U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

RAVINDER VYASABATTU,

PROSECUTING PARTY,

v.

eSEMANTIKS,

and

RAHESH NARAYAN,

RESPONDENTS.

ARB CASE NO. 10-117

ALJ CASE NO. 2008-LCA-022

DATE: February 11, 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Ravinder Vyasabattu, *pro se*, Hyderabad, India

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge,* and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Ravinder Vyasabattu petitioned the Administrative Review Board to review a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) under the H-1B provisions of the Immigration and Nationality Act, as

amended (INA).[1] The ALJ dismissed the complaint as untimely. We reverse and find that eSemantiks owes Vyasabattu the full amount stated in the Labor Conditions Application it signed.

INTRODUCTION

The issue presented to the Administrative Review Board for determination is whether the ALJ properly found that Vyasabattu's complaint was not timely filed because he failed to file it within twelve months of the day on which he received definitive and unequivocal notice that Narayan had taken adverse action against him by terminating his employment. Reversing the ALJ's decision, we find that given eSemantiks's admission that it did not fire Vyasabattu, in addition to evidence establishing an ongoing employment relationship; the ALJ's finding that eSemantiks effected a definitive and unequivocal termination of Vyasabattu's employment in August 2005 must be rejected as unreasonable and not supported by the record.

BACKGROUND

The INA's H-1B provisions permit employers in the United States to hire foreign nationals in certain "specialty occupations" defined by the INA and its implementing regulations.[2] The H-1B hiring process involves three procedural phases. During the first of the three phases, the H-1B employer files with DOL for certification of the completed Labor Condition Application (LCA).[3] In the LCA, the employer stipulates to the wage levels and working conditions, among other things, that it guarantees for the H-1B worker for the period of his or her authorized employment.[4] Second, if DOL certifies the LCA, then the employer must file an H-1B petition with United States Citizenship and Immigration Services (USCIS), requesting permission to employ the H-1B worker and allowing the H-1B beneficiary to apply for an H-1B visa.[5] Third, if USCIS approves the H-1B petition, the H-1B beneficiary must apply to the U.S. State Department for an H-1B

---

[1] 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thomson Reuters Supp. 2013), as implemented by 20 C.F.R. Part 655, Subparts H and I (2013).

[2] 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1184(i)(1).

[3] 8 U.S.C.A. § 1182(n); 20 C.F.R. § 655.700-.760 (Subpart H).

[4] 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732 (2013).

[5] 20 C.F.R. § 655.705(a), (b). The visa request may be unnecessary if the H-1B worker is already lawfully present in the United States. Our general discussion at this point outlines the typical necessary steps if the H-1B employer seeks to hire an H-1B nonimmigrant who is outside of the United States.

visa. An approved visa grants the H-1B beneficiary permission to seek entry into the United States up to a date specified on the visa as the "expiration date."

Once the H-1B petition is granted, the petitioning employer assumes various legal obligations after the H-1B beneficiary enters the country or becomes "eligible to work for the petitioning employer."[6] The H-1B employer must begin paying the H-1B worker within the time prescribed in 20 C.F.R. § 655.731(c)(6)(ii). More importantly, the H-1B petitioner must pay the required wage even if the H-1B nonimmigrant is in "nonproductive status" (i.e., not performing work) "due to a decision by the employer (e.g., because of the lack of assigned work) . . . ."[7] The employer may end its obligation to pay the H-1B nonimmigrant through a "*bona fide* termination" of the employment relationship, and it must inform DHS of such termination.[8] In "certain circumstances," the H-1B petitioner must pay for the H-1B worker's return trip to his home country.[9]

eSemantiks filed a Labor Condition Application for H-1B Nonimmigrants on Vyasabattu's behalf on August 28, 2004. The LCA listed Vyasabattu's "Job Title" as "SAP [Systems Application and Programming] Programmer" and stated that the "Wage Rate" was $45,000.00 per year. The period of employment indicated was October 1, 2004, to October 1, 2007.[10]

Vyasabattu entered the United States on the eSemantiks-sponsored H-1B visa on April 29, 2005. Narayan picked him up at the airport and took him to the company's guesthouse. Upon Vyasabattu's arrival, there was no job waiting for him. Instead, he was required to interview with eSemantiks's clients and be selected by one before he could start working. He completed a number of interviews, but he was not selected for employment. He understood that he would be paid every month regardless of whether a client company hired him, but he received no salary, health insurance, or other benefits from eSemantiks.[11]

---

[6] 20 C.F.R. § 655.731(c)(6)(ii).

