U.S. Department of Labor

Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION,

PROSECUTING PARTY,

v.

ALEUTIAN CAPITAL PARTNERS, LLC,

RESPONDENT.

ARB CASE NO. 14-082

ALJ CASE NO. 2014-LCA-005

DATE: June 1, 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondent:
Richard B. Solomon, Esq.; Law Office of Richard B. Solomon, Pleasantville, New York

For the Administrator, Wage and Hour Division:
M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; Andrea Lindemann Gilliam, Esq.; ***Office of the Solicitor; U.S. Department of Labor*****, Washington, District of Columbia**

BEFORE: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; Joanne Royce,** ***Administrative Appeals Judge*****; and Luis A. Corchado,** ***Administrative Appeals Judge*****. Judge Corchado, concurring, in part, and dissenting, in part.**

FINAL DECISION AND ORDER

This case arises under the H-1B visa program provisions of the Immigration and Nationality Act, as amended (INA), 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b) and 1182(n) (Thomson

Reuters 2014) and implementing regulations at 20 C.F.R. Part 655, subparts H, I (2015). Respondent Aleutian Capital Partners, LLC (Aleutian) urges the Administrative Review Board (ARB or Board) to reverse the Department of Labor Administrative Law Judge's (ALJ) Order Denying Respondent's Motion For Summary Decision and Granting Administrator's Cross Motion for Summary Decision (July 9, 2014). Considering these motions, the ALJ granted summary decision in favor of the Administrator, Wage and Hour Division (Administrator) based on her findings of undisputed fact showing, among other things, that Aleutian failed to meet its obligation to make monthly pro-rata salary payments to two H-1B non-immigrant workers, Shakir Gangjee and Minh Horn. The ALJ also rejected as lacking legal merit Respondent's arguments that it, (1) could rely on bonuses paid Gangjee to meet its monthly pro rata salary payment obligation, and (2) that the Administrator exceeded his investigative authority by investigating the pay of Minh Horn, who had not filed a complaint. Respondent appeals the ALJ's Order to the ARB. Upon de novo review of the summary decision, the Administrative Review Board (ARB) affirms the ALJ's order granting the Administrator's cross motion for summary decision for the following reasons.

BACKGROUND[1]

A. Monthly Pro-Rated Salary

Respondent employed Gangjee as a salaried financial analyst at $65,000 per year and Horn as a salaried market research analysis at $42,453 per year, under the H-1B non-immigrant visa program according to respective Labor Condition Applications (LCA) approved by the Labor Department. Government's Exhibits 4, 5; Respondent's Exhibit C. Respondent paid Gangjee's wages monthly and these wages included base pay and occasional bonuses calculated at three percent of monthly revenue that Respondent earned and received. Government Exhibits 10, 12. For tax year 2012, Respondent paid Gangjee a dollar amount that exceeded the compensation required to be paid him that year. Respondent's Exhibit D. However, Gangjee's monthly salary payments did not always meet the monthly pro rata salary amount, or $5,416.67. Government Exhibits 2, 5, 9. Regarding Horn, Respondent's other H-1B nonimmigrant worker, Respondent paid her in December 2012 less than the monthly pro rata salary amount or $3,537.75. Government Exhibits 2, 5, 9.

B. Wage and Hour Division Investigation

On January 14, 2013, Gangjee filed a complaint with the Wage and Hour Division, asserting that Respondent "failed to pay nonimmigrant worker(s) the higher of the prevailing or actual wage" and also failed to pay his wages according to the conditions set forth in the Labor

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1 The Background facts are from the ALJ's "Findings of Undisputed Fact." Order at 3-4. For the reader's ease, we cite to exhibits as marked by the ALJ. *Id.* at 3 n.3.

Condition Application. Respondent's Exhibit A. Wage and Hour investigated the complaint with regards to Gangjee, who filed it, as well as to Horn, Respondent's other H-1B nonimmigrant worker. Wage and Hour determined, among other things, that Respondent failed to pay Gangjee and Horn their respective monthly pro-rated salary amount as required by the statue and regulations. Specifically, with regard to Gangjee, the Administrator found that while Gangjee received a number of bonuses, there were 4 months in 2011 and 6 months in 2012 in which Aleutian paid Gangjee less than his monthly pro-rated salary amount. With regard to Horn, Wage and Hour determined that Aleutian paid her less that her monthly pro-rated salary in December 2012. Government Exhibits 2, 3, 9.

