U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 July 2021

CASE NO.: 2020-LCA-00002

In the Matter of:

ADMINISTRATOR,
WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

BITSOFCODE SOFTWARE SYSTEMS, INC.,
Respondent.

Appearances: Chris Lopez, Esq.
Office of the Solicitor
for the Administrator

Annie Bannerjee, Esq.
for Respondent

Before: Paul C. Johnson, Jr.
District Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act H-1B visa program, 8 U.S.C. § 1101(a)(15)(H)(i)(b) (the "INA" or "Act"), and its implementing regulations at 20 C.F.R. Part 655, Subparts H and I. BitsOfCode Software Systems, Inc. ("Respondent") challenges the Determination Letter issued by the Administrator, Wage and Hour Division ("Administrator") on October 24, 2019, finding that Respondent failed to pay the required wage to one H-1B worker.

I presided over a formal hearing on August 11, 2020. The parties appeared through counsel. Administrator's Exhibits ("AX") 1-43, Respondent's Exhibits ("RX") 1-2, 3A-B, 4, 7, 8A-D, 9-11, and 13, and Administrative Law Judge ("ALJ") Exhibit 1 were received in evidence. NagaRaju Dontula, Joseph Callihan, and Jiju Joseph testified at the hearing. Counsel for the Administrator made a closing argument at the end of the hearing, and Respondent filed a written closing brief. The record is closed.

My decision is based on thorough consideration of all the testimonial and documentary evidence in this matter.[1] The discussion that follows relates to the allegation that Respondent owes back wages to an H-1B worker, and not to the allegations regarding (1) Respondent's failure to provide notice of filing a Labor Condition Application in violation of 20 C.F.R. § 655.805(a)(5), or (2) Respondent's failure to maintain required documentation in violation of 20 C.F.R. § 655.815(a)(15) as Respondent stipulated to those violations at the time of the hearing.

The sole issue for resolution is whether Respondent paid its foreign worker the correct wages under the approved Labor Condition Applications. In this regard, Respondent agrees that the correct wage, as determined by the National Prevailing Wage Center, was wage level III for a Computer Systems Analyst, which was $79,934 per year from November of 2015 through June of 2016, and $84,240 per year from July of 2016 through June of 2017. (AX 19.) Respondent argues that the payments made to its foreign worker exceeded those prevailing wages. The Administrator argues instead that the foreign worker was underpaid.

Findings of Fact

On March 19, 2014, the Certifying Officer certified Labor Condition Application No. 1-200-14072-991789 filed by Respondent for one Systems Analyst to work in Houston, Texas for the period September 12, 2014 through September 12, 2017. The LCA provided for a prevailing wage of $27.25 per hour. (Administrator's Exhibit ("AX") 8.) After the LCA was certified, Respondent filed an I-129 Petition for a Nonimmigrant Worker with the U.S. Customs and Immigration Service on behalf of Venkata NagaRaju Dontula. (AX 10, 16.) USCIS approved the petition on September 29, 2014. (AX 12.)

On December 8, 2014, Respondent sent Mr. Dontula an offer letter for a position as a Systems Analyst at an annual salary of $53,410, which Respondent noted was "effectively $27.25 per hour." (AX 15.) The offer letter, accepted by Mr. Dontula, required him to report for duty in Respondent's Houston office no later than February 15, 2015. (*Id.*)

On October 30, 2015, the Certifying Officer certified Labor Condition Application No. 1-200-15299-571022 filed by Respondent for one Software Engineer to work in Round Rock, Texas for the period November 15, 2015 through November 15, 2018. The LCA provided for a prevailing wage of $27.65 per hour as determined by Respondent through the Office of Foreign Labor Certification Online Data Center. (AX 9.) Mr. Dontula's employment was governed by this LCA, as he worked in Round Rock and never in Houston. (AX 2; Transcript of Hearing ("Tr.") p. 18.) Mr. Dontula started work on November 9, 2015. (AX 34, RX 11.)

Mr. Dontula worked at the site of Respondent's client, Dell, through August 31, 2016. (Tr. 20, RX 2.) At that time, he was told by a Dell representative that the contract with Respondent terminated as of the end of August, and he was not to

[1] Any exhibit that is not explicitly referred to in this Decision and Order was nevertheless reviewed and considered.

report to work any longer. (Tr. 20) He attempted to contact BitsOfCode, but was unable to do so, and started working with a new employer on October 1, 2016. (*Id.*)

Respondent paid for Mr. Dontula to live in a hotel for a couple of weeks while he looked for an apartment. (Tr. pp. 42, 132.) Thereafter, Respondent made the following payments to Mr. Dontula[2]:

Date	Amount (Gross/Net)	Type (Direct Deposit/Check)
12/4/2015	$3,000.00/ $3,000.00	Check
1/12/2016	$5,000.00/ $5,000.00	Check
2/5/2016	$4,578.00/ $4,063.87	Direct Deposit
3/1/2016	$4,578.00/ $4,063.88	Direct Deposit
3/2/2016	Unknown/ $5,854.66	Check
4/6/2016	Unknown/ $4,265.19	Check
5/9/2016	Unknown/ $4,265.19	Check
6/6/2016	Unknown/ $3,862.54	Check
7/18/2016	Unknown/ $4,265.19	Check
8/17/2016	Unknown/ $4,265.19	Check
9/21/2016	Unknown/ $4,265.19	Check
10/18/2016	Unknown/ $4,500.00	Check
2/2/2017	$1,539.45/ $0.00	N/A

There is no dispute that most of the payments in the above table represent wage payments to Mr. Dontula. The nature of the payments of $5,854.66 on March 2, 2016 and of $1,539.45 the February 2, 2017 is less clear. Mr. Dontula testified that the $5,854.66 payment on March 2, 2016 represented reimbursement of business expenses, while Jiju Joseph testified that it represented an advance of pay. There is little documentation to support either alternative. Resolving the discrepancy, I credit Mr. Dontula's characterization of the payment over Mr. Joseph's. The payments that are indisputably advances of pay are in whole dollar amounts and in multiples of $1,000.00, while the March 2, 2016 payment is neither. The payment is more consistent with reimbursement of expenses of varying amounts

[2] These payments are consistently reflected on AX 31, AX 5, and RX 8, and there is no dispute that they were made.

than with an advance of pay. In addition, Respondent paid Mr. Dontula one day earlier for his February wages, and paid him on April 6, 2016 for his March wages, so there was no need for a pay advance on March 2. Accordingly, I find that the payment of $5,854.66 does not represent a payment of wages.

The February 2, 2017 "payment" of $1,539.45 (actually $0.00 to Mr. Dontula) does not represent wages either. The pay stub associated with that payment refers to it as "salary" for the period from March 1 to August 31, 2016, but Mr. Dontula had already been paid wages for that period of time. Additionally, there was no testimony concerning the exact nature of that payment, and Mr. Dontula had long since left his employment with Respondent. Although it is not clear why Respondent prepared that pay stub, it does not represent wages to Mr. Dontula.

Respondent issued a check dated November 22, 2016 to Mr. Dontula in the amount of $4,265.00. (AX 31.) The check was subsequently canceled. (*Id.*; Tr. pp. 27, 98, 103, 154.) It will not be included in the calculations related to Mr. Dontula's wages.

Respondent asserts that it made other payments to Mr. Dontula. (RX 9.) These include the amounts of $202.87 on February 5 and March 1, 2016 and $2,253.71 on February 2, 2017 (AX 31); and payments totaling $22,432.15 for credit card payments, a telephone, travel tickets, a hotel stay, and a car loan (RX 8). Mr. Dontula and the Administrator do not dispute these amounts, but they do not represent wages. The amounts of $202.87 on February 5 and March 1, 2016 represent "POP deductions" that are not explained in the record, but were clearly a deduction from Mr. Dontula's wages and were not additional wage payments. Likewise, the payment of $2,253.71 on February 2, 2017 was not identified on AX 31 as a wage payment, but as "company paid" health insurance. I conclude that it represents Respondent's portion of the health insurance premiums paid for Mr. Dontula's coverage while he was employed by Respondent, and not wages paid to him. Finally, the other payments totaling $22,432.15 do not represent wages, but instead represent the cost of other perquisites provided to Mr. Dontula by the company.

