

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 13Nov2002

CASE NO: 2001-LCA-00029

In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION
Prosecuting Party

v.

PEGASUS CONSULTING GROUP, INC.
Respondent



Appearances:

Roy D. Ruggiero, Esquire
For Respondent

Susan Jacobs, Esquire
For Prosecuting Party

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER

This is a proceeding under the Immigration and Nationality Act (8 U.S.C. 1101), hereinafter "the Act", to enforce compliance with an H-1B Labor Condition Application under 20 CFR §655.700, et.seq.

The matter was tried in New York, New York, on January 22, February 26, and April 2-3, 2002. Briefs were filed by August 20, 2002. References are: "G"- Prosecuting Party (Government) exhibits; "R" - Respondent exhibits¹; "Tr." transcript of trial.

¹ Respondent's submission after trial of proposed R 30a (transcript) is not received into this record, as no leave was given therefor and no foundational basis underlying its admission established. The Government's motion to strike R30, admitted at trial, is denied as lacking in merit, see fn.9, infra.

Herein, the Government seeks collection of a deficiency in wages² in the amount of \$288,218.04³ on behalf of nineteen (19) non-immigrants, in addition to a recovery of a civil money penalty of \$40,000 for willful violation of the Act.

THE LAW

In pertinent part, the Act provides that an H-1B employer pay a required wage for both productive⁴ and non-productive time⁵ (where such non-productive time is due to a decision of the employer because of lack of assigned work), for the entire period of authorized employment of the H-1B employee. This wage obligation ends when a bona fide termination occurs, 8 U.S.C.1182(n). A bona fide termination is not recognized where the employer rehires the “terminated” or “laid off” employee, 20 CFR Part 655 (Preamble at 80171).⁶ Moreover, the employer is required to notify the Immigration and Naturalization Service (INS) of any such termination so that the H-1B status is canceled, 8 CFR. 214.2(h)(11). Finally, 8 U.S.C. 1182(n)(2)(C)(ii)(I) authorizes the imposition of a civil money penalty where a willful failure to comply with the regulations occurs, see 20 CFR §655.805 (a)(9)(b).

ISSUE

At issue is whether the Government’s alleged wage deficiency is valid in foundation and amount, and whether the civil money penalty assessed is warranted under the law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

² Relative to non-payment of both non-productive, as well as productive, time.

³ Reduced from an initial assessment of \$401,228.21.

⁴ Herein, the alleged unpaid productive time consisted in work on an “internal project”, where client billing was unavailable.

⁵ Commonly referred to as “benching”, where an employee is not assigned to a client for billing purposes.

⁶ There are three exceptions to this rule, not applicable here, specifically noted therein.

I
WAGE DEFICIENCIES

The Government asserts that nineteen (19)⁷ employees were underpaid⁸, eight of whom, willfully so.

1. VEERRAJU⁹ - Alleged wage deficiency - \$33,653.90
Period 1/23/99 to 9/19/99 - internal project work

Respondent insists that this individual was never authorized to travel to the United States for employment, but was in this country on vacation visiting relatives.

I find the testimony of this employee credible, and the documentation supporting this testimony contained at G20 more than sufficient to establish his employment with Respondent. Particularly convincing is the evidence that Respondent paid Veerraju's travel expenses (G20 @ E,F), and provided a corporate credit card (id. @I), as well as medical insurance (id. @J). Also significant is the corroboration of his work for Respondent by other employees (Tr. @339; G2@D; G9@D; G18@D).

The amount due this former employee is found to be \$32,653.90 because the Government failed to give credit for two \$500.00 salary advances (G20@L, M).

2. SUDESWARAN - Alleged wage deficiency - \$11,285.55
Period - 11/29/99 to 3/15/00 - non-productive

Respondent asserts that this employee was "terminated" in November, 1999. But, Respondent admits that he was rehired in March, 2000 (see also G21 where Respondent notes that this employee was "...on leave without pay" from November, 1999 to March, 2000).

As there is no evidence that any of the exceptions to the preamble to 20 CFR §655, supra., apply, nor any evidence of notification to INS under 8 CFR 214.2, supra., I find that there was no bona fide termination of this individual, and thus, such individual is due the total unpaid wage asserted.

3. THOSECAN - Alleged wage deficiency - \$19,437.07

⁷ The first six (6) listed employees testified at trial.

⁸ All unpaid wage computations are contained at G1@5.

⁹ A tape recording of a purported conversation between this individual and Paul Parmar, Respondent's president (R30), while admitted into this record, was found entirely not understandable, and thus, of no evidentiary value. (Tr. @853-854-857).

