U.S. Department of Labor

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

In the Matter of:

ADMINISTRATOR,
WAGE & HOUR DIVISION,

PROSECUTING PARTY,

and

HELGA INGVARSDOTTIR,

COMPLAINANT,

v.

VICKRAM BEDI, President, and
DATALINK COMPUTER PRODUCTS, INC.,

RESPONDENTS.

ARB CASE NO. 14-096

ALJ CASE NO. 2012-LCA-057

DATE: February 29, 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Jonathan R. Pearson, Esq.; *Law Office of Jonathan R. Pearson,* Albany, New York

For the Respondents:
Mitchell I. Weingarden, Esq.; *Law Offices of Mitchell I. Weingarden, PLLC*; White Plains, New York

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

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

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act (INA), H-1B visa program, 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n) (Thomson Reuters 2014), and implementing regulations, 20 C.F.R. Part 655, Subparts H, I (2014). Vickram Bedi, President of Datalink, hired Helga Ingvarsdottir, as an H-1B employee (an account executive) in May 2005. Ingvarsdottir filed a complaint with the Wage and Hour Division (WHD) stating that Bedi and Datalink failed to pay her wages in contravention of the INA. Respondents countered that Ingvarsdottir was paid by cash, check, and other means, and that she failed to come to work. After an investigation, the Wage and Hour Division, U. S. Department of Labor (WHD), issued a determination awarding Ingvarsdottir $237,066.06 in back wages for violations of the implementing regulations at 20 C.F.R. § 655. Both Complainant and Respondents filed objections with the Office of Administrative Law Judges (OALJ). On August 4, 2014, the ALJ issued a decision ordering Respondents to pay Ingvarsdottir back wages in the amount of $341,693.03, pre-judgment compound interest, and post-judgment interest until satisfaction. Respondents petitioned the Administrative Review Board (ARB) for review. We affirm with one modification.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision.[1] Where the statute and regulations provide no expressed standard of review, as in H-1B appeals, the Board chooses to defer to the ALJ's fact findings if they are reasonable, and we make reasonable inferences permitted by the ALJ's findings and the undisputed record.[2] The Board reviews an ALJ's legal conclusions de novo.[3]

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[1] 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).

[2] *Adm'r, Wage & Hour Div. v. XCEL Sols. Corp.,* ARB No. 12-076, ALJ No. 2011-LCA-016, slip op. at 4 (ARB July 16, 2014).

[3] *Id*.

DISCUSSION

In affirming the ALJ's Decision and Order, we limit our comments to the most critical points. While there are many complex facts in this case, the relevant facts are simple. Vickram Bedi filed a Labor Condition Application (LCA) for Helga Ingvarsdottir to work as an H-1B nonimmigrant on March 1, 2005, which listed the prevailing wage for Ingvarsdottir's position of "Account Executive" as $61,152.00, for the period from May 20, 2005, to May 15, 2008.[4] Bedi filed a second LCA for Ingvarsdottir on May 8, 2008, for the period May 16, 2008, to May 15, 2011.[5] The second LCA listed the prevailing wage for Ingvarsdottir's position of "International Account Executive," as $59,717.00.[6] During these two LCA periods, Ingvarsdottir went to Iceland, her home country, three times: the first time for three days in 2006, the second for six weeks in 2008, and the third for twenty-eight days in 2010.[7] On November 4, 2010, both Bedi and Ingvarsdottir were arrested, and Ingvarsdottir spent forty-one days in custody before her release.[8]

After a hearing, the ALJ issued a decision finding that Respondents Bedi and Datalink failed to pay Ingvarsdottir her required wages during both periods of her H-1B employment.[9] The ALJ found that the prevailing wages for the two periods were $61,152 per year from May 20, 2005, through May 15, 2008, and $59,717 per year from May 16, 2008, through May 15, 2011, as listed on the two LCAs for these periods.[10] The ALJ found that Respondents were liable for wages until the end of the LCA period because an employer's obligation to pay wages only ends when an employer has made a bona fide termination of the H-1B worker's employment, and Respondents never effected a bona fide termination.[11]

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4 AX 2; AX 3.

5 AX 4.

6 *Id.* The INS also approved this LCA. AX 5.

7 Decision and Order (D. & O.) at 18-19.

8 *Id.*

9 *Id.* at 13.

