Section of Litigation Employment & Labor Relations

Harsh Rulings Against H-1B Employers For LCA Violations

By Anthony F. Siliato and Scott R. Malyk – September 25, 2012

Despite its drawbacks, the H-1B visa classification is, by far, the most sought-after temporary work visa in the United States for foreign-born professional workers. The H-1B category requires sponsorship by a U.S. employer and is limited to "specialty occupations" that generally require the candidates hold at least a bachelor's degree (or an equivalent combination of education and/or experience) in a relevant discipline. H-1B petitions are filed with the U.S. Citizenship and Immigration Services (USCIS), a branch of the Department of Homeland Security.

What Is a Labor Condition Application?

The labor condition application (LCA) form is a key component of an H-1B petition. The LCA stipulates the required wage levels and working conditions that the sponsoring employer guarantees for the H-1B worker. More specifically, the LCA is an attestation to the Department of Labor (DOL) that: (i) The working conditions for the foreign national will be identical to those of U.S. workers; (ii) the salary will equal either the prevailing wage in the area of employment or match the actual wage being paid to others similarly employed by the employer, whichever is greater; (iii) that there is no strike or lockout at the employer's facility; and (iv) that the employer has met all other requirements of the H-1B program as specified in the DOL regulations. The posting of an LCA and certification of the same by the DOL is a necessary precondition to filing an H-1B petition.

Sponsoring employers who fall within the definition of H-1B dependency (based upon the number of H-1B workers in their overall workforce) are required to submit further attestations including, with some exceptions, the completion of statutorily prescribed recruitment efforts to locate U.S. workers.

The authority of the DOL to investigate H-1B violations is tied to the attestations contained in the LCA. The employer reaffirms these duties when it submits the certified LCA with an I-129 Petition for Nonimmigrant Worker to the USCIS to obtain authorization from the USCIS for the worker to enter the United States and work under the H-1B classification. *See* 20 CFR § 655.705(c); 8 CFR § 214.2(h)(4)(iii)(B).

As demonstrated by the Wage and Hour Division cases discussed herein, in addition to the award of back wages, there are numerous fines, penalties, and even criminal sanctions that may arise from an employer's LCA violations.

The Wage Attestation Contained in the LCA

By filing the LCA with the DOL, a sponsoring employer certifies that it will pay the "required wage" to the H-1B worker for the duration of the foreign national's "authorized period of stay." *See* 8 CFR § 214.2(h)(4)(iii)(B)(2). As described above, the required wage must be the equivalent to at least the prevailing wage in the geographic location of employment, or the actual wage (including benefits) the sponsoring employer pays to similarly employed U.S. workers, *whichever is greater*.

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In addition to awards of back pay for failure to pay the required wage, violations of the regulatory obligations placed on the employer can also result in civil penalties and fines to the employer up to $1,000 per violation, and up to $5,000 per violation for a finding of a "willful" failure to comply with the regulations. Moreover, if the ALJ determines a violation is willful, and, as a result of such violation a U.S. worker was displaced, the employer may be subject to additional fines of up to $35,000 per incident. Finally, an employer may be debarred from using the H-1B program for a period of up to three years for a finding of willful misconduct.

Recently, the Office of Administrative Law Judge (ALJ) decided a Wage and Hour Division case that alleged various LCA violations of H-1B workers of a New Jersey-based employer. In particular, the ALJ found the employer liable for willfully failing to pay 18 H-1B workers the required wage (as the employer attested it would in the LCA) and awarded those employees collectively over $250,000 in back pay. The ALJ also imposed civil penalties in the amount of $67,000 for what the judge felt were willful violations of the LCA provisions.

"Benching" H-1B Workers During Nonproductive Periods

Because the sponsoring employer certifies that it will pay the "required wage" for the duration of the foreign national's "authorized period of stay," if an H-1B worker is rendered inactive during that period due to a decision attributable to the employer, the employer is still bound by the LCA to pay the H-1B worker the required wage even if he or she is not performing work during that period of time. *See* 20 C.F.R. §655.731(c)(6)(ii), (7)(I).