C. Proceedings Before the ALJ and Appeal to the ARB

On April 22, 2014, Respondent filed a Motion for Summary Decision under 29 C.F.R. § 18.40 (2013). Respondent noted that it is undisputed that it paid Gangjee a dollar amount over the 12 months preceding the filing of the complaint that exceeded the amount the Administrator calculated as due and owing for that time period or for 2012, establishing that the required compensation was paid. Respondent added that since there was no wage violation in the 12-month period prior to the complaint's January 2013 filing, the Administrator was without the authority to investigate any time period prior, rendering void his award of wages for 2011. Respondent also argued that the Administrator was not authorized to investigate Minh Horn's pay as she had not filed a complaint. Respondent's Motion for Summary Decision (filed Apr. 22, 2014).

On May 16, 2014, the Administrator filed the Cross-Motion for Summary Decision and Opposition to Respondent's Motion for Summary Decision. The Administrator argued that it is undisputed that Respondent was obligated to pay these two salaried H-1B nonimmigrant workers a pro rata monthly amount, did not do so, and could not be credited with contingent bonuses paid to Gangjee in months that it underpaid Gangjee his pro rata amount. The Administrator also argued that contrary to Respondent's arguments, the Administrator's assessment of back wages for 2011 are not time-barred and the Administrator had the authority to investigate Minh Horn's pay although Horn had not filed a complaint. The ALJ agreed with the Administrator and granted the Administrator's cross-motion for summary decision, ruling against Respondent and denying its motion for summary decision. Respondent has filed a petition for review with the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's Order. 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 the INA).

The Board reviews an ALJ's grant of summary decision de novo,[2] applying the same standard applicable to the ALJ for granting summary decision under 29 C.F.R. § 18.40. In ruling on a motion for summary decision, the evidence is not weighed to determine the truth of the matters asserted.[3] Under 29 C.F.R. § 18.40, the question is whether, upon viewing the evidence in the light most favorable to the nonmoving party, "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact" and if not, whether the moving party is thus entitled to summary decision as a matter of law.[4] Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.[5]

DISCUSSION

An H-1B nonimmigrant worker must be paid the "required wage," which is the higher of the actual wage or the prevailing wage for the occupation in which the H-1B worker is employed. 20 C.F.R. § 655.731(a)(1). An H-1B worker must be paid, at least monthly, one-twelfth of his or her annual required rate. Specifically, the "required wage must be paid to the employee, cash in hand, free and clear, when due . . . ." 20 C.F.R. § 655.731(c)(1). For salaried employees, such as Gangjee and Horn, "wages will be due in prorated installments . . . paid no less often than monthly . . . ." 20 C.F.R. § 655.731(c)(4). *See also* Requirements for Employers Using Non-immigrants on H-1B Visas, 59 Fed. Reg. 65,646; 65,653 (Dec. 20, 1994)("The wages of [H-1B] salaried employees are due in pro-rata installments . . . .")

We recognize that the summary decision standard applies to our review of the ALJ's Order. Respondent and the Administrator each filed a motion for summary decision, reflecting their arguments that the opposing party did not establish a genuine issue of material fact. While this matter was pending before the ALJ, both parties accepted as undisputed certain facts, resulting in the ALJ's Findings of Undisputed Facts. Order at 3-4. In the parties' briefs on

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[2] *Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 99-107, ALJ No. 1999-STA-021, slip op. at 2 (ARB Nov. 30, 1999).

[3] *Siemaszko v. First Energy Nuclear Operating Co., Inc.,* ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012). *See also Franchini v. Argonne Nat'l Lab*., ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 5-6 (ARB Sept. 26, 2012); *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 6 (ARB May 29, 2009) (citation omitted); *Seetharaman v. G.E. Co.,* ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004) (citations omitted).

[4] *Siemaszko*, slip op. at 3; *Hasan*, slip op. at 6; *Franchini*, slip op. at 5-6.

[5] *Id.*

appeal to us, neither party challenges any part of the ALJ's Findings of Undisputed Facts. We conclude that these facts are dispositive of the case before us. The undisputed facts show that Respondent's monthly salary payments to Gangjee and Horn did not always amount to the pro rata monthly compensation due them under the terms of their respective LCAs. On a monthly basis, the amount Respondent owed to Gangjee was $5,416.67. On a monthly basis, the amount owed to Horn was $3,537.75. Order at 3, 4. On appeal, Respondent does not dispute that it did not pay this monthly pro rata salary obligation for every month that it employed Gangjee and Horn. Based upon the ALJ's undisputed facts, that are not challenged on appeal, we conclude that Respondent has failed to show that there exists an issue as to any material fact on the issue of this monthly salary obligation. Nor has Respondent set forth specific facts or presented evidence sufficient to raise a genuine issue with respect to any possible exceptions to the monthly pro rata wage requirements.[6] We therefore affirm the ALJ's order that the Administrator is entitled to summary decision as a matter of law.