[7] 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i).

[8] 8 C.F.R. § 214.2(h)(11); 20 C.F.R. § 655.731(c)(7)(ii) (emphasis in original).

[9] 8 C.F.R. § 214.2(h)(11); 20 C.F.R. § 655.731(c)(7)(ii).

[10] *Vyasabattu v. eSemantics, Inc.,* ALJ No. 2008-LCA-022, slip op.at 6 (May 26, 2010)(D. & O.). In the Background Section of this Final Decision and Order, where there is only one footnote at the end of a paragraph citing to the ALJ's D. & O., this footnote supplies the support for all fact findings stated in the preceding paragraph. In addition, the Board's decision cites to Exhibits, that the ALJ admitted to the record, for factual assertions that were undisputed by the parties.

[11] D. & O. at 6-7.

After Vyasabattu failed to obtain employment, Narayan told Vyasabattu that he would charge him $500 a month to stay in his Chicago guesthouse if he did not get a job at his next interview. Vyasabattu told Narayan that he would leave the guesthouse to visit his brother in St. Louis and then to arrange his own interviews so that he could find a project to work on. Narayan told Vyasabattu that "'you will not be paid'" and "'we [eSemantiks] are not going to pay you.'" Vyasabattu left the guesthouse in August 2005.[12]

Narayan requested USCIS to revoke Vyasabattu's I-129 Petition for Alien Worker. On November 22, 2005, USCIS notified Narayan that his request was successful. Narayan testified that he attempted to contact Vyasabattu to inform him of the visa's cancellation, but that Vyasabattu never responded to e-mails sent to his eSemantiks or personal e-mail addresses.[13]

Vyasabattu worked as a contractor for three companies in the United States after leaving the eSemantiks guesthouse: FedEx (January 30, 2006-February 17, 2006), J. P. Morgan Chase (May 30, 2006-September 6, 2006), and McKesson (October 23, 2006-(end date not specified)).[14] Vyasabattu claims that he obtained work by informing preferred vendors and middle vendors that he was an eSemantiks employee, and these vendors in turn allowed him to work with third-party clients. Vyasabattu e-mailed eSemantiks "PO" agreements and timesheets, which he alleges allowed eSemantiks to profit from work that he was performing.[15] Vyasabattu received no compensation from eSemantiks, though he received between $2,000 and $2,500 from a consulting company called Reliance Global.[16] Reliance Global filed an H-1B petition for Vyasabattu, but the petition was denied.[17]

Vyasabattu petitioned for his family members to join him in the United States as H-4 dependents in August of 2006.[18] However, the State Department requested tax

---

12 *Id.* at 7.

13 *Id.* at 7-8.

14 ALJ Ex. 2 at 7.

15 ALJ Ex. 16 at 40-43, 64, 65.

16 D. & O. at 9.

17 *Id.* at 8.

18 ALJ Ex. 16 at 9.

records that Vyasabattu did not have. In September of 2006, Vyasabattu contacted Narayan to request a W-2 statement. Narayan, in turn, requested $3,500 in exchange for issuing a W-2 in an e-mail dated September 8, 2006. Vyasabattu's brother paid Narayan $3,500, but it is not clear whether Vyasabattu ever received a W-2.[19]