Periods - 6/2/99 to 7/5/99 non-productive
7/6/99 to 12/31/99¹⁰ -internal project work

I find this individual's testimony to be credible. In pertinent part, he arrived in the United States on May 2, 1999, was assigned to Respondent's internal project from early July, 1999 through October 4, 1999, and thence client-assigned through to the end of his employment. The computation of wage deficiency (G1@5), is, however, somewhat confusing and also incorrect on its face. The

June 2, 1999 beginning date of the period of deficiency is explainable since 8 U.S.C. (n)(2)(C)(vii)(I) requires wages to be paid (in this individual's case) 30 days after first entry into the country. However, since the internal project (wage deficient) work lasted only through early October 4, 1999, there exists no explanation for running the end of the period of deficiency to December 31, 1999¹¹. A wage deficiency of \$36,057.75 was found for the period July 6, 1999 through December 31, 1999 (25 weeks). But, the Government concedes that this employee was properly paid for his work when assigned to clients, from early October, 1999 onward. (Gov't Br. @38). Accordingly, the proper wage deficiency established for the internal project work would be only for the period July 6, 1999 through October 4, 1999, a period of 13 weeks at \$1,442.31 or \$18,750.03, not the \$36,057.75 as computed at G1@5.

Respondent counters this claim with the proposition that this employee was never authorized to travel to the United States for employment, but was visiting his brother here. Also, Respondent claims that this employee was assigned to the internal project, but only for July and August, 1999, and then terminated.

I find that the documentation contained at G19, together with this employee's credible testimony amply supports the conclusion that he was authorized by Respondent to travel to this country, that he was on non-productive status between June 2, 1999 and June 5, 1999, that he worked the internal project from June 6, 1999 to October 4, 1999, and that he was client-assigned thereafter. I also find that since there is no evidence of notification to the INS of the alleged termination, no bona fide termination occurred, and, accordingly that this individual is due unpaid wages of \$18,750.03.

4. JAIN¹² - Alleged wage deficiency - \$11,736.96
Period - 5/16/99 to 9/5/99

¹⁰ See qualification, *infra*.

¹¹ This extension of the deficiency period through the end of 1999, and deduction of actual wages paid for the year 1999 (\$20,288.48) is entirely unnecessary since these actual wages were paid only for the work while client-assigned (Govt. Br. @38; G19@E).

¹² See Ftn. 14, *infra*.

This individual testified, credibly in these following respects only, that upon his termination from Respondent he secured another position with S3 Consulting, and thereupon transferred his H1-B visa to this new employer. On this basis, I find that no deficiency in wages is owed this individual.

5. MUKUNDA - Alleged wage deficiency - \$5,769.24
Period 9/19/99 to 10/31/99

This individual testified, credibly in this following respect only, that he was paid in full all salary to which he was entitled while working for Respondent. Accordingly, I find no wage deficiency as regards this employee.

6. NATHAN - Alleged wage deficiency - \$2,884.62
Period - 9/20/99 - to 10/15/99 - non-productive

I find this individual's testimony credible. He was initially assigned to a client project from November, 1998 to August, 1999, and then restarted on another client project in November, 1999. He was not paid any salary from September 20, 1999 to October 15, 1999 (Tr. 394; G21).

Respondent claims that this employee was on voluntary leave during this period when he was not paid, but Mr. Nathan adamantly denies that he ever requested any such leave, and credibly so (Tr. @405). Accordingly, I find a wage deficiency in the full amount alleged to be due.

Despite Respondent's insistence to the contrary (Br. @30), I find that the foregoing testimonial evidence provides an adequate representative basis to establish a pattern and practice of violation of the Act, and, accordingly, the following individuals (who did not testify at trial) are eligible to recover any unpaid wages. R.C. Foss & Son, Inc., WAB Case #87-46 (12/31/90); Martin v. Selker Bros. Inc., 949 F.2nd 1286 (C.A. 3rd 1991).