10 *Id.* at 21.

11 *Id.* at 17. The regulations at 20 C.F.R. § 655.731(c)(7)(ii), state that an employer is not obligated to pay wages if it has made a bona fide termination of the H-1B nonimmigrant worker's employment. To effect a bona fide termination, an employer must (1) notify the worker that her employment is terminated, (2) notify the Department of Homeland Security so that its petition for the non-immigrant worker can be cancelled, and (3) pay for the reasonable cost of the worker's transportation home. 20 C.F.R. § 655.731(c)(7)(ii); *Batyrbekov v. Barclays Capital*, ARB No. 13-

As a part of her wages calculation, the ALJ gave Respondents a credit for checks in the total amount of $2,760.00 that they paid to Ingvarsdottir in 2006, because both the IRS and the New York State Department of Taxation and Finance confirmed that they received wage and withholding information for Ingvarsdottir for 2006.[12] The ALJ did not give Respondents credit for any other check payments they made to Ingvarsdottir because both federal and state tax requirements were not met for any other year.[13] The ALJ also did not give Respondents credit for any cash or payments in the form of housing, debt payments, or otherwise, because the payments failed to meet the criteria for "authorized deductions" under 20 C.F.R. § 655.731(c)(9)(iii).[14] The ALJ did give Respondents credit for periods of time when Ingvarsdottir was unavailable to work during the LCA periods because she found that these periods were "of nonproductive status due to conditions unrelated to employment which take [that employee] away from his/her duties," and were at Ingvarsdottir's "voluntary request or convenience," under 20 C.F.R. § 655.731(c)(7)(ii). She explained that under the regulations, employers are not obligated to pay wages to H-1B employees for periods of non-productive status for reasons unrelated to employment which take the H-1B worker away from her duties at her voluntary request and convenience.[15] The ALJ ordered Respondents to pay Ingvarsdottir $341,693.03 in back wages for the periods of the LCAs, plus pre- and post-judgment interest.[16]

013, ALJ No. 2011-LCA-025, slip op. at 9 (ARB July 16, 2014). The ALJ found that none of these conditions were met in this case. *Id.*

[12] *Id.* at 15. According to the regulations at 20 C.F.R. § 655.731(c)(2)(i)-(iv), "cash wages paid" are payments that meet several criteria including that payments reported as the employee's earnings must have had appropriate employer and employee taxes paid to all appropriate Federal, State, and local governments.

[13] *Id.* at 14-16.

[14] *Id.* at 16-17.

[15] 20 C.F.R. § 655.731(c)(7)(ii).

[16] D. & O. at 22. The ALJ arrived at this number by first multiplying the prevailing wage rate for the first LCA period by three for the three-year period and then multiplying the prevailing wage rate for the second LCA period by three for that three-year period and adding those two together. The ALJ then subtracted the credited amounts for the $2,760 in checks that Respondents paid to Ingvarsdottir in 2006, for 42 days when Ingvarsdottir was in Iceland in 2008, for 28 days when Ingvarsdottir was in Iceland in 2010, and for 41 days when Ingvarsdottir was incarcerated in 2010. Although the ALJ had found that Respondents were not obligated to pay Ingvarsdottir for an additional three days in 2006, when Ingvarsdottir went to Iceland to attend to her grandmother, the ALJ did not subtract this amount in her calculations. D. & O. at 18, 21-22.

Finally, the ALJ found that Bedi was individually liable as an employer for the violations and that the Respondents' violations were not willful.[17]

Respondents argue that Ingvarsdottir's crimes in an unrelated matter somehow absolve them of the requirement to pay her wages during the LCA periods. We are unpersuaded. If Respondents had wanted to end the requirement to pay wages because Ingvarsdottir was not performing work under the LCA, then they should have effected a bona fide termination of her employment. Respondents admittedly never effected a bona fide termination,[18] so the requirement to pay wages continued. The ALJ finding that Respondents are liable for back wages under the Act is affirmed. We also affirm her findings that the wage rates were the prevailing wages as listed on the two LCAs for the reasons stated by the ALJ and her order that Respondents shall pay pre- and post-judgement interest.[19]