On September 29, 2006, Vyasabattu wrote an e-mail to Narayan stating, "I have been working with ESemantiks Inc. till date and there was no compensation provided for me till now despite continuously request for my salary as mentioned in LCA."[20] Narayan responded, "One thing that still puzzles me is what makes you think you are employed by eSemantiks Inc. Your services were terminated long ago when you went absconding right after your arrival from India."[21] In a subsequent e-mail, Narayan wrote, "In our case, you left us on your own. We did not fire you even though we should have."[22]

Vyasabattu filed his complaint with the Department of Labor's Wage and Hour Division (WHD) on December 30, 2006.[23] He left the U.S. in August of 2007. His brother paid the cost of his return transportation.[24]

The WHD issued a determination letter stating that, based on evidence obtained in the complaint investigation, there had been no violation.[25] Vyasabattu disagreed and requested a formal hearing on his complaint.[26] The ALJ held a hearing at which Vyasabattu testified via videoconference from Hyderabad, India. The ALJ issued his D. & O. denying Vyasabattu's complaint on the grounds that he failed to timely file it. Vyasabattu filed a timely petition for review with the Board.[27]

---

[19] D. & O. at 8.

[20] ALJ Ex. 14 at 29.

[21] *Id.*

[22] *Id.* at 28, ALJ Ex 25 at 3.

[23] D. & O. at 1.

[24] *Id.* at 9.

[25] ALJ Ex. 1.

[26] ALJ Ex. 2.

[27] Unfortunately, Complainant's appeal was mistakenly prematurely deleted from the ARB's docket, and Complainant did not alert the Board to the fact that it had not issued a decision in the case between September 2011 and March 2014. Further, although Respondent requested leave to file a closing brief with the OALJ, it did not do so. It also has

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision.[28] Where the statute and regulations provide no expressed standard of review, as in H-1B appeals, we choose to defer to the ALJ's fact findings if they are reasonable, and we make reasonable inferences permitted by the ALJ's findings and/or the undisputed record.[29] The ARB has plenary power to review an ALJ's legal conclusions de novo, including whether a party has failed to prove a required element as a matter of law.[30]

DISCUSSION

The H-1B regulations provide that an aggrieved party must file a complaint with the Administrator "not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA."[31] The ALJ found that the limitations period for filing Vyasabattu's complaint began to run when he left the eSemantiks guesthouse in August 2005.[32] In support of this finding the ALJ cited the Board's decision in *Ndiaye v. CVS Store No. 6081*[33] for the proposition that "[t]he limitations

---

not participated in the adjudication before this Board. The Board's attempts to communicate with Respondent have been unsuccessful.

[28] 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845; *see* Secretary's Order No. 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

[29] *Batyrbekov v. Barclays Capital,* ARB No. 13-013, ALJ No. 2011-LCA-025, slip op. at 6 (ARB July 16, 2014).

[30] *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2007-LCA-005, slip op. at 3 (ARB June 6, 2013).

[31] 20 C.F.R. §655.807(a)(5).

[32] D. & O. at 10-12.

[33] ARB No. 05-024, ALJ No. 2004-LCA-036, slip op. at 3 (May 9, 2007), *aff'd* 547 F. Supp. 2d 807 (S.D. Ohio 2008).

period begins to run on the date that a complainant receives final, definitive, and unequivocal notice of a discrete adverse employment action."[34]

Regardless whether *Ndiaye* was properly decided, it is unnecessary to resolve that issue here because we hold that the ALJ's ultimate finding that eSemantiks effected a final, definitive, and unequivocal termination of Vyasabattu's employment in August 2005 is not reasonable given the undisputed evidence of record. The ALJ, in support of his finding that eSemantiks unequivocally terminated Vyasabattu's employment when he left the guesthouse, relied upon Vyasabattu's testimony that Narayan told him when he left, "'you will not be paid' and 'we [eSemantiks] are not going to pay you.' (Tr. 54)."[35] The ALJ concluded, "These statements denote conclusive communications that leave no further chance for discussion. They are not ambiguous. Vyasabattu could come to only one conclusion—eSemantiks would not pay his wages."[36]

But this finding overlooks two salient and dispositive facts. First, the ALJ overlooked the fact that Narayan admitted that he did not fire Vyasabattu.[37] Secondly, eSemantiks had not paid Vyasabattu any wages since he entered employment with it. So stating that eSemantiks would not pay him wages does not denote a change in his employment status, but a continuation of the same status he had been in since starting to work for eSemantiks.[38]

---

[34] D. & O. at 10.

