U.S. Department of Labor

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

In the Matter of:

SAJIDA AHAD, M.D.,

PROSECUTING PARTY,

v.

SOUTHERN ILLINOIS UNIVERSITY SCHOOL OF MEDICINE,

RESPONDENT.

ARB CASE NOS. 16-064
16-065

ALJ CASE NO. 2015-LCA-023

DATE: JAN 29 2018

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
Michael F. Brown, Esq.; ***DVG Law Partner LLC,*** **Neenah, Wisconsin; and Vonda K. Vandaveer, Esq.;** ***V.K. Vandaveer, P.L.L.C.,*** **Washington, District of Columbia**

For the Respondent:
Aaron R. Gelb, Esq.; Martin T. McElligott, Esq.; and Joseph K. Mulherin, Esq.; ***Vedder Price P.C.,*** **Chicago, Illinois; and Frank Martinez, Esq.;** ***Office of the General Counsel, Southern Illinois University School of Medicine,*** **Springfield, Illinois**

Before: E. Cooper Brown, ***Administrative Appeals Judge;*** **Joanne Royce,** ***Administrative Appeals Judge;*** **and Tanya Goldman,** ***Administrative Appeals Judge.***

FINAL DECISION AND ORDER

This case arises under the H-1B nonimmigrant visa program provisions of the Immigration and Nationality Act, as amended (INA or Act).[1] Following a hearing, a Department of Labor Administrative Law Judge (ALJ) concluded that Southern Illinois University School of Medicine (the University) violated the H-1B program's required wage obligation when it underpaid Sajida Ahad (Ahad) for both her academic and clinical work during her employment

[1] 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b) and 1182(n)(Thomson Reuters 2018); 20 C.F.R. Part 655, Subparts H & I (2016).

on an H-1B visa. Ahad filed an appeal with the Administrative Review Board (ARB or Board) contesting the amount of wages the ALJ credited towards the University's wage obligation (ARB No. 16-064). The University responded in opposition to Ahad's appeal, and also filed a cross appeal asserting reversible error in the ALJ's disallowance of certain deductions and calculation of wages (16-065). For the following reasons, the Board affirms the ALJ's Decision and Order (Apr. 13, 2016)(D. & O.) and denies both appeals.

BACKGROUND

Legal Background

Under the Immigration and Nationality Act's H-1B program, employers in the United States may hire nonimmigrant workers in specialty occupations on a temporary basis.[2] To do so, the employer must file a petition with the United States Citizenship and Immigration Services, United States Department of Homeland Security.[3] Before the employer can file the petition, however, it must seek the approval of the United States Department of Labor by filing a Labor Condition Application (LCA).[4] The LCA includes the employer's attestation that it will pay the H-1B nonimmigrant worker the "required wage."[5]

The wage obligation is provided for at 8 U.S.C.A. § 1182(n)(1)(A)(i)(I), (II); 20 C.F.R. § 655.731(c). The "required wage" is defined as the greater of the "prevailing wage" or the "actual wage."[6] The "prevailing wage" is "the prevailing wage level for the occupational classification in the area of employment."[7] The "actual wage" is determined in one of two ways. If the employer has employees other than the H-1B nonimmigrant worker "with substantially similar experience and qualifications in the specific employment in question—i.e., they have substantially the same duties and responsibilities as the H-1B nonimmigrant"—the actual wage is the amount paid to those other employees.[8] But if "no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer."[9]

2 *See generally* 8 U.S.C.A. § 1182(n).

3 20 C.F.R. § 655.700(b)(2).

4 20 C.F.R. § 655.700(b)(1).

5 20 C.F.R. § 655.731(a).

6 8 U.S.C.A. § 1182(n)(1)(A)(i)(I); 20 C.F.R. §§ 655.730(d)(1); 655.731(a); 655.731(a)(3).

7 8 U.S.C.A. § 1182(n)(1)(A)(i)(II); *see also generally* 20 C.F.R. § 655.731(a)(2).

8 20 C.F.R. § 655.731(a)(1).

9 *Id.*

Under 20 C.F.R. § 655.731(c)(2), payments only count towards an employer's required wage obligation if: (i) the payments are recorded on the employer's payroll records "as earnings for the employee" and are "disbursed to the employee, cash in hand, free and clear"; (ii) the payments are "reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS"; (iii) both the employer and employee portions of the taxes required under the Federal Insurance Contributions Act (FICA)—i.e., known colloquially as Social Security and Medicare taxes—have been paid; and (iv) the payments are reported and documented so that all applicable federal, state, and local taxes are paid.[10] At issue in Ahad's appeal is a section of this regulation, namely 20 C.F.R. § 655.731(c)(2)(v), which provides:

> Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not contingent on some event such as the employer's annual profit(s)). **Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).**

20 C.F.R. § 655.731(c)(2)(v)(emphasis added).

The University's cross-appeal raises the issue of what deductions from wages are authorized under the H-1B program. "Authorized deductions" include deductions that are "reasonable and customary in the occupation and/or area of employment." 20 C.F.R. § 655.731(c)(9)(ii). Unauthorized deductions are considered nonpayment of the H-1B required wage obligation and may result in a back pay award, monetary penalties, and/or disqualification from the H-1B program. 20 C.F.R. § 655.731(c)(11).

Factual Background[11]

The University filed an LCA with the Department of Labor to employ Ahad as an "Assistant Professor of Surgery/Bariatric Surgeon" from July 2011 to July 2014. The University attested that it would pay Ahad at the wage rate of $250,000 per year,[12] a rate higher than the

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10 20 C.F.R. § 655.731(c)(2).

11 We briefly set forth certain facts as determined by the ALJ, noting those that are disputed by the parties.

12 Under a private employment agreement, the University paid Dr. Ahad separately for academic work ($125,000 per year for each year) and clinical work ($125,000 per year for two years, then this compensation became contingent on clinical incentives and became subject to deductions for failing to meet those incentives). Respondent's Exhibit F. Both appeals focus on clinical compensation.

stated prevailing wage of $130,780 per year. Complainant's Exhibit 1. The ALJ calculated that the University paid Ahad at a rate of approximately $215,442 per year. *See* D. & O. at 3-8, 11. To determine the "required wage," for which the University is liable to Ahad, the ALJ used the amounts of compensation the University paid physicians whom he found to be comparator physicians to Ahad. D. & O. at 8-12. *See also* 20 C.F.R. § 655.731(a)(1). The ALJ calculated this "required wage" rate at over $301,000 per year. After making one adjustment for Ahad's maternity leave, the ALJ awarded back wages totaling $223,884.27, consisting of $80,001.52 for the underpayment of academic based compensation and $143,882.75 for the underpayment of clinical based compensation. Finally the ALJ ordered prejudgment compound interest on the back pay owed and post-judgment interest. D. & O. at 18-19. In its appeal, the University disputes the ALJ's factual finding that there are any comparable physician salaries with which to evaluate Ahad's salary as, it asserts, Ahad was the sole bariatric surgeon it employed during the course of her employment and Ahad had different duties, titles, responsibilities, qualifications, and skills from all the other "comparator physicians" the ALJ identified.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's decision, but neither the statute nor the regulations provide a standard of review.[13] Nevertheless, we will defer to the ALJ's findings of facts that are reasonable from the record.[14] The Board 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.[15]

DISCUSSION

The ARB's Notice of Intent to Review (May 24, 2016) specifies the following 2 issues for review:

> Did the ALJ properly find that Respondents are liable to the Prosecuting Party for $223,884.27, consisting of $80,001.52 for the underpayment of academic based compensation and $143,882.75 for underpayment of clinical compensation, plus prejudgment compound interest on the back pay owed and post-judgment interest until satisfaction in full?

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[13] *See* 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845; *see also* Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,377; 69,378 (Nov. 16, 2012).

[14] *Administrator, Wage & Hour Div., USDOL v. XCEL Solutions Corp.*, ARB No. 12-042, ALJ No. 2011-LCA-009, slip op. at 4 (ARB July 16, 2014).

[15] *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2011-LCA-005, slip op. at 3 (ARB June 6, 2013).

> Did the ALJ properly find that the wages paid by Southern Illinois University Healthcare are attributable to the satisfaction of Southern [Illinois] University School of Medicine's wage obligation?

Ahad's Appeal: ARB No. 16-064

The ALJ properly counted contingent clinical wages paid as H-1B wages

Ahad reiterates her argument, rejected by the ALJ, that *none of the clinical incentive compensation wages she was paid* can be credited towards the University's wage obligation because this compensation was contingent on "relative value units" (RVUs) earned monthly, as well as other factors, and as such does not count as wages per 20 C.F.R. § 655.731(c)(2)(v). Ahad assigns error to the ALJ's interpretation of 20 C.F.R. § 655.731(c)(2)(v) to the effect that while future, unpaid, yet to-be-paid bonuses or similar compensation may be credited toward satisfaction of the wage obligation if they are assured and not conditional or contingent, *once paid such compensation counts as wages as long as it satisfies the requirements of subsections (c)(2)(i) through (iv),* namely that the compensation is recorded and reported as "earnings" with appropriate taxes and withholdings. The ALJ found, "Here, though the wages were contingent on Dr. Ahad's RVUs, they were not future wages as they had been paid." D. & O. at 13. The ALJ thereby applied the regulation as it is written, and the regulation plainly does not provide, as Ahad urges, that contingent compensation can never be counted towards fulfillment of the wage obligation. Rather, the regulation imposes the requirement that certain contingent compensation, once paid, counts as wages as long as it meets the requirements of 20 C.F.R. § 655.731(c)(2)(i)-(iv). Accordingly, the Board rejects Ahad's contrary argument for the reasons provided by the ALJ.

Ahad also argues that the ALJ erred in finding that she misreads the import of the ALJ's decision in *Administrator v. Aleutian Capital Partners, LLC*, 2014-LCA-00005 (ALJ July 9, 2014),[16] upon which Ahad relied. The ALJ distinguished the ALJ's decision in *Aleutian* from this case as follows:

> Further, in *Aleutian* the ALJ did not find that contingent payments could never be wages. The H-1B employee in *Aleutian* was salaried creating an obligation upon the employer to pay him one-twelfth of his annual salary each month, which the employer failed to do. *Aleutian Capital Partners, supra* (citing 20 C.F.R. § 655.731(c)(4)). For the wage obligation the ALJ found only that the employer could not credit "overpayments occurring in other months against its obligation to pay the prorated wage monthly,"

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[16] Affirmed on other grounds, *Administrator, Wage & Hour Div. v. Aleutian Capital Partners, LLC*, ALJ No. 2014-LCA-005, ARB No. 14-082 (ARB June 1, 2016); *Aleutian Capital Partners, LLC v. Hugler*, No.16 Civ. 5149, 2017 WL 4358767 (S.D.N.Y. Sept. 28, 2017) (granting Labor Department's motion for summary judgment and denying Aleutian Capital Partners, LLC's motion for summary judgment).

> and that it owed back wages "for those months in which [the employee] received less than one-twelfth of the required wage." *Aleutian Capital Partners, supra*. In *Aleutian*, it was not the contingency of the wages, but rather that the employee did not receive one-twelfth of the required wage each month.
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> Here it is clear that Dr. Ahad's contingent wages were not future wages because they had been paid. I find that the wages SIU HealthCare paid are attributable to SIUSM's wage obligation.

D. & O. at 13. As relief for this alleged error, Ahad urges the ARB to rule, again, that all of her clinical compensation ($253,676.64) did not count towards "wages paid" under 20 C.F.R. § 655.731(c)(2) and to order that the University pay $253,676.64 plus interest *in addition to the amount of back wages the ALJ ordered.* Petition for Review at 5-8; Opening Brief at 2, 14, 21 at n.4, 21-22; Rebuttal Brief at 10. We reject this argument as there is no legal basis for it, the ALJ having properly distinguished *Aleutian* from this case. As set forth above, the ALJ's decision to count as wages the clinical incentive compensation the University paid to Ahad is consistent with the regulatory scheme. 20 C.F.R. § 655.731(c)(2); *see generally Aleutian*, (ARB June 1, 2016) slip op. at 5 n.6 (certain qualifying bonus payments count as wages paid).

University's Appeal: ARB No. 16-065

The ALJ properly disallowed unauthorized deductions to clinical wages

The University contends that certain deductions it made under the parties' compensation agreement from Ahad's clinical compensation are "authorized" as they were "reasonable and customary in the occupation and/or area of employment" under 20 C.F.R. § 655.731(c)(9)(ii). The University argues that the ALJ violated its due process guarantees by declining to consider this argument. The ALJ indicated that while the University claimed that it is typical in a multispecialty group medical practice to enter into an agreement similar to the parties' agreement —which allows for deductions from wages for failure to meet clinical incentive goals, the University "failed to offer any evidence of what is 'reasonable and customary' compensation for an assistant professor that has an appointment to a division of general surgery. [The University] offered evidence only on what was customary at [the University], not what was the customary practice throughout the medical school community. Without evidence to support its premise, I decline to consider this argument." D. & O. at 14.

The Board rejects the University's contention. The ALJ's conclusion stands. The evidence fails to demonstrate that these deductions were "reasonable and customary" within the meaning of 20 C.F.R. § 655.731(c)(9)(ii).[17] Likewise, the ALJ properly rejected the employer's

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[17] The University also failed to show that the deductions from Ahad's compensation were "reasonable." On the contrary, the ALJ noted a number of undisputed facts suggesting that the deductions from Ahad's compensation were unreasonable given that they were rooted in detrimental actions taken by the University. For example, beginning in about March or April 2011 the University restricted Ahad's ability to take Medicaid patients, which was a significant portion of her

argument, reiterated here, that these deductions are "authorized" under 20 C.F.R. § 655.731(c)(9)(iii)(A) given that Ahad signed the compensation agreement accepting same. The ALJ properly noted that under this section, deductions must be "principally for the benefit of the employee" and here, the ALJ determined, they were not. Rather, the ALJ determined that the deductions allowed the University to pay Ahad only "when she generated revenue for the entity and not for other duties such as providing postoperative care for bariatric patients and the time Dr. Ahad spent marketing the program to doctors in the local area. TR 45 and 51." D. & O. at 14-15. These deductions from Ahad's clinical compensation were unauthorized and, as such, are considered nonpayment of that amount of wages. 20 C.F.R. § 655.731(c)(11). Accordingly, the Board affirms the ALJ's calculation of back wages based on the disallowance of these deductions.

The University assigns reversible error to the ALJ's setting of the "required wage" by using the compensation of "comparator physicians." *See* 20 C.F.R. § 655.731(a)(1). The University asserts that Ahad was the only bariatric surgeon it employed during her H-1B employment and consequently, the "required wage" must be what she was actually paid as opposed to what the comparator surgeons were paid as determined by the ALJ. The University makes several arguments to the effect that the ALJ disregarded evidence that there are no comparator surgeons here, as the physicians had differences in duty, title, responsibilities, education, qualifications, skills, etc. The University alleges that the ALJ ignored this evidence as well as evidence showing, it contends, Ahad's lack of productivity as compared to the other physicians. The University submits that the ALJ erred in finding any comparator surgeons and thus "improperly added approximately $29,510 to Dr. Ahad's academic base of $125,000." Petition for Review at 21. Upon review, we find that the record amply supports the ALJ's setting of the required wage using comparator physicians, see D. & O. at 8-12, and that his conclusions are consistent with the regulation at 20 C.F.R. § 655.731(a)(1). The University's many challenges amount to a request that the ARB reweigh the evidence, which the Board will not do. Based on the foregoing, the Board affirms the ALJ's assessment of back wages based on his determination of the "required wage."

CONCLUSION

In sum, the University failed to pay Ahad the required enforceable wage. Therefore, the Board **AFFIRMS** the ALJ's order of $223,884.27 in back wages and **AFFIRMS** the ALJ's order of damages in all other respects, including his direction that the Wage and Hour

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patient base. In addition, the University failed to adequately staff and promote Ahad's program. D. & O. at 15.

Administrator, "shall make such calculations with respect to back pay and interest necessary to carry out this order." D. & O. at 16.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

TANYA GOLDMAN
Administrative Appeals Judge