U.S. Department of Labor

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Issue Date: 18 July 2003

CASE NO.: 2003-LCA-00015

In the Matter of

ADMINISTRATOR,
WAGE AND HOUR DIVISION
Prosecuting Party

v.

KEN TECHNOLOGIES, INC.
Respondent

Appearances:

Susan B. Jacobs, Esquire
For the Administrator

Paul Mandal, Esquire
For Respondent

Before: Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

JURISDICTION

This matter arises under the Labor Condition Application provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1101 and § 1182 ("the Act"), and the implementing regulations set forth at 20 C.F.R. Part 655, et seq.

Under the Act, an employer may hire nonimmigrant workers from "specialty occupations" to work in the United States for prescribed periods of time. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. Such workers are issued H-1B visas by the Department of State upon approval by the Immigration and Naturalization Service (or "INS"). 20 C.F.R. § 655.705(b). In order for the H-1B visa to be issued, the employer must file a Labor Condition Application (or "LCA") with the Department of Labor, and detail, inter alia, the wage rate and working conditions for the H-1B employee. 8 U.S.C. § 1182(n)(1)(D); 20 C.F.R. §§ 655.731 and 732. Once the Department of Labor certifies the LCA, INS can then approve the nonimmigrant's H-1B visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700(a)(3).

PROCEDURAL HISTORY

In the instant matter, the Administrator of the Wage and Hour Division ("Administrator") determined in a February 3, 2003 Notice and Determination that Ken Technologies ("Respondent") committed the following two violations of the H-1B nonimmigrant worker program:[1] 1) failing to pay wages to one H-1B non-immigrant worker (a violation of 20 C.F.R. § 655.731); and 2) failing to provide notice to its employees that it filed a February, 2002 LCA (a violation of 20 C.F.R. § 655.734). On February 14, 2003 Respondent requested a formal hearing. A hearing was held before me in Cherry Hill, New Jersey on March 31, 2003 where the parties had full opportunity to present argument and evidence. Administrator filed a post-hearing brief on June 6, 2003 and Respondent filed a post-hearing brief on June 9, 2003.

THE PARTIES' CONTENTIONS

Administrator maintains that Respondent was required to pay an H-1B nonimmigrant worker Jorige Chandrasekhar Prasad ("Prasad"), at a rate of $45,700 annually, which was set forth as the prevailing wage rate in a May 25, 2000 LCA. Instead, according to Administrator, Respondent failed to pay Prasad wages during the period of March 18, 2001 through July 21, 2001, thereby violating 20 C.F.R. § 655.731(c). Additionally, Administrator asserts that Respondent violated 20 C.F.R. § 655.734 by failing to notify its employees that it had filed an LCA in February, 2002 and intended to employ an H-1B nonimmigrant worker. Administrator's Brief, pp. 5 - 10.

Respondent maintains that it hired Prasad as an H-1B nonimmigrant worker but subsequently discovered that Prasad had materially misrepresented his qualifications to Respondent. Consequently, on or about February 26, 2001 Respondent terminated Prasad and did not pay any wages to him after that date. Although Prasad remained in the United States until July 17, 2001, Respondent contends that it had effected a bona fide termination of Prasad's employment, thereby alleviating its obligation to pay Prasad. Respondent further argues that it would be inequitable for the Administrator to penalize Respondent, especially where Prasad was terminated because he misrepresented his qualifications. Respondent's brief, pp. 3 - 6. Respondent also contends that Prasad was never legally authorized to work in the United States, because he misrepresented his qualifications, which were the basis for Respondent's visa application on his behalf. Finally, Respondent asserts that imposing a duty on Respondent to pay H-1B nonimmigrant workers for periods when they are not working is a violation of due process pursuant to the Fourteenth Amendment to the United States Constitution. Respondent's brief, pp. 7 - 10. Respondent did not address Administrator's complaint regarding the purported failure to provide notice to Respondent's employees that it had filed an LCA in February, 2002.

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[1]At the hearing, Administrator stated that it was not seeking prosecution of an alleged violation of 20 C.F.R. § 655.730(c) as listed on the February 3, 2003 Notice and Determination. Tr at 10.

ISSUES

The issues presented for adjudication are:

(1) whether Respondent violated the Act by failing to pay wages to Prasad during a period when he was not engaged in employment for Respondent;

(2) whether Respondent violated the Act by failing to provide notice to its employees that it had applied for an LCA in February, 2002;

(3) if so, what is the appropriate remedy.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

On May 24, 2000, Respondent, a computer software development company with offices in New Jersey, filed a Labor Condition Application with the Department of Labor seeking certification to hire five H-1B nonimmigrant workers at a prevailing wage of $45,700 annually. The H-1B nonimmigrant workers were to be hired as programmer analysts and would work at Respondent's offices located in Iselin, New Jersey. The application stated that the H-1B nonimmigrant workers would be employed from October 1, 2000 through September 30, 2003. The Department of Labor certified the application on May 25, 2000. AX 1.[2]

On May 22, 2000 Respondent filed a petition with the Immigration and Naturalization Service to sponsor an H-1B visa for Prasad, a citizen of India. Previously, on January 22, 2000, Respondent and Prasad executed an employment contract and agreed that Prasad would be paid $50,000 annually as a programmer/analyst. AX 3. In the INS application, Respondent indicated that Prasad's duties would be to "render computer programming and analysis duties," and to provide technical support. Respondent stated that, "Prasad has over two years of relevant experience in the field." AX 2.

In a March 20, 2003 affidavit, Arun Jain testified that he was an employee of Respondent and was involved in the hiring and recruitment of Prasad in India.[3] RX 10 at ¶ 2. Jain stated that

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[2]The following abbreviations are used herein: "AX" refers to Administrator's Exhibit; "RX" refers to Respondent's Exhibit: and "Tr" refers to the transcript of the March 31, 2003 hearing.

[3]Prior to the hearing, counsel sought authorization for testimony of witnesses by telephone, and was advised by me to secure the agreement of counsel for the Administrator. I

during the initial interview process, Prasad "had falsely represented to Ken that he has undergone training in QA[4] . . . Ken made a decision to hire him based upon this representation". RX 10 at ¶ 3. Jain stated that Respondent subsequently made arrangements to hire Prasad as an H-1B nonimmigrant worker, however, "[u]pon Prasad's arrival in the United States, it was discovered that he lied to us about the training, which was essential to him being able to complete his duties . . ." Id. Jain testified that Prasad arrived in the United States on February 18, 2001 and was immediately terminated on February 22, 2001 when Respondent discovered that Prasad did not have QA training. Id. at ¶ 5. Jain also insisted that, "Prasad was clearly advised that he was terminated and was asked to leave the United States. However, he continued to remain in Ken's guest house as an intruder. He refused to leave despite our numerous demands that he do so". Id. at ¶ 6. Jain further alleged that Prasad demanded that Respondent issue fake pay checks and also stated, "[h]e did not want to be terminated and therefore continued to ignore the fact that due to his misrepresentation, he was terminated and would be forced to leave the country". Id. at ¶ 7.

Respondent submitted into evidence email communications ("email" hereinafter) regarding Prasad's employment with Respondent and the subsequent requests by Respondent that Prasad vacate a guest house owned by Respondent.[5] The correspondence includes a February 12, 2001 email from Prasad to Jain, wherein Prasad confirmed that he completed his QA training. RX 1. An email dated February 22, 2001 from an individual identified as "Shibu"[6] to Jain, stated: "[r]egarding Prasad, I believe I repeatedly asked you to convey Prasad of taking QA Classes in Load Runner, Winrunner, SQA Robot etc, which now he tells he has not done the training. These are some of the hot stuff in QA. Pls make sure that in future, we bring candidates who get trained in the hot skills, especially in this market scenario." RX 2.