[35] *Id.* at 12.

[36] *Id.*

[37] ALJ Ex. 14.

[38] The ALJ properly rejected Narayan's argument that because Vyasabattu never started a project with a client company, he never entered into employment. D. & O. at 12 n.5. As the ALJ determined,

> The statute and regulations do not support his arguments. An H-1B nonimmigrant is entitled to receive pay beginning on the date when the nonimmigrant "enters into employment" with the employer. 20 C.F.R. § 655.731(c)(6). An H-1B nonimmigrant has "entered into employment" when he first makes himself available for work or otherwise comes under the control of the employer, "such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter." *Id.* at § 655.731(c)(6)(i); *Vojtisek v. Clean Air Tech., Inc.*, ARB No. 07-097, ALJ No. 2006-LCA-9, slip op. at 10-11 (ARB July 30, 2009).

Furthermore, the ALJ failed to consider e-mail exchanges between Vyasabattu and Narayan that further muddy the waters and preclude a finding of a final, definitive, and unequivocal notice of termination even as late as September 2006. For example, on August 15, 2006, Vyasabattu e-mailed Narayan stating, "Could you plz call Jyoti, Reliance, HR . . . so that she can forward the [Purchase Order] to you."[39] Reliance was the middle vendor for Vyasabattu's work at JP Morgan from May 30-September 6, 2006.[40] On September 8, 2006, Vyasabattu e-mailed Narayan: "I have emailed you PO Yesterday and waiting for you to forward number so that I can fax my Aug time sheet. Could you plz let me know if there is any chance to issue me w2 statement for me from May 2005-Dec 2005 . . . ."[41] On September 11, 2006, Vyasabattu e-mailed Narayan: "Let us plz work on my previous year w2 statement also. Kindly request you to take initiative in the same as it is needed for my green card processing."[42] In response Narayan does not reject the request for a W-2 statement or question why he would be expected to sign a Purchase Order for work that Vyasabattu is performing through Reliance Global, since he is no longer an eSemantiks employee. Instead Narayan writes, "I will go ahead and call Reliance and we will sign the PO contract."[43]

If, as the ALJ found, Narayan unequivocally terminated Vyasabattu's employment, why would he accept a purchase order for the work Vyasabattu performed? Clearly, the exact nature of the continuing relationship between Vyasabattu and Narayan after Vyasabattu left the guesthouse is far from clear. But because of the ambiguousness of the record evidence relevant to this relationship, we are not convinced that eSemantiks has carried its burden of establishing that it effected a final, definitive, and unequivocal termination of Vyasabattu's employment, as the ALJ found, when he left the guesthouse or at any other time prior to December 30, 2005.

CONCLUSION

Accordingly, we **REVERSE** the ALJ's finding that Vyasabattu's complaint was untimely. We hold that because eSemantiks failed to establish that it effected a bona fide

---

Id.

[39] ALJ Ex. 16 at 40.

[40] ALJ Ex. 2 at 7.

[41] *Id.* at 15.

[42] *Id.* at 16.

[43] *Id.*

termination of Vyasabattu's H-1B visa and failed to pay Vyasabattu the compensation required by the LCA, that Vyasabattu is entitled to the total compensation provided for in the LCA. Therefore, we **ORDER** eSemantiks to pay to Vyasabattu $135,000.00 ($45,000.00 per year for 3 years) plus interest at the rate established at 26 U.S.C.A. § 6621 (Thomson Reuters 2011) (underpayment of federal income taxes) under the methodology set forth in *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, -042, 00-012; ALJ No. 1989-ERA-022, slip op. at 23, 29 (ARB May 17, 2000).

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge