

BNA DAILY LABOR REPORT

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Immigration: OWNER WHO CUT WAGES, FIRED H-1B DOCTORS MUST PAY \$ 1.1 MILLION AWARD, COURT AFFIRMS

By Jay-Anne B. Casuga

The Labor Department's Administrative Review Board did not act arbitrarily and capriciously when it upheld a \$ 1.1 million judgment against the owner of a chain of medical clinics in Tennessee who allegedly violated the Immigration and Nationality Act by cutting the wages of physicians with nonimmigrant work visas and then reprimanding, withholding payments from, and eventually firing several doctors for complaining, a federal court in Tennessee ruled Aug. 19 (*Kutty v. DOL*, E.D. Tenn., No. 05-00510, 8/19/11).

Dismissing Mohan Kutty's petition for review and affirming ARB's ruling, the U.S. District Court for the Eastern District of Tennessee said substantial evidence supports a finding that Kutty, who owned the Center for Internal Medicine and Pediatrics, failed to pay the doctors' required wages under the terms of their H-1B visas when he reduced their salaries because of financial difficulties.

Additionally, the court agreed with the board that Kutty's decisions to stop paying eight of the doctors after they demanded their proper wages and threatened to complain to DOL, and to fire seven of them on the same day that DOL's Wage and Hour Division initiated an investigation constituted violations of the INA's "no benching" and whistleblower provisions. Further, the court said, ARB properly applied Tennessee common law to pierce the corporate veil and hold Kutty personally liable for the INA violations.

Judge Thomas W. Phillips wrote the opinion.

Doctor Hired Nonimmigrants to Staff Clinics.

According to the court, Kutty operated his medical practices via several corporate entities in Tennessee and Florida that he owned and operated, either individually or with his wife as the sole officers and directors. Between 1998 and 2000, Kutty opened five clinics in rural Tennessee and staffed them with 17 physicians holding J-1 nonimmigrant visas.

Under the J-1 visa program, the doctors entered the United States as exchange visitors to receive graduate medical education and training. Generally, the doctors would have been required to return to their home countries for two years prior to applying for immigrant or other nonimmigrant visas or permanent

residence, but that requirement is waived if an interested state agency makes a request on their behalf. All 17 physicians obtained such J-1 waivers based on a health care professional shortage.

Meanwhile, Kutty signed and filed H-1B nonimmigrant visa petitions on behalf of the 17 doctors. As part of that process, he filed with DOL labor condition applications (LCAs), which state that the nonimmigrant will be paid the greater of the actual wage level the employer pays to all other individuals with the same experience, or the prevailing wage for that occupational classification in the region. DOL certified that the LCAs, and the Immigration and Naturalization Service, now the U.S. Citizenship and Immigration Services, approved the H-1B petitions.

Late in 2000, Kutty began experiencing financial difficulties, and in January 2001, he began cutting some of the doctors' salaries. Eight of the physicians hired an attorney, Robert Divine, who wrote Kutty a letter in February 2001 demanding payment of the salary amounts that were past due, and warning that he would notify DOL of Kutty's noncompliance with the terms of the LCAs if they were not paid. After receiving the letter, Kutty issued for the first time written performance reprimands to the eight doctors and stopped paying them. He continued to pay doctors who did not complain.

On the same day that WHD began investigating Kutty, he fired seven of the 10 doctors who had become clients of Divine by that point. Following the investigation, WHD determined that Kutty violated the INA by willfully failing to pay the doctors their required wages, and violated the statute's "no benching" and whistleblower provisions by reprimanding, withholding payments from, and terminating the doctors who engaged in protected conduct by complaining.

An administrative law judge in October 2002 agreed with WHD and sustained its calculation that Kutty owed the doctors approximately \$ 1.1 million in back wages and penalties. The ALJ also found that circumstances dictated piercing the corporate veil and holding Kutty personally liable. All of Kutty's Tennessee corporations had dissolved by June 2001. ARB affirmed the ALJ in May 2005, and Kutty filed a petition for review in federal district court.

ARB Ruling Not Arbitrary and Capricious.

In denying Kutty's petition, the district court noted that reviews of ARB actions are "highly deferential" and require it to "defer to the inferences that the DOL derives from the evidence." It added that ARB rulings may be reversed if they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law" or "unsupported by substantial evidence."