Conclusions of Law

Under 20 C.F.R. §655.731, an employer must attest that, for the entire period of authorized employment, it will pay the required wage rate to the non-immigrant H-1B employees. The employer must pay the greater of the actual wage rate or the prevailing wage. "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).

The regulation further defines "when due": "For salaried employees, wages will be due in prorated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where employer pays biweekly) paid no less often than monthly …" Respondent paid Mr. Dontula monthly. For salaried employees, 20 C.F.R. § 655.731(c)(4) requires that wages be paid in prorated installments no less frequently than monthly. *See also* Requirements for Employers Using Non-immigrants on H-1B Visas, 59 Fed. Reg. 65,646 at 65,653 (Dec. 20, 1994). "It is well-established that each pay period is to be viewed separately when determining

whether an H-1B worker was paid the required wage." *Administrator v. Wings Digital Corporation*, 2004-LCA-030 (ALJ March 21, 2005).

Mr. Dontula Was a Salaried Employee

Respondent argues that Mr. Dontula was an hourly employee, rather than a salaried employee. I reject Respondent's argument.

First, Respondent's initial job offer to Mr. Dontula offered an annual salary, and parenthetically noted that it was "effectively" equal to an hourly rate. This indicates that from the beginning, Mr. Dontula was considered to be a salaried employee.

Second, 20 C.F.R. § 655.731(b)(v)(A) requires an employer to maintain documentation of its wage statement that includes, for hourly workers, the number of hours worked each day and each week by the employee if the employee is paid on an hourly basis. Employer did not do so, supporting a conclusion that Mr. Dontula was not an hourly employee, but a salaried employee. Employer attempts to shift the responsibility to Mr. Dontula to document his hours, but the regulation makes it clear that it is Respondent's duty to do so. Its failure tends to show that Mr. Dontula was a salaried employee. Furthermore, RX 8D demonstrates that Respondent did record somewhere the number of hours worked by Mr. Dontula, as reported by him through the payroll system, but the payroll checks issued to Mr. Dontula bear little to no relation to the number of hours reported.

Third, the payments made to Mr. Dontula each month did not vary by the amounts that would be expected if he were an hourly employee. In January and February of 2016, he received equal amounts of pay. In April through September of 2016, he likewise received equal amounts of pay, although the amount was different from what he was paid in January and February. If he were in fact paid hourly, variations in the pay would be expected. The lack of variation tends to show that he was a salaried employee.

Fourth, although the payroll documentation is sparse, there are pay stubs in the record showing how Mr. Dontula's pay was calculated for the months of January and February 2016. In both months, the pay was calculated on the basis of 168 hours of work. Mr. Dontula testified that his regular work day was eight hours long, so each of those two months represents 21 working days. But in both of those months there were only 19 working days when federal holidays are excluded, and 19 eight-hour days would result in 152 hours rather than 168. If Mr. Dontula worked on those holidays, he would have worked 168 hours in January and 160 hours in February; the amount of wages for those two months would not have been the same.[3] That they were tends to support a conclusion that Mr. Dontula was not an hourly worker.

[3] I note that the spreadsheet prepared by Respondent to explain its payments to Mr. Dontula (RX 10) shows a different number of hours for January (168 hours) and February (160 hours) of 2016 from the number of hours shown on the pay stubs for those months (AX 31). As the spreadsheet includes calculations for payment at wage level III as well as wage level I, and it was not until after Mr. Dontula filed his complaint in this matter that NPWC determined Mr. Dontula's position

Fifth, when NPWC made its prevailing wage determination, its results were expressed in terms of annual salaries, and not in terms of hourly rates. This suggests to me that a Systems Analyst is to be considered a professional salaried position and not one paid by the hour.

I conclude, based on the foregoing, that Mr. Dontula was a salaried employee, not an hourly employee. Thus, Respondent was obligated to pay Mr. Dontula at least one-twelfth of his annual salary each month. For the period between November 2015 and June 2016, the annual Level III salary for a Systems Analyst was $79,934, which equates to monthly payments of $6,661.17. For the period between July 2017 and September 2017, the annual Level III salary for a Systems Analyst was $84,240, which equates to monthly payments of $7,020.00.