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was not informed until the day of the hearing that the Administrator had not agreed to the request. Had Respondent renewed his request with me, I would have issued a Order to Show Cause why the request for telephonic testimony should not be allowed. After all testimony at the hearing had been given, counsel for Respondent objected on the grounds of hearsay. I overruled the objection, as hearsay testimony elicited by the Administrator included evidence in support of Respondent's case, which may have been elicited by witnesses telephonically.

[4]Administrator and Respondent do not provide an explanation of the term, "QA" training/qualifications. Based on Respondent's business as a computer software development company, I infer that QA training/qualifications are, at the very least, specialized training that computer software and program designers can obtain. The issue of what QA constitutes is not germane to my decision.

[5]Where possible, I list these email communications in chronological order so that they can assume some context. Additionally, while I make some grammatical changes to the emails for clarity's sake, I have left most of the syntax and grammatical errors untouched.

[6]Presumably, this individual was at the time employed by Respondent.

Subsequently, Jain sent a termination letter to Prasad dated February 26, 2001. In the letter, Jain informed Prasad that "[w]e find that you are unable to work on the project even though you confirmed having the required skills and which are mentioned in your resume." AX 7; RX 11. Jain stated that Prasad's employment was terminated and "[s]ince you have come all the way from India, You may collect the return ticket from us at the earliest." AX 7; RX 11. As gleaned from the email correspondence that follows herein, Prasad did not leave the United States after being terminated and continued to remain in a guest house provided by Respondent.

Pertinent e-mails:

May 19, 2001 from Prasad to Jain: "I don't have a place to stay. Someone is ready to share a room for $400, if you arrange that amount I will move. I am also applying for jobs. I will try one more month. If I didn't get job then you book the ticket to India." RX 3.

May 26, 2001 response from Jain: "It will be difficult to wait for another month. However we can give you a week to 10 days to try otherwise I am afraid you will have to come back to India." RX 3.

May 27, 2001 from Prasad: "Please give some time to find room. Now getting contract jobs is very difficult in U.S. They are asking for permanent employees. I will apply for those permanent posts, if you give the paychecks. Once I got the job then I will pay for our company, but paychecks must be needed (at least one day salary for each pay check). Please give a quick response. I am also boring here." RX 3; 6.

June 11, 2001 from Jain: "I have given you a lot of time to search for a job. As you are aware, boys are coming from India and we need the place." RX 7.

June 13, 2001 from Prasad: "one of my friend has know one consultancy. They are looking for people who are ready to transefor (sic) H-1B. I will go to meet them this weekend or next Monday. But they want to see all of my original certificates. Can you give my degree certificate?" RX 4.

June 22, 2001 from Prasad to Jain: "I have no friends here. Since I have no money, I can't leave this place. What am I to do? Please give reply soon." RX 8.

July 2, 2001 from Prasad: "U are aware of the three months salary which I had asked u last week. If u are not willing to pay me money and return my degree certificate, then I am sorry to inform u that I might need to some seviour (sic) action by informing the labour office. Pls send me a reply regarding this issue." RX 9.

Although no direct evidence has been presented on this issue, Prasad's email of July 5, 2001, implies that he became aware that he was terminated: "How can you terminate without intimation? Why didn't you tell me? Without my degree certificate I don't leave this guest house." RX 4. In an undated response to Prasad's July 5, 2001 email, Jain stated, "As committed by you, the three days time for you to vacate the guest house is over. I understand that you have still not vacated. We are unable to allow you any further stay at the guest house. We are initiating action to have you removed from our premises." RX 4.

On July 5, 2001, Prasad filed a complaint with the Department of Labor's Employment Standards Administration, alleging an H-1B violation. AX 4, p. 2. In a July 3, 2001 statement by Prasad, he asserted that he arrived in the United States on February 18, 2001 for employment with Respondent, but that Respondent now wanted him to return to India. Prasad stated: "going back is not a problem, but they have paid me only $350 from [February 18, 2001 to the present]." AX 5. Prasad also claimed that Respondent was holding his engineering certificate and had told Prasad that the certificate would be returned to him through Respondent's office in India. Id. Prasad further stated,

> When I asked [about my salary] I received a mail that I have been terminated from the company long back but I did not received any word or mail about my termination. Currently, I don't have money and I don't know anyone to guide me in this situation, I am currently depending on you only to help and sort me out in this issue, hence I kindly request you to take some immediate action.

AX 5.

In a July 10, 2001 email from Prasad to Jain, Prasad stated: "I have not yet vacated the guesthouse because I have to go to India with my degree certificate. Now you are agree to give degree certificate what about flight tickets. Once I receive the tickets immediately I will vacate the guesthouse and I will stay with some of my friends up to flighting." RX 5.

In a letter addressed to Respondent on July 17, 2001, Prasad wrote, "I confirm that I have received my degree certificate and other belongings and I have nothing pending with the company." AX 8. Prasad left the United States for India on July 17, 2001. AX 6.

Bruce A. Waltuck, a compliance specialist with the Wage and Hour Division of the Department of Labor, was assigned to investigate Respondent's compliance with the H-1B visa program. As part of that investigation, Waltuck interviewed Girish Kalra, an H-1B nonimmigrant worker who was familiar with Prasad's situation. Kalra told Waltuck that Prasad complained to him that he did not receive any pay from Respondent during his stay in the United States and eventually left the United States in July, 2001. AX 10; 11.

At the March 31, 2003 hearing, John Warner, an investigator for the Wage and Hour Division, testified that he assisted Waltuck with the investigation of Respondent.[7] Tr. at 13. Warner testified that their investigation uncovered two violations of the H-1B requirements, the nonpayment of wages to Prasad and the failure to post a notice of a February, 2002 LCA filed with the Department of Labor. Tr. at 14. Warner testified that the regulations pertinent to H-1B employees require the employee, such as Prasad, to be paid even when the employee is not working because H-1B nonimmigrant workers are "not supposed to be in the United States unless they're working" and the payment requirement discourages employers from "stockpiling" H-1B nonimmigrant workers. Tr. at 15 - 16.Warner testified that during the course of the investigation, Respondent admitted that it had failed to notify INS that Prasad was terminated. Tr. at 18. As support for this statement, Warner referred to Administrator's Exhibit 9, a list of several H-1B nonimmigrant workers hired by Respondent and documentation of personnel actions taken with regard to each worker. AX 9; Tr. at 12 - 19. Regarding Prasad, the document reports "Date of Termination" was February 26, 2001, and "Copy of Termination Notice to INS" as "N.A." AX 9.

The Administrator concluded that Respondent failed to comply with H-1B requirements, and Warner calculated Prasad's unpaid wages from March 18, 2001 through July 16, 2001, using the $45,700 listed as the prevailing wage on Respondent's LCA.[8] Tr. at 21. Based on his pro rata calculations, Warner stated that Respondent owed Prasad unpaid wages in the amount of $15,233.81. Tr. at 21 - 22; 26 - 27.

In his March 20, 2003 affidavit, Jain stated that, to the best of his knowledge, Respondent complied with the notice requirement for the February, 2002 LCA. RX 10 at ¶ 8. In support of Administrator's allegation of the second violation disclosed in the investigation, Warner testified that Respondent posted its notice of an LCA filing for an employee in Kalamazoo, Michigan at its Princeton, New Jersey office. Tr. at 23. Warner explained that Administrator's Exhibit 13 is an LCA filed with the Department of Labor by Respondent on February 6, 2002. Tr. at 13. The February 6, 2002 LCA indicates that Respondent sought certification from the Department of Labor to employ one H-1B nonimmigrant worker at an office in Kalamazoo, MI. Id. Warner testified that Administrator's Exhibit 14, a notice of an intent by Respondent to file an LCA to hire this H-1B nonimmigrant worker was posted next to a fax machine and a recording rack at Respondent's Princeton, New Jersey office. Tr at 22 - 23; AX 13; 14.

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[7]Waltuck retired from the Wage and Hour Division in September, 2002.

