.R. § 655.820.

The complaint was referred to the Office of Administrative Law Judges for a formal hearing in accordance with 20 C.F.R. § 655.835. A formal hearing was held before the undersigned Administrative Law Judge on December 1, 2000. (Tr.) [1] Prosecutor submitted eight exhibits identified as P-1 through P-8, of which, P-1 through P-3 and P-5 through P-8 were admitted (Tr at 10,11, 13, 36, 76, 78, and 85); exhibit P-4 was withdrawn. (Tr at 27.) Respondent submitted one exhibit, identified as R-1, which was admitted. (Tr at 12.)

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

DISCUSSION OF LAW AND FACTS

The Respondent, Yano Enterprises, Inc. does business in Lakeland, Florida as Shogun Japanese Steak House. The sole owner and officer of the corporation is Mr. Yoshikazu Yano, who was present and testified at the formal hearing. (Tr. 66.) Mr. Yano testified that the H-1B non-immigrant, Mr. Jose Pasqual Araque (a citizen of Venezuela), was his roommate in college in 1985, and that both he and Mr. Araque were employed at a Shogun Japanese Steak House in Jacksonville, Florida, while they were in college. (Tr. 67.) Mr. Yano testified that Mr. Araque called him from Venezuela and asked what opportunities might exist for him to work in the United States, and that he invited Mr. Araque to come to see his business. (Tr. 68.)

On November 15, 1993, a Labor Condition Application was filed by Mr. Yano, as President of Yano Enterprises, Inc. to permit Mr. Araque to be employed as Personnel Manager of Yano Enterprises, Inc., for the period of January 1, 1994 to December 31, 1996. The salary to be paid to Mr. Araque was stated in the LCA as $2500.00 per month. The LCA was approved by Floyd Goodman, Certifying Officer, U.S. Department of Labor on November 17, 1993. (P-1.)

A subsequent LCA was submitted by Respondent, signed by Mr. Yano as President, seeking approval for employment of Mr. Araque at a salary of $30,000.00 per year for the period of January 1, 1997, to January 1, 2000. This LCA was approved by Floyd Goodman, Certifying Officer, on November 17, 1996. (P-2.)

[1] Tr - Transcript; P- Prosecutor's exhibit; and R- Respondent's exhibit.

The U.S. Department of Labor Wage and Hour Division investigation in this matter[2] found violations of the Act and assessed a civil money penalty of $1,750.00, and the Respondent was ordered to pay back wages to the H-1B non-immigrant, Jose Pasqual Araque, in the amount of $92, 297.00. The Respondent requested a hearing pursuant to 20 C.F.R. § 655.820, stating

> Though my client does not wish to contest the fine assessed, and will pay the fine forthwith, it does wish to contest the assessment of back wages and the amount thereof, as it is convinced that there is justification for a lesser amount, and equitable and legal limitations on the assessment.

(Respondent appeal letter dated October 10, 2000.)

The parties have agreed that the civil money penalty has been paid by Respondent. (Tr. 6.) Therefore, the sole issue to be decided is the amount of back wages owed to Jose Pasqual Araque, the H-1B non-immigrant. In determining the amount of any back wages owed, the total wages which were due to Mr. Araque must be computed based upon the required wage rate under 20 C.F.R. § 655.731, minus the amount of wages actually paid, and minus any authorized deductions under § 655.731(c)(7).

The Required Wages:

Twenty C.F.R. § 655.731(a) provides that "...the [required] wage shall be the **greater** of: the actual wage rate (as specified in paragraph (a)(1) of this section) or the prevailing wage (as specified in paragraph (a) (2) of this section." 20 C.F.R. § 655.731(a).

The actual wage is determined under subsection (a)(1) in two ways. First, the actual wage is defined as the wage rate paid to all other individuals with similar experience and qualifications for the employment in question. 20 C.F.R. § 655.731(a)(1). However, as there is no such evidence in this record, the actual wage rate cannot be determined on this basis.