Mr. Dontula Was Underpaid

As discussed above, Respondent was required to pay Mr. Dontula his prorated annual salary on a monthly basis. For January and February of 2016, the gross and net wages paid to Mr. Dontula are ascertainable from the pay stubs admitted into evidence. But for the remaining months, the evidence shows only what Mr. Dontula actually received. Because the burden is on Respondent to maintain accurate wage records, I resolve the matter by concluding that the amounts paid to Mr. Dontula for all months other than January and February of 2016 represent gross wages.

Mr. Dontula did not work during the month of September 2016. Under 20 C.F.R. § 655.731(c)(7)(i), an employer must pay the full prorated amount due to a salaried H-1B worker in nonproductive status due to a lack of work or for any other reason other than those set forth in § 655.731(c)(7)(ii). The latter section provides that the H-1B worker need not be paid if the worker is unproductive status for reasons unrelated to employment that take the worker away from duties at his/her own voluntary request and convenience, or when conditions render the worker unable to work. There is no evidence that conditions made Mr. Dontula unable to work during September. He testified that he was in Panama for an unknown period of time during September, but there is no evidence that he requested that time away voluntarily or for his convenience. Instead, it appears that he made every effort to contact Respondent regarding his work assignment, but was unsuccessful, and took advantage of his "benching" to travel. Because the conditions of § 655.731(c)(7)(ii) that would excuse Respondent from paying Mr. Dontula the required wages were not met, Respondent was required to pay wages for September – and did so, on October 18, 2016.

Respondent was required to pay wages until there was a *bona fide* termination of the employment relationship. 20 C.F.R. § 655.731(c)(7)(ii). Under 8 C.F.R. § 214.2(h)(11), an employer must notify DHS that the employment relationship has ended in order to effect a *bona fide* termination.[4] In this case, Respondent notified

should be paid at level III, it is clear to me that RX 10 was prepared after the relevant time period and I give it no weight on the issue whether Mr. Dontula was an hourly or a salaried employee.

[4] Under some circumstances, not applicable to this matter, an employer must also offer the H-1B worker transportation to the worker's home.

DHS of the end of its employment relationship with Mr. Dontula on December 2, 2016. (AX 13.) This suggests that Respondent was required to continue wage payments to Mr. Dontula through that date. However, the evidence establishes that he began employment with a new employer on October 1, 2016. (Tr. p. 21.) Respondent cites *Batyrbekov v. Barclays Capital*, ARB No. 13-013, ALJ No. 2011-LCA-025 for the proposition that an employer's obligation to pay its H-1B worker ends when the worker finds new employment. Respondent is not quite right: *Batyrbekov* held that "a bona fide termination of employment can occur and end back wage liability for an employer that proves it (1) expressly notified an H-1B employee that it terminated the H-1B employment, and (2) thereafter, the H-1B employee secured USCIS's approval for a 'change of employer.' The burden of proving the end of back wage liability remains with the employer." *Id.*, slip op. p. 10 (ARB Jul. 16, 2014). In this case, Respondent has proven neither of the conditions; there were no communications with Mr. Dontula after he last worked in August of 2016, let alone an express notification that his employment had been terminated. And although there is evidence that Mr. Dontula started employment with a new employer on October 1, 2016, there is no evidence that he secured USCIS's approval for a change of employer. But in this case, neither the Administrator nor Mr. Dontula has sought wage payments beyond September 30, 2016, so no party was on notice that such evidence would be required. I will therefore not award back wages for the period between September 30 and December 2, 2016.

Thus, based on my findings regarding the nature of the payments made to Mr. Dontula, I find that Respondent underpaid him in the following amounts:

Month	**Gross Wages Paid**	**Level III Wages Required**	**Underpayment**
November 2015	$3,000.00	$4,884.86*	$1,884.86
December 2015	$5,000.00	$6,661.17	$1,661.17
January 2016	$4,578.00	$6,661.17	$2,083.17
February 2016	$4,578.00	$6,661.17	$2,083.17
March 2016	$4,265.19	$6,661.17	$2,395.98
April 2016	$4,265.19	$6,661.17	$2,395.98
May 2016	$3,862.54	$6,661.17	$2,798.63
June 2016	$4,265.19	$6,661.17	$2,395.98
July 2016	$4,265.19	$7,020.00	$2,754.81
August 2016	$4,265.19	$7,020.00	$2,754.81
September 2016	$4,500.00	$7,020.00	$2,520.00
Total			**$25,728.56**

* Mr. Dontula started work on November 9, 2015. He therefore worked 22/30 of the month of November, and this figure is calculated by taking 22/30 of the applicable Level III monthly wage of $6,661.17.