[8]Warner did not calculate Prasad's wages from the date of his termination on February 26, 2001 because he stated that the regulations "allow up to 30 days before the employee has to be put on the pay records." Therefore, Warner determined that unpaid wages to Prasad should be calculated beginning on March 18, 2001, 30 days after Prasad first arrived in the United States. (T 20 - 21).

On cross-examination by Respondent, Warner admitted that he had no direct evidence that a notice was not in fact posted at the Kalamazoo, MI office. Tr. at 24. Warner also admitted that he did not investigate any representations that Prasad may have made to Respondent, nor did Warner interview Prasad at any time during the investigation. Tr. at 25 - 26.

B. Discussion

The Immigration and Nationality Act of 1952, as amended, defines various classes of aliens who are not considered "immigrants" under the U.S. immigration law and who may enter the United States for prescribed periods of time and for prescribed purposes under various types of visas. 8 U.S.C. § 1101(a)(15). One class of nonimmigrant aliens, known as "H-1B workers," is allowed entry to the United States on a temporary basis to work in "specialty occupations," or as fashion models of distinguished merit and ability. 8 U.S.C. § 1101(a)(15)(H); 20 C.F.R. § 655.700(c)(1) (1998).

The H-1B program is limited, with restrictions on the number of visas issued in any fiscal year and a maximum six-year period of admission for the authorized H-1B visa holder. 8 U.S.C. § 1184(g). An employer seeking to hire an alien in a specialty occupation on an H-1B visa must first obtain certification from the U.S. Department of Labor by filing an LCA; only after the employer receives the Department's certification will the Immigration and Naturalization Service approve the visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); see also 20 C.F.R. Part 655, Subparts H and I. The Department has published detailed guidelines that an employer may use in completing and filing LCAs.

A valid LCA must indicate the number of aliens to be hired, the occupational classification, the required wage rate, the prevailing wage rate and the source of such wage data, the date of need, and period of employment. 20 C.F.R. § 655.730 through .734. Furthermore, an I-129 petition for admission must be filed with the INS also indicating the dates that the nonimmigrant will be employed because INS has authority to decide whether an alien satisfies the criteria for admission to the United States on an H-1B visa. See 8 U.S.C. § 1184(i)(1).

Finally, the relevant regulations also require employers to provide notice to its current employees that it has filed an LCA with the Department of Labor and intends to hire H-1B nonimmigrant workers. 20 C.F.R. § 655.734. An employer may give notice to its employees by informing the collective bargaining representative or posting conspicuous notice in the employment areas where the H-1B nonimmigrant workers will be employed. 20 C.F.R. § 655.734.

1. Respondent owes $15,233.81 in unpaid wages to Prasad.

Employers are required to pay H-1B nonimmigrant workers beginning on the date when the nonimmigrant "enters into employment" with the employer or 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition. 20 C.F.R. § 655.731(c)(6).

If the H-1B worker is in a nonproductive status due to a decision by the employer (e.g., because of a lack of assigned work), the employer is still required to pay the salaried employee the full amount of the weekly salary at the required wage for the occupation listed on the LCA. See 20 C.F.R. § 655.731(c)(7)(i). However, the regulations also provide that if the H-1B nonimmigrant worker experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his duties at his voluntary request and convenience (e.g., touring the U.S., caring for an ill relative), then the employer is not required to pay the required wage during that period. 20 C.F.R. § 655.731(c)(7)(ii). Payment is also not required "if there has been a *bona fide* termination of the employment relationship." Id. The regulations further require that the employer notify INS that the employment relationship has been terminated so that the petition is canceled. 20 C.F.R. § 655.731(c)(7)(ii); 8 C.F.R. § 214.2(h)(11); 8 C.F.R. § 214.2(h)(4)(iii)(E).