Respondents also argue that the ALJ erred by ordering an excessive back pay award because she should have taken into account income Ingvarsdottir earned from other sources during the LCA period. Again, this argument is unpersuasive. As the ALJ explained, Respondents can only receive credit for wages paid as that is defined under the regulations. One requirement for payments to be "wages" under the regulations is that appropriate employer and employee taxes must be paid on them to all appropriate Federal, State, and local governments.[20] The only year that Respondents took this action was in 2006, and the ALJ gave Respondents credit for check payments Datalink made to Ingvarsdottir that year. Also as the ALJ explained, money Bedi provided to Ingvarsdottir in the form of rent, a car, and payment for a storage unit, among other things, did not qualify as payment in kind because Respondents failed to show that they were authorized deductions from Ingvarsdottir's wages under the Act.[21]

While Respondents' arguments about non-productive status fail, it does appear that the ALJ failed to give Respondents credit for one period of time to which she found that they were entitled. The ALJ found that Respondents should receive credit for three days in 2006, when Ingvarsdottir was in Iceland to attend to her grandmother, but the ALJ failed to credit this

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17 *Id.* at 21, 23.

18 September Hearing Transcript (Sept. Tr.) at 12.

19 *XCEL Sols. Corp.*, ARB No. 12-076, slip op. at 11-12 (in which the Board ruled that as the intent of a back pay award is to make the employee whole, payment of interest is logically required).

20 20 C.F.R. § 655.731(c)(2).

21 D. & O. at 16; see 20 § C.F.R. 655.731(c)(9)(iii).

amount of time in her calculations.[22] Therefore, we modify the ALJ's back pay award to account for these three days for which the ALJ found Respondents not obligated to pay wages.

Respondents also argue that their due process rights were violated by holding the hearing while Bedi was incarcerated because Respondents were prevented from obtaining evidence regarding Ingvarsdottir's other income sources and her criminal activities. As described above, neither Ingvarsdottir's crimes nor her other income is relevant to the determination that Respondents failed to pay Ingvarsdottir wages under the Act, so Respondents' argument fails.

Respondents' arguments about Bedi's individual liability are likewise unpersuasive and we affirm the ALJ that Bedi is individually liable as an employer for back wages owed to Ingvarsdottir under the H-1B provisions of the Act.[23] Finally, Respondents' argument about ineffective assistance of counsel fails as parties are accountable for the acts and omissions of their attorneys.[24]

Ingvarsdottir argues on appeal that Respondents are not entitled to credit for times that she was in Iceland because she was fleeing abuse by Bedi, such that this nonproductive time was not voluntary or for her own convenience, but instead caused by the employer. We affirm the ALJ that Respondents are entitled to credit for these periods because the ALJ found that Ingvarsdottir was not a credible witness and did not credit Ingvarsdottir on these issues.[25]

Lastly, we affirm the ALJ's non-determination of a willful violation. The ALJ considered the relevant factors in making her decision and noted that Ingvarsdottir was the only affected worker and that there was no evidence that Respondents had ever violated the INA in the past.[26]

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[22] *Id.* at 18. The other three occasions that the ALJ found Respondents should receive credit were six weeks in 2008 while she was in Iceland, twenty-eight days in 2010 when she was in Iceland, and forty-one days in 2010 when she was incarcerated. *Id.* at 19.

[23] We note that pursuant to 20 C.F.R. § 655.715, an "employer" is defined as "a person," among other entities, and Bedi is a named employer in this case.

[24] *Mikami v. Adm'r, Wage & Hour Div.*, ARB No. 13-005, ALJ No. 2012-LCA-025, slip op. at 3-4, n.9 (ARB June 16, 2014) (citation omitted).

[25] Specifically, the ALJ discussed Ingvarsdottir's U-visa certification (CX-17) (which she found did not constitute a final adjudication as to whether any abuse occurred) and Ingvarsdottir's temporary orders and final order of protection against Bedi (CX 19) (which she noted covered periods of time after her trips to Iceland at issue in this case), and found that they did not support Ingvarsdottir's claims that her nonproductive time in Iceland was due to Respondents' abusive acts.

[26] D. & O. at 23.

CONCLUSION

For the preceding reasons, we **AFFIRM** the ALJ's order except that we modify her back wages calculation to give Respondents credit for three days in which the ALJ found that Ingvarsdottir made herself voluntarily non-productive.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge