U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 September 2004

Case No. 2004-LCA-39

In the Matter of:

RAVI GUPTA
Prosecuting Party

v.

JAIN SOFTWARE CONSULTING, INC.
Respondent

DECISION AND ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS

This case arises under the Immigration and Nationality Act (8 U.S.C. 1101) and relates to an H-1B Labor Condition Application under 20 CFR §655.700*, et. seq*. The Complainant, Ravi Gupta (hereinafter Gupta), filed his complaint with the Wage and Hour Division of the Employment Standards Division of the Department of Labor on September 12, 2003. Gupta alleged that the Respondent, Jain Software Consulting, Inc. (hereinafter Jain), had violated the Labor Condition Application (LCA) requirement for employers to pay H-1B employees during nonproductive time under 20 C.F.R. § 655.731(c)(7)(i). By letter dated August 2, 2004, Gupta was notified that the Wage and Hour Division investigation had been completed and no violation was found. A timely appeal was filed by Gupta and this matter was assigned to the undersigned for a formal hearing scheduled on October 13, 2004 in Chicago, Illinois.

PROCEDURAL HISTORY

On September 9, 2004, Jain filed a Motion to Dismiss based upon the alleged failure of Gupta to timely file his original complaint with the Wage and Hour Division of the Employment Standards Division of the Department of Labor. The applicable limitation period is specifically "not later than 12 months after the latest date on which the alleged violations were committed… or the date on which the employer, through its action or inaction, allegedly demonstrated a misrepresentation of a material fact in the LCA." 20 C.F.R. § 655.806(a)(5). Jain filed an Amended Motion to Dismiss on September 13, 2004. Gupta filed a reply brief to the Motion to Dismiss on September 21, 2004.

BACKGROUND

Gupta filed his initial complaint on September 12, 2003. He alleged that Jain had failed to pay him while he was placed on nonproductive status. [1] The dates of the alleged violations in Gupta's complaint were from August 31, 2001 until May of 2003. Gupta's claim is based on 20 C.F.R. § 655.731(c)(7)(i) which requires an employer to pay an H-1B employee his or her normal salary if the employer places a worker on nonproductive status. This obligation extends to all H-1B employers unless certain enumerated circumstances have occurred. *See* § 655.731(c)(7)(ii) (2000).

Jain and Gupta entered into a contract in late 2000 for the employment of Gupta as an H-1B worker at a base salary of $55,000 a year. Gupta's visa was approved for the period from February 10, 2001 to October 15, 2003. Gupta began working for Jain on or about February 10, 2001. By August of the same year, Gupta had stopped being paid by Jain and had stopped providing services to Jain whether due to benching or due to voluntary discontinuance of service. Gupta claims that he remained on nonproductive status for a period that lasted from August of 2001 until he was informed about the cancellation of his visa on April 22, 2003. At some point, unclear on the record before the court, Jain requested the revocation of Gupta's Labor Condition Application by writing to the Department of Justice. [2] By letter time-stamped August of 2002, the Department of Justice confirmed the revocation of Gupta's visa in accord with Jain providing the Department with notice of termination of Gupta's employment.

ISSUE

Whether Complainant timely filed his complaint.

DISCUSSION

I have no discretion to resolve factual disputes when evaluating a motion to dismiss. However, the issue of timeliness can be decided as a matter of law under 20 C.F.R. § 655.806(a)(5), which requires the filing of complaints within 12 months of the last alleged violation.

Jain argues that the date that the "alleged violation was committed" is the date that Gupta became aware of the fact that he was no longer actively working for Jain, and that this date of awareness was no later then August of 2001 when Gupta stopped receiving payment from Jain and stopped reporting to work. Jain alternatively argues that if each pay period is considered a separate violation then Gupta is only entitled to seek relief for the violations that occurred within the twelve month period prior to his filing his complaint, which would not entitle him to any relief as Gupta was officially no longer Jain's employee as of August 2002 when his visa was revoked. [3]

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[1] Being placed on nonproductive status is also commonly referred to as benching.
[2] Such notice is required anytime a good faith termination occurs. *See Id.*; 8 C.F.R. § 214.2(h)(11).
[3] Logic dictates that Jain could not have breached a duty under the LCA or applicable regulations for the period that Jain was not Gupta's employer; the bona fide termination date of the Gupta-Jain employment relationship can be no later than the visa cancellation in August of 2002.