I find that Respondent's termination of Prasad on February 26, 2001 was not a *bona fide* termination that would have relieved Respondent of its obligation to pay wages to Prasad. The regulations provide that a termination is considered bona fide if the employer notifies INS that the worker was terminated. 20 C.F.R. § 655.731(c)(7)(ii). The record evidence shows that Respondent considered Prasad terminated on or about February 26, 2001. Prasad's assertion that he was not paid wages after that time is uncontroverted. Respondent did not pay Prasad any wages after terminating his employment, but did allow him to stay in Respondent's guest house until July 17, 2001 when Prasad returned to India. Since Prasad was not working for Respondent during this time period, Prasad was nonproductive. Consequently, Respondent could have avoided paying wages to Prasad if there was a bona fide termination of the employment relationship. However, according to Respondent's records, Respondent failed to contact INS to inform the agency that Prasad had been terminated. AX 9. Therefore, Prasad's termination was not bona fide and Respondent is liable for unpaid wages during the time period when Prasad was nonproductive[9].

Respondent argues that it would be inequitable to be required to pay wages to Prasad because he deliberately misrepresented his QA qualifications to Respondent. I find, however, that the evidence does not establish that Respondent relied upon Prasad's assertions regarding his training before employing him. Prasad was hired by Respondent based on the January 22, 2000 employment contract. AX 3. In a February 10, 2001 email, Jain questioned whether Prasad had completed his QA training, and Prasad responded with confirmation that he had completed his QA training. RX 1. However, according to his February 10, 2001 email, Jain had arranged for Prasad's travel to the United States before confirming that the desired training was complete: "we have booked your flight directly to the U.S.A. for 18th February." RX 1. Further, after

[9]Although no evidence was presented that Respondent did finally effect a bona fide termination of Prasad's employment pursuant to 20 C.F.R. §655.731(c)(7)(ii), that individual is no longer in the United States and cannot reasonably be found to still be in Respondent's employ under the terms of the H-1B visa.

Respondent discovered Prasad did not have QA training, Respondent (through Shibu) emailed Jain to remind him of the importance of ensuring future H-1B candidates have QA training before they arrive in the United States. RX 2.

I find that the sparse record does not support Respondent's allegation that Prasad deliberately misrepresented his qualifications and that it would be inequitable for Respondent to pay Prasad for his nonproductive time. Although Jain relied upon Prasad's representations of his intent to complete QA training, all arrangements for his employment were made before Respondent confirmed whether Prasad met the desired qualifications. It wasn't until Prasad's arrival in the United States that his lack of qualifications was discovered, leading to his termination. RX 1; 2. I accord little weight to Jain's claims that Prasad deliberately deceived Respondent into hiring him. See, RX 10. Assuming *arguendo*, that Respondent established that Prasad deliberately misrepresented his qualifications, Respondent would still be liable to pay wages for nonproductive time because Respondent failed to notify INS of Prasad's termination. 20 C.F.R. § 655.731(c)(7)(ii); 8 C.F.R. § 214.2(h)(11); 8 C.F.R. § 214.2(h)(4)(iii)(E). I decline to speculate why Respondent deemed a termination notice to INS informing the agency of the end of its relationship "N.A." [not applicable]. See, AX 9.

Even if Respondent were able to show that it relied upon misrepresentations, I am unable to agree with its argument that making misrepresentations with respect to H-1B status renders an individual an illegal nonimmigrant worker. Respondent has directed my attention to the Supreme Court's holding in Hoffman Plastic Compounds, Inc., v. NLRB, 122 S.Ct. 1275 (2002). In Hoffman, the Court held that the NLRB was foreclosed from awarding back pay to an undocumented alien who had never been legally authorized to work in the United States. Hoffman, 122 S.Ct. at 1283. The Court's decision in Hoffman is distinguishable from Prasad's situation because Prasad was legally admitted into the United States. Respondent filed an LCA which was certified by the Department of Labor, allowing Prasad to work for Respondent as an H-1B nonimmigrant worker. Because Prasad was in the United States as a valid H-1B worker, I find that Respondent's reliance on Hoffman is without merit.