Here, the court first ruled that substantial evidence supports ARB's findings that Kutty's medical clinics violated INA's wage requirements, particularly its "no benching" provision. Introduced to the INA in the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), the "no benching" provision requires an employer who places an H-1B employee "in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license' must pay the employee full-time wages for all nonproductive time," the court explained.

Kutty argued that the provision did not apply in the instant case because the U.S. District Court for the District of Columbia in 1996 enjoined enforcement, on procedural grounds, of DOL regulations that included a "no benching" provision. Rejecting this argument, the court said Congress amended the INA to include the "no benching" provision as part of ACWIA, and that requirement "was immediately

enforceable, regardless of whether the injunction pertaining to the regulation was dissolved."

"The regulation was invalid based upon procedural grounds: the failure to comply with notice and comment rulemaking," the court said. "Congress was free to take the substance of the regulation and incorporate it into the statute."

The court also rejected Kutty's argument that ARB acted improperly by retroactively applying the "no benching" provision. The requirement became effective on ACWIA's general enactment date of Oct. 21, 1998, and Kutty's INA violations occurred after that date, it said.

Explanations for Pay Withholding Pretextual.

Additionally, the court agreed with ARB that Kutty violated the INA's "no benching" and whistleblower provisions by reprimanding and withholding pay from eight doctors who complained about their wages and then firing seven of them when WHD initiated an investigation.

The INA's whistleblower protections apply to employees who "disclose information that they reasonably believe shows a violation of the INA" or who "cooperate in an investigation concerning the employer's compliance with the INA," the court said. To establish a prima facie case of retaliation under the INA, it added, an employee must show he or she engaged in protected activity and that the employer knew about the activity and took an adverse employment action against the employee because of the protected activity.

Here, the court said, the eight doctors engaged in protected activity when they complained about wage decreases they reasonably believed were violations of the INA. Kutty knew about the protected activity because he received their attorney's letter and then committed adverse employment actions by withholding payments and reprimanding the doctors and subsequently firing them, it said.

Although Kutty alleged he stopped paying and later fired the doctors for legitimate performance-related reasons, such as their failure to generate income or to work enough hours, the court said substantial evidence supports a finding that this proffered reason was pretextual based on the timing of Kutty's actions.

For example, the court said, Kutty for the first time issued written performance reprimands to the doctors who complained only after he received their attorney's February 2001 demand letter. In addition, Kutty fired seven of the attorney-represented doctors "on the same day" as WHD's investigation.

"The timing of these adverse decisions cannot be understated," the court said.

Piercing the Corporate Veil Proper.

The court also held that ARB was not arbitrary and capricious in upholding the ALJ's decision to apply Tennessee common law in piercing the corporate veil and holding Kutty personally liable for the INA violations.

Analyzing several factors, the court observed that Kutty had sole control over the corporate entities that

employed the doctors and submitted their immigration paperwork, ignored corporate governance formalities, freely commingled personal and corporate assets, undercapitalized the corporations and operated them at a loss, and engaged in fraud by representing to the government that he would pay required wages to the H-1B doctors and then failing to do so.

As such, the court found that the medical clinics "did not have an existence separate from Dr. Kutty" and the "interests of justice are served by piercing the corporate veil."

Defective Petitions Not a Defense, Court Says.

Further, the court agreed with ARB that Kutty is precluded under the doctrine of quasi-estoppel from arguing that his INA violations should be excused because the LCAs and H-1B petitions approved by DOL and USCIS were defective and should have been rejected as incomplete or inaccurate. For example, he said the filings lacked evidence that the doctors could practice medicine in Tennessee.

Under Tennessee law, the court observed, quasi-estoppel "forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects."

Here, the court said, Kutty benefitted from the H-1B program because he employed several nonimmigrant doctors for several years, and thus "acquiesced" to the validity of the LCAs and H-1B petitions. "It would be patently unfair for Dr. Kutty to submit these documents, obtain benefits under the program for years, and then later argue that the documents should not have been approved," the court said.

Angelo A. Paparelli, Yoshiko I. Robertson, and Lory D. Rosenberg of Paparelli & Partners in Irving, Calif., and Rockville, Md., and W. Tyler Chastain of Bernstein, Stair & McAdams in Knoxville, Tenn., represented Kutty. Kenneth L. Wainstein, Loretta S. Harber, R. Craig Lawrence, and Michael J. Ryan of the Justice Department's U.S. Attorneys Offices in Washington, D.C., and Knoxville, Tenn., represented DOL.