Respondent further challenges the Wage and Hour's Division's authority to investigate matters pertaining to Horn because Horn did not file a complaint; only Gangjee did. In a letter dated January 28, 2016, counsel for the Administrator advised the Board's General Counsel, with copy to Respondent's counsel, of the decision of the United States Court of Appeals for the Eight Circuit in *Greater Missouri Med. Pro-Care Providers, Inc. v. Perez*, 812 F.3d 1132 (8th Cir. 2015).[7] In *Greater Missouri*, the Eighth Circuit held that under INA Section 212(n)(2)(A), 8 U.S.C.A. § 1182(n)(2)(A), reasonable cause to investigate a single allegation of LCA violations in an aggrieved-party complaint, such as the one Gangjee filed in this case, does not establish reasonable cause to conduct a comprehensive investigation of an employer. The Eighth Circuit thus reversed the district court's contrary decision. The Administrator notes, "The Eighth Circuit's opinion is contrary to the Administrator's argument on pages 18-20 of its response brief where the Administrator asserts that the Department had the authority to investigate wage violations involving a second H-1B employee who had not filed a complaint," namely Minh Horn. The Administrator argues, however, that the ARB is not bound by the Eighth Circuit's *Greater Missouri* decision as the case before us falls within the "ambit" of another United States Court of Appeals. Andrea Lindemann Gilliam's letter to Janet Dunlop (Jan. 28, 2016).

The Eighth Circuit's decision in *Greater Missouri* conflicts with those of this agency and we are not bound to acquiesce in the appeals court's view of the Secretary of Labor's authority to

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[6] Aleutian claims its bonus plan was nondiscretionary but did not produce any contract evidencing this claim. Further, as the ALJ explained, even if the bonuses were assured, they were completely contingent (on company revenue). The regulations permit employers to pay less than the monthly required rate only if the employer provides certain guaranteed bonuses and documentation thereof. The employer must show both, (1) that the bonus is guaranteed, and (2) that the guaranteed bonus, once paid, will meet the wage obligation "for each current or future pay period." 20 C.F.R. § 655.731(c)(4).

[7] This case was fully briefed by the parties before the Eighth Circuit issued its decision in *Greater Missouri.*

investigate an aggrieved-party complaint such as that filed by Gangjee. This matter arises in New York and comes within the ambit of the United States Court of Appeals for the Second Circuit. Under these circumstances, we are not bound by and thus do not acquiesce in the Eighth Circuit's ruling. *See Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992). Rather, we continue to adhere to the opinion expressed by this Board in the majority decision in *Greater Missouri Med. Pro-Care Providers, Inc.,* ARB No. 12-015 (ARB Jan. 29, 2014).

Based on the foregoing, the ALJ's Order Denying Respondent's Motion for Summary Decision and Granting Administrator's Cross-Motion for Summary Decision is **AFFIRMED**.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Judge Corchado, concurring in part and dissenting in part:

I concur in affirming the ALJ's summary decision that Aleutian (1) violated the manner in which it was required to pay the LCA wage obligation to Gangjee during 2011 and the last quarter of 2012 and (2) failed to pay all that was owed to Gangjee in 2011 in the amount suggested by the Administrator. But I disagree that the ALJ properly granted summary decision in favor of the Administrator's claim that Aleutian failed to pay the wage obligation in 2012. I must emphasize that my opinion starts with the understanding that the Administrator not only treated Gangjee's annual LCA pay as comprising a base pay and bonus but also accepted part of the bonus payments made as wages. In other words, the Administrator implicitly acknowledges that at least some of the bonus payments qualified as "wages" that could be credited towards the LCA obligation and the issue of "contingency" did not matter for some of the bonuses. Yet, all of the bonus payments flowed from the same exact payment arrangement, that is, 3% of revenues. Administrator's Brief at 7. Had the Administrator rejected bonus payments entirely as failing to qualify as "wages" for the LCA obligation, Aleutian would have the burden of proving that the actual and prevailing wage rate in the LCA included bonuses. *See* 20 C.F.R. § 655.731(a) and (b). But that issue is not before the Board. Aleutian argues that all of the bonus payments should have "counted." Aleutian's Opening Brief at 5. With this understanding, I would reverse the summary decision that Aleutian underpaid Gangjee during 2012. If the Administrator had indicated that penalties remained as an unresolved issue, I would have remanded the case for that issue.

To be entitled to summary decision on the liability and amount for the 2012 wage obligation, the Administrator must show "there is no genuine dispute as to any material fact *and* [the Administrator] is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a) (2015)(emphasis added)(regulation formerly provided at 29 C.F.R. § 18.40(d)(2014)). In my view, the undisputed facts disprove and the law fails to support the Administrator's claim of an underpayment in 2012.

