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EMPLOYER NOT ALWAYS OBLIGATED TO PAY RETURN TRANSPORTATION COST OF TERMINATED H-1B WORKER

Posted on March 21, 2017 by Cyrus Mehta

In *Vinayagam v. Cronous Solutions, Inc*., ARB Case No. 15-045, ALJ Case No. 2013-LCA-029 (ARB Feb. 14, 2017) the Administrative Review Board held that an employer's failure to pay return transportation costs home of a terminated H-1B employee was not fatal when the worker did not return to her home country on her own volition.

When filing a Labor Condition Application (LCA) - a necessary first step in the filing of an H-1B visa petition - the employer attests that it will pay the required wage to the H-1B nonimmigrant worker. See INA 212(n)(1)(A); 20 CFR 655.731(a). The required wage must be paid until there is a bona fide termination of the employment relationship. In order to demonstrate such a bona fide termination of the employment relationship, the ARB held in *Amtel Group of Fla., Inc. v. Yongmahapakorn, ARB No. 04-087,* ALJ No. 2004-LCA-0006 (ARB Sept. 29, 2006). that an employer must meet three requirements to effectuate a bona termination of the relationship under 20 CFR 655.731(c)(7)(ii). First, the employer must expressly terminate the employment relationship with the H-1B worker. Second, the employer must notify USCIS of the termination so that the USCIS can revoke its prior approval of the employer's H-1B petition under 8 CFR 214.2(h)(11). Third, the employer must provide the H-1B worker with payment of return transportation home under INA 214(c)(5)(A) and 8 CFR 214.2(h)(4)(iii)(E). If the employer otherwise explicitly terminates the employment relationship, but fails to follow the second and third steps, the employer may still be obligated to pay the required wage for failure to effectuate a bona fide termination. Although in the real world the employer must only undertake step one, in the case of an H-1B worker, the employer

must also take steps two and three that have been mandated by the Department of Labor (DOL).

It is the third prong that has been the subject of much interpretation. Must an employer still offer to pay the return transportation costs even if the worker chooses to remain in the US on his or her own volition? In *Vinayagam v. Cronous Solutions*, the terminated H-1B worker did not leave the United States on her own volition and unsuccessfully applied for H-1B status through another employer. Prior to this unsuccessful attempt, the worker sought to apply for B-2 visa status, which was also denied. The employer under this scenario was not required to pay the return transportation costs home, and thus was not liable to continue to pay the required wage after the employer fulfilled steps one and two. This decision follows a line of other ARB decisions where the employer was not obligated to pay the return transportation costs where the H-1B worker had married a US citizen and adjusted her status to permanent residence or where the worker found an employer to file another H-1B petition and thus extend H-1B status through that employer or where the H-1B worker outright rejected the reimbursement. If the H-1B worker voluntarily terminates employment prior to the expiration of the authorized H-1B stay or is dismissed when the authorized stay has ended, the employer is not liable for return transportation costs. See *Toia v. Gardner Family Care Corp*., 2007-LCA-6 (April 25, 2008).

It is intriguing that the Department of Labor has latched on to USCIS rules for requiring a bona fide termination of employment. The employer's obligation to pay the wage is an obligation under DOL rules, but in determining the employer's ending of that obligation, the DOL has relied on the rules of United States Citizenship and Immigration Services (USCIS), which includes notification to the USCIS that results in the revocation of the H-1B petition (8 CFR 214.2(h)(11) and payment of the return transportation home obligation (8 CFR 214.2(h)(4)(iii)(E). Naomi Schorr has astutely observed that when one agency engages in interpreting and enforcing the rules of another agency, courts will not defer to that agency's interpretation. See Schorr, *It Makes You Want To Scream: Overstepping Bounds: The Department of Labor and the Bona Fide Termination of H-1B Employees*, Bender's Immigration Bulletin, Oct. 15, 2014. Indeed, in a 1999 exchange of correspondence between a private attorney and the INS, the response was that the "Service views the return transportation provision as a private contractual issue between the petitioner and the

beneficiary. As a result, the Service has not developed any policies with respect to the questions that you have raised." See Letter from Thomas W. Simmons, Chief, INS Business and Trade Services Branch to Robert A. Klipstein (May 20, 1999), *reprinted in 70 Interpreter Releases* 1140 (July 26, 1999).

While the USCIS does not give this rule any teeth, the DOL has chosen to enforce it against an employer if the employer cannot demonstrate that the H-1B worker chose to stay in the US on his or her own volition. In fact, notwithstanding *Vinayagam v. Cronous Solutions*, unless it is clearly indicated that the worker chooses to remain in the US, it would be prudent for the employer to give the benefit of doubt to the H-1B worker and offer the return transportation costs home. These cases have shown that the employer must always go through protracted litigation to establish that the H-1B worker voluntarily stayed on in the US in order to escape back wage liability. Moreover, the burden is on the employer to demonstrate whether it had a duty to provide the return transportation costs and whether it had satisfied that requirement. See *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039 (ARB Mar. 30, 2007).

The High Skilled Worker Rule that took effect on January 18, 2017 provides for a 60 day grace period to H-1B as well as other nonimmigrant workers holding E-1, E-2, E-3, H-1B1, L-1 or TN status. See 8 CFR 214.1(2). The 60 day grace period is indeed a salutary feature. Up until the rule took effect, whenever a worker in nonimmigrant status got terminated, they were immediately rendered to be in violation of status. Derivative family members, whose fortunes were attached to the principal's, would also be rendered out of status upon the principal falling out status. Thus, the 60 day grace period not only gives the worker more time to leave the United States, but it also provides a window of opportunity to find another employer who can file an extension or change of status within the 60 day period. Similarly, the worker could also potentially change to some other status on his or her own, such as to F-1, after enrolling in a school.

The new 60 day grace period may incentivize the H-1B worker to remain in the US, and thus enable an employer to escape paying the return transportation costs. On other hand, it should not be viewed as a green light to never offer the return transportation costs home. While the 60 day grace period does allow a terminated worker some cushion in finding another employer in the US, it also provides a cushion for the worker to leave the United States less abruptly if

terminated prior . In the latter situation, the employer's failure to offer return transportation costs home could still render the employer liable for back wages as a result of not effectuating a bona fide termination.