Second, subsection (a)(1) then provides that, "[w]here no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B non-immigrant by the employer." Thus, the actual wage under subsection (a)(1) in this case is the amount Respondent actually paid to Mr. Araque. Mr. Araque testified that he actually made $5.00 per hour, with small increases of 15 and 25 cents per hour. (Tr at 26.) The computations of the Wage and Hour Division investigator shows Mr. Araque's wages paid at the rate of $5.00 per hour as reflected on his W-2 forms. (P-3.)

Clearly the wages actually paid to Mr. Araque are less than the prevailing wage as provided in 20 C.F.R. § 655.731(a)(2). Subsection (a)(2) provides that the prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. Further, § 655.730(c)(1) indicates that Form ETA 9035 must state "the prevailing wage for the occupation in the area of intended employment..."

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[2] The reason for initiation of the investigation was not stated.

There are two forms ETA 9035 in evidence, covering both periods of employment. The Form ETA 9035 for the period of January 1, 1997 through December 31, 2000 indicates that the prevailing wage is $30,000. (P-2.) The Form ETA 9035 covering the periods from January 1, 1994 through December 31, 1996, [3] indicates that Respondent would pay Employer $2500 a month (or $30,000.00 per year, $2,500.00 X 12 = $30,000.00). (P-1.)

Respondent has not argued that the $30,000.00 salary listed on the two LCA's is not the prevailing wage. Instead, Respondent argues that he only agreed to pay Mr. Araque $5.00 per hour (Tr at 69), and that the LCA's signed by Mr. Yano indicated figures that were far higher than he had agreed to pay. Mr. Yano testified that he could not remember whether the salary information was completed on the first LCA he signed, but that the second time, "It was blank." (Tr. 70, 84.) Respondent argues that it was his attorney, Mr. Weiner who must have filled in the salary amounts (Tr. 8.) Mr. Yano stated that he did not know he was supposed to be paying Mr. Araque $2500 per month. (Tr at 76.)

However, the amount Respondent believed it agreed to pay Mr. Araque is irrelevant. The regulations state that the H-1B non-immigrant is to be paid the greater of his actual wage or the prevailing wage. In this case, the prevailing wage of $30,000.00 per year was approved by the Certifying Officer when the LCA was approved, and was always greater than the actual wages Respondent paid Mr. Araque.(see P-3.) Thus, Mr. Araque should have been paid the prevailing wage of $30, 000 per year, as reflected in the computations of the Wage and Hour Division Investigator. (P-3.)

Respondent argues in his October 10, 2000 letter requesting a hearing that it wished to contest the assessment of back wages on "equitable grounds." Respondent did not indicate what equitable remedy it was seeking, but simply argued at the hearing that the documents signed by Mr. Yano on behalf of Yano Enterprises indicated figures that were far higher than Mr. Yano had agreed to pay. (Tr at 8.)

First, I find that Mr. Yano is not a credible witness as his testimony is unbelievable and contradictory. Mr. Yano, the president of a corporation that owns a chain of restaurants and made a profit of $400,000 (P-6), testified that he signed a form that left the salary he was supposed to pay an employee blank (Tr at 70). He also testified that he understood he was only supposed to pay Mr. Araque $5.00 per hour. (Tr at 69.) Mr. Yano also testified that he received a copy of the 1993 LCA, albeit a year late, as well as the notification that it had been approved. (Tr at 85.) Then, later, Mr Yano testified that he did not know whether he had received any of the completed paperwork back from Mr. Weiner, because he was "building a restaurant, and, you now, most of the time I didn't pay attention to that thing." (Tr at 71.)

Even if I found Mr. Yano to be a credible witness, his ignorance was wilful. He signed an application to approve employment of Mr. Araque with a space available for salary but with no salary written in. Even after the paperwork was completed and approved by the Certifying

[3] Mr. Yano testified that he actually filled out two application in 1993, one that was rejected and one that was accepted. (Tr at 85.) This is the one that was accepted.