In its "Statement of Facts," the Administrator expressly concedes that the $57,509 Gangjee earned in 2012 "exceeded the amount required by the LCA" in 2012. Administrator's Brief at 8. The Administrator's factual concession settles that there was no underpayment in 2012 and ends the Administrator's ability to secure summary decision on that point.

In discussing the law, the Administrator advanced three H-1B wage principles that went beyond the requirements and restrictions of the statutes and regulations it cited, which then spiraled into a mistaken finding that Gangjee was still owed money in 2012. To be clear, Aleutian committed a violation but not to the extent argued by the Administrator. First instance, the Administrator asserts that "[e]ach pay period is viewed separately and overpayments in one period cannot offset payments in other periods." But the Administrator points to no regulation that states this principle. Instead, turning to *Adm'r v. Wings Digital Corp.*, ALJ No. 2004-LCA-030 (Mar. 21, 2005), the Administrator relies on a statement by an administrative law judge who also fails to cite statutory, regulatory, or ARB precedent as support for this ruling. Administrator's Brief at 11.

Second instance, the Administrator stated that a "contingent bonus is indeed 'considered to be wages paid' for H-1B purposes, *see* Aleutian Motion at 2-3, but only for the purpose of meeting the monthly pro rata payment requirement for the month in which the bonus was distributed."[8] Administrator's Cross-Motion at 9. The Administrator relied on 20 C.F.R. § 655.731(c)(2)(v) and (c)(4) for this proposition. But neither of those provisions says that the bonus credit applies only to the "monthly" wage obligation in the month of distribution. Instead, Section 655.731(c)(2)(v) provides that the bonus may be credited toward the "wage obligation" and Section 655.731(c)(4) expressly discusses the possibility of a bonus applying towards the wage obligation on a "quarterly" basis.

In one other instance, the Administrator suggests the H-1B employer can only receive credit towards the promised annual salary at exactly the rate of one-twelfth of the annual salary per month. But the Administrator confuses the timing requirement with the amount required under the annual wage obligation. Violating the timing requirement throughout 2012 does not automatically mean that Aleutian failed to ultimately pay the amount owed in 2012. In fact, the Administrator concedes that Aleutian paid the amount owed in 2012. Moreover, I am not convinced that an H-1B employer violates the timing requirement if it pays at a rate that exceeds the one-twelfth rate so long as the cumulative payout rate never falls below the one-twelfth rate

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[8] Peculiarly, in its brief to the Board, the Administrator did not directly advance this point.

throughout the year. More specifically, as long as Aleutian cumulatively paid at least 1/12th in January, 2/12ths in February, 3/12ths in March, etc., it would comply with the requirement that no less than 1/12 be paid throughout the year. If Aleutian had cumulatively paid only 5/12ths of the LCA obligation by the end of June, it would have violated the protection offered by the pro rata requirement. I agree with Aleutian that the Administrator is penalizing Aleutian for paying more than was required in the first quarter of the year.

In this case, it was not until approximately September 2012 that the cumulative payout rate fell below the one-twelfth rate. Looking at all the money paid as of September 2012 does not involve looking at "contingencies" but at actual payouts. Whether the actual payouts qualified as LCA wages is a different question, but the Administrator accepted some of the bonus payments as "wages." Regardless, as of September 2012, looking *backward* at all the money actually paid to Gangjee in 2012 demonstrates that Aleutian's payout rate fell below the annual cumulative rate required. Looking *forward* in the months of September through November 2012, Aleutian paid less than the required rate of pay and there is insufficient record evidence showing that Aleutian could remedy the shortfall by pointing to a qualifying contingent bonus. In December 2012, Aleutian rectified the annual shortfall but it violated the pro rata protection by paying too little as of September, October, and November. While Aleutian violated the timing requirement for payments, it did ultimately pay Gangjee in 2012 his LCA wage—again, given the Administrator's acceptance of some of the bonus payments as satisfying the wage obligation. In short, once the Administrator determined that some of the bonuses could be credited towards the wage obligation, I see no regulatory basis for ignoring part of those bonuses in deciding whether Gangjee was underpaid as opposed to whether he was receiving the minimum amount owed throughout the year.

I next turn to the violations related to Horn. Like the majority, I find that the Eighth Circuit Court of Appeals in *Greater Missouri*, misunderstands the intent of the regulatory limitations on investigations. These limitations attempt to prevent arbitrary or improper targeting of H1-B employers. But once Gangjee filed a potentially meritorious complaint about the LCA wage obligation, it was not arbitrary for the Administrator to ask for information from Aleutian about its other H1-B employee to ensure that it is not misapplying the same rule in the same way.

LUIS A. CORCHADO
Administrative Appeals Judge