On the other hand, an employer may be excused from the wage payment requirements of the LCA when the H-1B worker

> experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (*e.g.,* touring the U.S., caring for an ill relative) or render the nonimmigrant unable to work (*e.g.,* maternity leave, automobile accident which temporarily incapacitates the nonimmigrant) . . . [or] there has been a *bona fide* termination of the employment relationship.

See 20 C.F.R. §655.731(c)(7)(ii).

Thus, the key to the analysis of whether the employer maintains an obligation to pay the H-1B worker the required wage set forth in the LCA is whether the H-1B worker's nonproductive status is due to the worker's voluntary absence from work or whether such status is the result of a decision of the sponsoring employer. If the latter, then back wages may be awarded to the H-1B worker who successfully pursues a claim with the Wage and Hour Division of the DOL.

The Requirement of a Bona Fide Termination of an H-1B Worker

Like most employees in the United States, H-1B workers are typically at-will employees. That said, however, if an H-1B worker is terminated prior to the conclusion of his or her "authorized period of stay," with some exceptions, the sponsoring employer has an affirmative duty under the regulations to effectuate a bona fide termination of the H-1B worker. Failure to do so can result in an award of back wages to the H-1B worker for the duration of the foreign national's "authorized period of stay," whether or not the H-1B worker remained employed during that period.

For there to be a "*bona fide* termination of the employment relationship" under the act, there must be (i) notice to the employee that the employment relationship has ended; (ii) notice to the USCIS that the employment relationship has ended; (iii) revocation of the LCA validity period during which the H-1B worker can remain in the United States to work for the specific employer; and, (iv) an offer of payment for transportation of the H-1B worker back to his or her last place of foreign residence. *See* 8 C.F.R. §214.2(h)(4)(iii)(E). If, however, the H-1B worker voluntarily resigns, transfers his or her employment to another H-1B employer, or changes his or her status to another lawful visa classification, the travel-reimbursement requirement is nullified.

In another recent Wage and Hour case, the ALJ awarded more than $150,000 in back wages, interest, and legal fees to a *single* H-1B worker who was wrongfully terminated by his California-based employer after only four months of H-1B employment. The basis for such a sizeable award was, in part, punitive, as the judge found that the employer had unlawfully retaliated against the H-1B worker upon learning that he filed a grievance with the DOL's Wage and Hour Division. The H-1B worker alleged in his grievance that he had been unlawfully "benched" and unpaid for much of his first four months of employment. Because the employer was unable to evidence proper notification to the USCIS of the H-1B worker's termination and, further, was unable to demonstrate it had offered to reimburse the terminated H-1B worker the cost of his travel back to his last residence abroad, the judge found the employer failed to effectuate a bona fide termination. As such, the judge ordered the employer to pay the H-1B worker the $60,000 yearly salary listed in the LCA for the remaining two years and eight months of the H-1B worker's "authorized period of stay" in the LCA.

Conclusion

In the wake of these somewhat harsh rulings, it may be prudent for your clients to reexamine the regulatory obligations placed on them as an H-1B sponsoring employer. The decisions discussed above are clear examples of how not only willful violations, but even careless mistakes (e.g., failing to notify the USCIS of an H-1B worker's termination), can result in the award of back pay to the H-1B worker, along with substantial fines to a sponsoring employer and possibly even debarment from the H-1B program.

When one considers how pro-enforcement the USCIS and the DOL have become under the Obama administration, with a drastic increase in H-1B audits and Wage and Hour Division investigations (often incident to the termination of an H-1B employee), one can predict that back-wage awards and penalties will not only become more commonplace but will also continue to get larger and more punitive in nature. What is more important, many of these issues can be avoided through the implementation of an immigration-compliance program coupled with open communication with qualified immigration counsel regarding decisions that affect foreign-national employees—especially when an employer is contemplating hiring or terminating an H-1B worker.

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