7. BERI - Alleged wage deficiency - \$8,276.07
Period - 5/1/99 to 7/15/99 - non-productive
8. SINGH - Alleged wage deficiency - \$34,191.56
Period 3/2/99 to 10/31/99 - productive
(internal project & other)
11/1/99 to 12/31/99 - non-productive

Respondent claims that neither of these individuals were authorized to travel to the United States for employment. But the credible statements and supporting documentation of these individuals (G3; G14) establish the contrary. Mr. Beri was reimbursed his airplane fare from India to the United States, as well as his travel to the depart airport in Zurich, and from the San Francisco airport to his hotel (paid for by Respondent) upon arrival in the United States

(G3AE@5).¹³ Mr. Singh, whom the Respondent claims was terminated in August, 1999, was actually sent a letter from Respondent's president on December 13, 1999 confirming his then current employment (G-14 @I), and his version of events is corroborated by other employees (see G19@C; Tr. @339).¹⁴ Respondent's invoked e-mail evidence to establish the alleged August, 1999 termination (R25), falls far short of its goal in that the addressee is not Mr. Singh, who has otherwise credibly denied the implementation thereof.

The amount of wage deficiency as to Mr. Singh is found overstated by \$1,600, however, because Mr. Singh acknowledges a \$5,000 salary payment made on December 31, 1999, which amount was not credited as salary paid - G1@5, but from which the amount of \$3,400 was deducted as an advance (G14@L), this creating a \$1,600 overstatement of wage deficiency. Accordingly, a total wage deficiency in the amount of \$32,591.56 is found as to this employee.

9. JOSHI - Alleged wage deficiency - \$20,038.62
Period - 1/1/99 to 2/1/00 - productive/non-productive

I find this individual's statements worthy of belief, and the documentation underlying the determined wage deficiency to be sufficiently supportive thereof (G-7).

While Respondent avers that Mr. Joshi was terminated in May, 1999, Respondent, inconsistently therewith, reimbursed, in November, 1999, Mr. Joshi's travel expenses from Cincinnati, Ohio to its New Jersey headquarters and thence to New York to interview a prospective client (id. @F). That a June, 1999 e-mail from a fellow employee requests Mr. Joshi to mail a lap top to the New Jersey headquarters of Respondent (R10), is found to have no adverse impact on the validity of this finding of continued employment and consequent wage deficiency.

10. ADKA - Alleged wage deficiency - \$24,849.60.

¹³ While R24 notes that Mr. Beri was, by e-mail on April 19, 1999, advised to hold off his travel to the United States, this absorption of expenses by Respondent negates the inferentially contrary probative value of this advice. Also, the R24 June 3, 1999 e-mail directive to return to India, sent a month after Beri's arrival in the United States, is insufficient to dissolve the previous authorization to travel to the United States.

¹⁴ Mr. Jain (see employee #4 supra.) testified on behalf of Respondent relative to his alleged conversations with several individuals who are the subject of this matter, and his testimony generally is consistent with Respondent's versions of the facts herein. I am compelled, however, to find these portions of his testimony not credible as he is found to be bias in favor of Respondent. He is currently employed at Respondent as a "practice director" upon being promoted to such position, and his legal presence in this country is entirely dependent upon his job/visa status with Respondent (Tr. @810, 838).

Periods 5/1/99 to 7/5/99 and 10/1/99 to 11/4/99 - non-productive;
7/6/99 to 9/30/99 - productive. Amount found due - \$21,449.60¹⁵

11. KUMAR - Alleged wage deficiency - \$14,786.01
Periods 5/16-31/99, 6/16-7/1/99, 11/20 - 12/10/99 - non-productive;
7/2 - 8/31/99 - productive
12. PAHADIA - Alleged wage deficiency - \$2,995.40.
Period 10/16/99 to 11/7/99 - non-productive
13. SUBRAMANARIAM - Alleged wage deficiency - \$12,526.28
Period 5/16/99 to 9/30/99 - productive
14. TANGILARA - Alleged wage deficiency - \$14,273.60
Period 6/11 - 7/6/99 - non-productive;
7/7/99 - 9/10/99 - productive. Amount found due - \$13,873.60¹⁶

As to each of the foregoing individuals (#10 thru #14), Respondent admits that they were hired, "fired" and then re-hired (see Br. @47,56,59,60,66). As there is no evidence that any of the exceptions to the preamble to 20 CFR 655, supra., apply, nor any evidence of notification to INS under 8 CFR 214.2 supra., I find that there was no bona fide termination of these individuals, and thus such individuals are due the unpaid wages as noted.

15. KOTEESWARAN - Alleged wage deficiency - \$23,323.47
Period 5/1/99 to 11/30/99 - non-productive
16. RUPAKALA - Alleged wage deficiency - \$748.85.
Period 12/25/99 to 12/31/99 - non-productive
17. GANGULI - Alleged wage deficiency - \$8,273.07.
Period 12/16/99 to 2/13/00 - non-productive

As to these three individuals, the Government has provided no statements or other sufficiently probative evidence underlying the wage deficiencies asserted (G6, G13, G4). The unauthenticated payroll time sheet at G6, the undated employment agreements at G6 and G13, and the November 18, 1998 H-1B petition letter at G4, fail to establish unpaid and due wages. As no

¹⁵ The Government's calculation of unpaid wages (G-1) fails to credit Respondent \$3,400 (\$3,000 on 9/20/99 and \$400 on 8/17/99) paid to this individual (R-15).

