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COMPANY VIOLATED INA BY FAILING TO PAY H-1B HOLDER FOR WORK TRAVEL TIME, ARB SAYS

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A medical software company in Georgia violated the Immigration and Nationality Act when it failed to pay a computer programmer with an H-1B nonimmigrant visa wages for two days he spent traveling for a work project, the Labor Department's Administrative Review Board ruled Jan. 31 (Administrator v. Integrated Informatics Inc., DOL ARB, No. 08-127, 1/31/11 [released 2/4/11]).

Affirming in part an administrative law judge's decision in favor of the administrator of DOL's Wage and Hour Division, ARB held that even if Integrated Informatics Inc. has a company policy withholding compensation from workers for travel time, such a policy does not excuse its obligation to pay wages owed to H-1B worker Kumal Vyas.

However, the board reversed the ALJ's finding that Integrated could offset back wages owed to Vyas by the amount of a loan the company had provided to him to purchase a car. Because the loan agreement was signed prior to the start of Vyas's period of authorized employment as an H-1B nonimmigrant worker, the board said the contract fell outside the H-1B program and is thus beyond the ALJ's and ARB's authority under the INA to enforce.

Administrative Appeals Judges E. Cooper Brown, Paul M. Igasaki, and Joanne Royce joined in the decision.

H-1B Worker Sought Pay for Travel Time.

According to the board, Integrated hired Vyas, a citizen of India, in May 2005 while he still held an F-1 nonimmigrant student visa.

To begin the H-1B process, the company filed a labor condition application (LCA) with DOL seeking certification to employ a nonimmigrant computer programmer at a salary of $ 33,000 per year from June 2005 to June 2008. Upon receiving approval from DOL, Integrated next filed a petition for a nonimmigrant worker with U.S. Citizenship and Immigration Services, which authorized Vyas's H-1B status from Aug. 5, 2005, to June 5, 2008.

Prior to receiving approval from USCIS, Integrated and Vyas entered into an agreement under which the company loaned $ 1,500 to Vyas in order for him to purchase a car.

Vyas, who became increasingly dissatisfied with his employment at Integrated, submitted on Feb. 17, 2006, a letter indicating he would resign on March 3. On Feb. 28, Vyas travelled to Phoenix for a work project. Vyas worked for two days, and then left on March 3.

In April 2006, Vyas filed a complaint with WHD, which subsequently found after investigation that Integrated violated the INA when it failed to pay Vyas for the two days he spent traveling to and from Phoenix. WHD ordered the company to pay Vyas $ 4,381.64 in back wages.

Integrated objected to WHD's determination and requested a hearing with an ALJ, before whom WHD became the prosecuting party. In July 2008, the ALJ ruled Integrated was liable for back wages owed to Vyas, but offset that amount by the $ 1,500 loan that Vyas was obligated to repay. The ALJ ordered Integrated to pay Vyas $ 1,018.70 in back wages.

Worker Entitled to Travel Pay With No Offset.

On appeal, ARB affirmed that Integrated must pay Vyas for the days he spent traveling to and from Phoenix, but reversed the ALJ's decision to use Vyas's $ 1,500 auto loan obligation to offset back wages owed to him.

The INA's "no benching" provisions at 8 U.S.C. $ S 1182(n)(2)(C)(vii)(I) and in federal regulations at 20 C.F.R. $ S 655.731(c)(7)(i), the court said, require an employer to pay wages even if the H-1B worker is in "nonproductive status . . . due to a decision by the employer." However, an employer does not have to continue to pay an H-1B worker

where there has been a bona fide termination of the employment relationship or where the employee's nonproductive status is due to conditions unrelated to employment, such as where he or she requests a leave of absence.

Here, the board agreed with the ALJ that Vyas's travel to Phoenix "was undertaken solely for work," which entitled him to compensation. ARB rejected Integrated's argument that a company policy, which withholds compensation for travel, precludes Vyas from obtaining wages for travel.

"In the LCA, Integrated attested that it would pay Vyas at the annual rate of $ 33,000 for full-time employment in accordance with the H-1B program," the board said. "These are the attestations we enforce. Even accepting as true that Integrated's policy is not to compensate its employees for travel time, a company policy is not among the exceptions to an H-1B employer's obligation to pay H-1B nonimmigrant workers their wages."

Turning to the ALJ's ruling that Vyas's back pay award could be offset by his obligation to repay the $ 1,500 loan from Integrated, the board decided that the loan agreement, which was established before the start of Vyas's authorized H-1B period of employment, fell outside of the Labor Department's jurisdiction under the INA, which "extends only to employment relationships that arise under, or are terminated pursuant to the INA's H-1B provisions."

"Accordingly, we reverse the ALJ's finding that Integrated may recoup the loan by making deductions from Vyas's wages," the board said, ordering Integrated to pay Vyas $ 3,726.24 in back wages as calculated by WHD.

DOL attorneys Joan Brenner, Paul Frieden, William C. Lesser, and Steven J. Mandel in Washington, D.C., represented WHD. Kapali Eswaran and Ashish Kulkarni of Integrated Informatics in Roswell, Ga., represented the company.