Officer, he did not read it. Such evidence does not provide a legal basis for not enforcing the required wage as provided in § 655.731(a).

Therefore, I find that Respondent was required to pay the H-1B, Mr. Araque, the salary of $30,000.00 per year.

The Department's wage and hour investigator, Sandra Kibler, testified regarding her calculations of the required wages and the actual wages paid to Mr. Araque, and summarized such on exhibit P-3. Further, the parties stipulated at the hearing that the sum of "$102,797.02 represents the total amount of wages that would have been due under the application documents that were submitted based on the periods that the individual worked and giving credit for any funds actually paid to the individual." (Tr at 17.)

Therefore, based upon exhibit P-3, the testimony of Ms. Kibler, and the stipulation of the parties, the total amount due to Mr. Araque after credit for all wages actually paid is $102,797.02.

Authorized Deductions under § 655.731(c)(7):

Respondent contends that it should be given a credit of $34, 700.00, based on the fair market value of the housing it provided the H-1B worker. (Tr at 7, 19.) Prosecutor contends that Respondent is entitled to at least $10, 500.00 in credit for the housing, based on a calculation of $300 per month. (Tr at 17.) The H-1B non-immigrant contends that no credit should be given for the housing and, therefore, contends that the amount owed is $102,797.02. (Tr at 20.)

Twenty C.F.R. § 655.731(c) states that "the required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(7) of this section may reduce the cash wage below the level of the required wage." The authorized deduction in subsection (c)(7) include three elements. The first two of these, § 655.731(c)(7)(i) and (ii), deal with deductions required by law, i.e. income tax and FICA, and deductions allowed by a collective bargaining agreement, and are not implicated here. Therefore, to be considered "authorized," Respondent's claim for a housing deduction must be considered under § 655.731(c)(7)(iii).

Subsection (c)(7)(iii) provides for authorized deductions, but includes a list of five criteria, all of which must be met in order for the deduction to be allowable.[4] The first of these criteria is that the deduction "[i]s made in accordance with a voluntary[5]**, written** authorization by the employee." 20 C.F.R. § 655.731(c)(7)(iii)(emphasis added).

[4] § 655.731(c)(7)(iii) provides that in order to be considered authorized, deductions must meet the criteria of subsections (A), (B), (C), (D) **and**(E).

[5] The regulation specifically provides that "(Note: an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing)."

There is no evidence in the record of a written authorization by Mr. Araque indicating that he agreed to any deduction his salary. To the contrary, Mr. Yano testified that he told Mr. Araque that he could live in the house for free. (Tr at 69.) Even Mr Araque stated, when asked whether he and Mr. Yano had discussed housing,

> Yes. I mean, while I was living in Venezuela, I talked by phone and letters about the housing, because I wonder where I was going to live when I move over there was the question. We exchanged our correspondence, but never did say he want to charge me for -- to live in this house. Was one of the conditions, I going to live for free. In fact, when I arrive here in January -- in February, sorry, February 12, '94, he asked me, you going to pay only the electricity and the phone, the phone bill and electricity.

(Tr at 32.)

As there is no evidence of a written authorization to deduct housing expenses from the wages, Respondent is not entitled to any deduction for housing provided to Mr. Araque during his employment under § 655.731(c)(7)(iii).

Thus, I find that Respondent owes back wages to the H-1B non-immigrant, Mr. Araque, in the amount of $102, 797.02.

ORDER

Accordingly, it is hereby ordered that Respondent, Yano Enterprises, Inc. shall pay to the H-1B non-immigrant, Mr. Jose Pasqual Araque, back wages in the amount of $102,797.02, plus interest at the rate specified in 28 U.S.C. § 1961 from this date until paid in full.

RICHARD E. HUDDLESTON
Administrative Law Judge