¹⁶ The wage due computation (G1@5) fails to give Respondent credit for a \$400.00 payment on 8/16/99 (R15).

prima facie case is made as to these individuals, I am compelled to find that no wage deficiency is due.

18. INYENGAR - Alleged wage deficiency - \$24,120.77.
Periods 7/6/99 to 9/30/99 - productive
10/1/99 to 4/1/00 non-productive
19. SUNDARARAMAN - Alleged wage deficiency - \$15,047.40.
Period 5/17/99 to 10/5/99 - non-productive

Respondent avers that both these individuals were terminated (Inyenger in August, 1999, Sundararaman in May, 1999). But, Mr. Inyengar, whose statement I find credible, was placed on a client project in November, 1999, and in January, 2000, was working at the help desk and preparing project proposals for Respondent (G5@E). And, Mr. Sundararaman, whose statement I also find credible, was asked, in May, 1999, whether he was interested in, but never finally offered, work on Respondent's internal project, and up until October 5, 1999, when he returned to India for vacation, in reasonable reliance thereof, held himself available for such work (G17@D). The evidence preponderantly indicates that neither of these employees were terminated as alleged by Respondent, and, at any rate, no notice therefor was ever given to INS under 8 CFR 214.2, supra. Thus, I find the asserted wage deficiencies validly due and owing.

II

CIVIL MONEY PENALTIES-LIABILITY AND AMOUNT

I find that the evidence in this record amply supports the imposition of \$40,000 in civil money penalties for willful/knowing violation of the Act. And, Respondent's one sentence, altogether inadequate, response to such imposition (at CONCLUSION - Br.@75), i.e., that the Government failed to meet its burden to provide a basis for the penalties and to demonstrate willfulness, indeed implicitly confirms this finding.

Under 8 U.S.C. 1182(n)(2)(C)(ii)(I), a penalty not to exceed \$5,000 per violation may be imposed in the event of a willful violation of the Act 20 CFR 655.805(c) defines "willful failure" as "a knowing failure..." to pay wages as required under 20 CFR 655.731 (wage obligations relative to H-1B non-immigrants). Penalties of \$5,000 each for eight (8)¹⁷ of the foregoing individuals

(#1,3,7,8,9,11,13 and 18) have been assessed (Tr. @416). Each of these individuals have hereinabove been found to have not been properly paid under applicable law.

¹⁷ That more than this number of violations may reasonably have been assessed, supra., suggests a more than fair amount of penalties assessed.

Respondent's president and sole shareholder, Paul Parmar, was fully aware of Respondent's wage obligations under the H-1B visa program, including wage payment for non-productive time (Tr. @462, 500, 556, 565). Respondent's vice-president of finance, S. Zaharis, was also fully aware of these statutory and regulatory wage obligations (Tr. @612, 665). Under the facts of this case, it is not possible to imagine that the responsible management of Respondent did not knowingly fail to pay the legally required wages! And, as noted, no serious argument is advanced in this regard. That financial concerns prompted the deficiencies in wage payments, is evident (Tr. 464-5, 537-8). Understandably, but not without consequences, H-1B visa status was not cancelled by notification to INS because of difficulties anticipated with the filing for new H-1B visas (Tr. 445, 709). Respondent threatened to not return a "security deposit" (required of the employees to be paid to Respondent before employment in the United States) unless they agreed in writing that no wages were due from Respondent (see, for example, Tr. @264, 273, 399-400; G9@E). Finally supportive of Respondent's "knowing/willful" violation of the Act is its initial documentary admission to the case investigator that certain of the subject employees were on "leave without pay" (Tr. 67-8), a phrase inherently inconsistent with the statutory scheme here involved designed to protect the American worker from cheap, uncompetitive, foreign labor.

ORDER

On the basis the foregoing, Respondent is **ORDERED**:

1. To pay to the Prosecuting Party the sum of \$231,279.41, representing the total of wage deficiencies, for distribution to the affected individuals as noted herein.
2. To pay to the Prosecuting Party the sum of \$40,000 in civil money penalties.

A

RALPH A. ROMANO
Administrative Law Judge

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 calendar 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.