Gupta does not clearly articulate the period that should begin the accrual of the statute of limitations, but raises in his reply the issue of failure to disclose the cancellation of his visa as a basis for the application of the doctrine of equitable tolling. Gupta argues that the statute begins to run at the date of a bona fide termination through the employer's satisfaction of the notification requirements in 20 C.F.R. § 655.731(c)(7)(ii). Gupta additionally argues that the employee must have notice of a bona fide termination of employment in order for the limitations period to begin to run.

As Jain stopped paying Gupta in August of 2001, I find that Gupta had until August of 2002 to file his complaint. *See Neeraja Rajan v. International Business Solutions, Ltd.,* 2003 LCA 00012 (Apr. 30 2003). Jain's alleged violation of Gupta's LCA occurred in August 2001, and this violation cannot be deemed continuing until Gupta's contract expired. If Gupta was in fact placed on nonproductive status in August of 2001, he can only rely on such status tolling the statute of limitations for a reasonable time. In order for Gupta's complaint to be deemed timely, Gupta must have believed that he was entitled to payment while he did not work under his LCA for a period of at least 13 months. Gupta fails to advance any rational basis for this belief. Although the record is unclear, it is illogical to assume that Gupta had stopped reporting to work and stopped being paid by Jain, but still reasonably believed that he would be paid under his contract for two more years. Gupta does not allege that any assurances were made by Jain to support this belief. He does not state that he was in communication with Jain regarding his benched status at any time after August 2001. Gupta does not even advance the argument that he still believed that he was a Jain employee. Therefore, I conclude that Gupta was placed on notice as to his status as unemployed by Jain after a reasonable time had passed after August 2001 without further assurances by Jain that he was still in their employ. As a result, his complaint was untimely filed.

In the alternative, if this court were to accept Gupta's argument that each failure to pay him qualified as a continuing violation of his LCA, Gupta's complaint is still untimely. There is no authority to suggest that any date following the official termination of an employment relationship can be permissibly used in calculating the statute of limitations. In fact, an employer's obligation to pay wages to an H-1B worker ends when there has been a bona fide termination of the employment relationship. 20 C.F.R. § 655.731(c)(7)(ii); *see also Administrator, Wage and Hour Division v. Pegasus Consulting Group, Inc.,* 2001-LCA-00029 (ALJ Nov. 13, 2002). Bona fide termination is equivalent to a good faith termination of the employment relationship. *See Neeraja Rajan v. International Business Solutions, Ltd.,* 2003-LCA- 00012 (Apr. 30 2003). The Administrative Review Board has clarified that the bona fide termination of employment can occur on the date that the employer notified the INS of the employee's discharge, not the date that the INS actually revokes the employee's visa. *See Neeraja Rajan v. International Business Solutions, Ltd.,* ARB No. 03-104 (Aug. 31 2004).

Therefore, the last possible date that Jain could have committed any violation of 20 C.F.R. § 655.731(c)(7)(i) was the date that Jain requested that Gupta's visa be terminated. In this case, this date is not provided in the record, but the reply by the Department of Justice revoking Gupta's visa was in response to Jain's request. This letter is clearly evidenced as being

time stamped in August of 2002. [4] Therefore, Jain must have notified the Department of Justice in or before August of 2002. As a result, the complaint under this theory would still be untimely because Gupta was not a Jain employee within twelve months of September 12, 2003, the date the complaint was filed.

Therefore, I find that Gupta's complaint is not timely filed and that it must be dismissed.

ORDER

IT IS ORDERED THAT the Motion to Dismiss filed by Respondent Jain Software Consulting, Inc. is GRANTED and that Complainant Ravi Gupta's complaint is DISMISSED.

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DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the

[4] Instead of Gupta's observation that the blurred date could read August of 2003 the court will note Gupta's own allegation that he was first notified of the visa termination was on April 22, 2003.