Finally, Respondent contends that the regulatory mandate to compensate H-1B nonimmigrant workers for nonproductive time imposes a burden on employers that is not imposed on employers who do not hire nonimmigrant workers. Respondent reasons that these regulations amount to a violation of the Fourteenth Amendment's Due Process clause. At the outset, I assume that Respondent is referring to the Due Process clause of the Fifth Amendment, which applies to federal laws. Although I lack authority to rule on constitutional questions, (see, 29 C.F.R. 655.840), I note that Respondent has totally failed to meet the requisite burden in such a due process case of establishing that the immigration regulations are not rationally related to a permissible governmental interest. North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); Ferguson v. Skrupa, 372 U.S. 726 (1963); Nebbia v. New York, 291 U.S. 502 (1934). From a practical standpoint, I find no undue burden is placed on employers with respect to their obligations to compensate nonimmigrant workers. I repeat my earlier observation that the regulations provide employers relief from the obligation where they

advise INS that the employment relationship has been terminated. 20 C.F.R. § 655.731(c)(7)(ii); 8 C.F.R. § 214.2(h)(11); 8 C.F.R. § 214.2(h)(4)(iii)(E).

Based on the foregoing, I find that Respondent failed to pay Prasad, an H-1B nonimmigrant worker, for a period of non-productivity from March 18, 2001 to July 16, 2001. Consequently, pursuant to the regulations and the testimony of Warner, I find that Prasad's unpaid wages should be calculated at $15,233.81. See C.F.R. § 655.731(c)(6).

2. There is no affirmative record evidence establishing that Respondent violated 20 C.F.R. § 655.734 by failing to post notice regarding a February, 2002 LCA.

Employers who file an LCA are required to provide notice of the filing to the employees' collective bargaining representative. If there is no such bargaining representative, employers are required to post notice of the LCA filing in conspicuous locations in the area of intended H-1B nonimmigrant employment. 20 C.F.R. § 655.734. The regulations provide detailed explanations of how an employer may satisfy this notice requirement when the employees in the same classification as the H-1B nonimmigrant workers have a collective bargaining representative and when the employees do not have a collective bargaining representative. See § 655.734(a)(i) and (ii).

The record evidence shows that Respondent filed an LCA on February 6, 2002 with the Department of Labor and sought certification for one H-1B nonimmigrant worker. The LCA stated that the H-1B nonimmigrant worker would work as a programmer at Respondent's office in Kalamazoo, MI. AX 13. At the hearing, Mr. Warner testified that Respondent's notice was deficient in that it identified an individual that was to be employed in Kalamazoo, Michigan, and Respondent provided a document indicating that the notice was filed in New Jersey. Tr. at 23. The document, proffered as Administrator's Exhibit 14, is a notice to Respondent's employees of Respondent's intent to file the LCA with the Department of Labor on February 11, 2002. AX 14. The notice states,

> (this) LCA and this notice posted from 2-11-2002 to 2-21-2002 (10 business days) at the following two locations:
>
> 1. Next to fax machine
>
> 2. Next to recording rack
>
> at the employer's premises located at 707 Alexander Rd., Bldg. 2, Suite 208, Princeton NJ 08540.

AX 14.

Administrator argues that this evidence establishes that Respondent failed to post notice in Kalamazoo, MI as required by 20 C.F.R. § 655.734. I disagree. While Administrator's Exhibit 14 shows that Respondent purportedly posted notice of its intent to file an LCA at the Princeton, NJ office, the evidence does not show that Respondent failed to post notice at the Kalamazoo, MI office. Warner admitted as much at the hearing when he stated that he had no direct evidence that Respondent did not, in fact, post notice of the February, 2002 LCA at the Kalamazoo, MI office. Tr at 25. I find that the record evidence does not establish that Respondent failed to post notice at the Kalamazoo, MI office in violation of 20 C.F.R. § 655.734.

ORDER

On the basis of the foregoing, Respondent is **ORDERED** to pay the Administrator the sum of $15,233.81, representing the total of wage deficiencies owed to Jorige Chandrasekhar Prasad for distribution to him as noted herein.

The Administrator's determination that Respondent failed to provide notice to its employees that it filed a February, 2002 LCA in violation of 20 C.F.R. § 655.734 is **DISMISSED.**

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 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 calender days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.