The underpayment calculated above differs by $789.08 from the underpayment calculated by the Administrator, who calculated underpayment in the amount of $24,939.48. (AX 5.) The difference is explained by two factors. First, the monthly prorated share of the Level III wage between November of 2015 and June of 2016 as calculated by me is $6,661.17, while that figure was calculated by

the Wage Hour investigator as $6,616.17. It appears that the investigator transposed two digits in the number he used, resulting in a difference of $45/month for seven full months. Second, the investigator's calculation for November of 2015 assumed that Mr. Dontula began work on November 10, when the evidence establishes that he worked on November 9, 2015; and the investigator's calculation incorrectly reflects 2/3 of the erroneous $6,616.17 prorated wage rate.

Interest

When an employer has failed to pay wages as required by 20 C.F.R. § 655.731, "the Administrator shall assess and oversee the payment of back wages…." 20 C.F.R. § 655.810. Although the regulation does not specifically mention interest, the Administrative Review Board has held that a prosecuting party who prevails on a back wages claim is entitled to prejudgment compound interest on the back pay award. *Mao v. Nasser*, ARB No. 06-121, slip op. at pp. 11-12 (ARB Nov. 26, 2008). Interest calculations adopt the formula from *Doyle v. Hydro Nuclear Serv.*, ARB Nos. 99-041, 99-042, 00-12, ALJ No. 89-ERA-22, slip op. at pp. 18-21 (ARB Mar. 17, 2000). *See Innawalli v. Am. Info. Tech. Corp.*, ARB No. 04-165, slip op. at pp. 8-9 (ARB Sept. 29, 2006).

Under this formula, to calculate pre-judgment interest, the Administrator shall use the applicable federal rate ("AFR") with interest compounded quarterly. The AFR is the interest rate "charged on the underpayment of Federal income taxes, which consists of the Federal short-term rate determined under" 26 U.S.C. § 6621(b)(3) "plus three percentage points." Post-judgment interest accrues from the date of this Decision and Order. In all other respects, post-judgment interest is calculated and compounded in the same way as pre-judgment interest: using the AFR and compounding interest quarterly. Although no post-judgment interest has actually been incurred when the Decision and Order is issued, ALJs include an award of post-judgment interest prospectively in the order. *See, e.g., Administrator v. University of Miami*, ARB No. 10-090, -093; Doyle, ARB Nos. 99-041, 99-042, 00-12 (discussing ALJ's treatment of post-judgment interest).

Conclusion

Based on the foregoing, and on the stipulations of the parties, I find and conclude:

1. Respondent owes back wages to H-1B worker Venkata NagaRaju Dontula in the amount of $25,728.56 plus pre- and post-judgment interest at the legal rate;
2. Respondent violated 20 C.F.R. § 655.805(a)(5) by failing to timely post a notice of filing of a Labor Condition Application, for which violation no civil money penalties are imposed;
3. Respondent violated 20 C.F.R. § 655.805(a)(15) by failing to maintain four signed copies of approved Labor Condition Applications, for which no civil money penalties are imposed.

ORDER

For the reasons set forth above, IT IS ORDERED:

1. Respondent shall pay back wages of $25,728.56 to the Administrator for payment to H-1B worker Venkata NagaRaju Dontula;
2. Mr. Dontula is entitled to pre- and post-judgment compound interest on the accrued back wages at the legal rate, which shall be calculated in accordance with 26 U.S.C. § 6621 and this Decision and Order, with post-judgment interest to be paid until satisfaction of this award;
3. The Administrator shall make such calculations of interest as may be necessary to carry out this Decision and Order;
4. Respondent shall comply with 20 C.F.R. § 655.805(a)(5) in the future; and
5. Respondent shall comply with 20 C.F.R. § 655.805(a)(15) in the future.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/ksw
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845. Such petition shall be received by the Board within 30 calendar days of the date of the decision and order. The petition shall be served on all parties and on the administrative law judge.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.

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