
Memorandum

Date: November 20, 1995

To: Director of Adjudication, PTLD—Sharon S. Green

From: Associate General Counsel—Lowell Dodge

Subject: Vietnamese Claims (Claim of Mr. Gia Huu Pham and related cases)—B-270008-O.M.

This is in response to your request for guidance in your memorandum to the General Counsel dated September 29, 1995, concerning several pay claims of former foreign national employees arising from their service to the United States in the former Republic of Vietnam in 1975. In many cases, these former employees were unable to leave the Socialist Republic of Vietnam until relatively recently and have been lawfully admitted to the United States under the Department of State's Orderly Departure Program. They now seek final compensation, usually for one or two pay periods in April 1975, severance pay, or other benefits.

In one case you present, copies of official National Archives and Records Administration records show that Mr. Gia Huu Pham was employed by the United States government from November 13, 1961, until the Navy separated him by a reduction-in-force action, effective April 30, 1975. However, while he was at work on April 28, 1975, acting under the orders of his last supervisor, Mr. John F. Smekal, he was struck by a stray bullet and had to be hospitalized. By the time he recovered, the People's Democratic Republic of Vietnam (now the Socialist Republic of Vietnam) had taken control, and he alleges that he did not receive compensation for the last pay period and severance pay to which he was then legally entitled. After imprisonment and other difficulties, he was lawfully admitted to the United States under the Department of State's Orderly Departure Program in October 1991.

Mr. Pham filed his claim with the agency by letter dated February 1, 1992. The agency denied the claim on the ground it was barred by the applicable statute of limitations.

Summary

As a general rule, claims arising from the evacuation of Vietnam in 1975 are barred under the 6-year statute of limitations in 31 U.S.C. § 3702(b). One exception to this rule is established by law.¹ To meet the exception, an employee must show: (1) that a payment that would otherwise have been transmitted to the employee was withheld under 31 C.F.R. § 211.1 (1994); and (2) that either (a) the payment was placed in a "special deposit account" and held in trust for the employee (31 U.S.C. § 3329(b)(4)), or (b) if the alternative procedures described in the Treasury Financial Manual (Volume 1, Section 4-2085.10) were followed, the amount of the payment has been established as a liability on the books of the employing agency for the benefit of the employee. The requirements for meeting this exception are to be strictly construed. Only if these requirements are met may the employing agency entertain such a claim.

Explanation

Title 31 U.S.C. § 3329(a) (1988) requires the Secretary of the Treasury to prohibit any checks which are, or will be drawn on public money from being sent to an individual payee in a foreign country if the Secretary determines that the postal, transportation, banking, or other conditions in that country do not reasonably ensure that the payee will receive the check and be able to negotiate it for full value.² The statute provides a mechanism to accomplish its objectives. See 31 U.S.C. § 3329(b)(3) (1988). It also authorizes the Secretary of the Treasury to "otherwise direct," that is, to establish alternate mechanisms. This the Secretary has done. It is the alternate method that is relevant here. We proceed to briefly describe it.

Under 31 U.S.C. § 3329(b)(3) (1988) the Secretary of the Treasury has promulgated regulations which "otherwise direct" the drawer i.e., a government department or agency, as to what to do with money owed to payees in restricted foreign countries. By Treasury Department Circular No. 655, revised November 14, 1964, the Secretary of the Treasury authorized the second method, and the first method was superseded. Our decision, Xie Qianhao, 70 Comp. Gen. 612, 614 (1991) describes the alternate method as follows.

"In lieu of writing checks payable to individuals in the restricted countries designated by the Secretary of the

¹31 U.S.C. § 3329 (1988).

²The Secretary added Vietnam to the restricted countries list on April 15, 1976. See 41 Fed. Reg. 15846-15847, codified at 31 C.F.R. § 211.1(a) (1994).

Treasury (and set forth at 31 C.F.R. § 211) and depositing them in the special deposit trust fund authorized by 31 U.S.C. § 3329, the Treasury Department has adopted an alternative procedure that is less burdensome administratively but which accomplishes the same objective as the statute. Under the alternative procedure, which is set forth in section 2085 of Part 4 of Volume 1 of the Treasury Fiscal Requirements Manual for Guidance of Departments and Agencies, agencies are directed not to draw checks or warrants intended for deliveries in restricted countries:

"In place of drawing a check or warrant which would be withheld under 31 C.F.R. § 211, the drawer agency will withhold payment and will establish the liability on its books.

"Section 2085.20 further provides that claims for 'proceeds withheld should be processed by the administrative agency responsible for originally authorizing issuance of those proceeds.' Upon approval of a claim for withheld proceeds, agencies are directed to pay the claim by issuing a check and decreasing the respective liability on the agency's books. Section 2085.20a."

Accordingly, the subject claims are barred under 31 U.S.C. § 3702(b) unless the employing agency has withheld payment and established a liability on its books, as prescribed by the Secretary of the Treasury, currently, I Treasury Financial Manual § 4-2085 (1988).

Thus, under Xie Qianhao, 70 Comp. Gen. 612 (1991), if an agency has withheld a payment, e.g., compensation or severance pay, otherwise due to a former employee in a restricted country, and has established that liability on its books, payment may be made to that former employee. Otherwise, the claim is subject to the 6-year statute of limitations in 31 U.S.C. § 3702(b) (1988). In this regard, we emphasize the necessity of meeting the foregoing stated conditions.³

As to any claim filed with our Office, we note that our regulations require that the agency from which the claim originated shall initially adjudicate the claim. See 4 C.F.R. § 31.4 (1995), and see also I Treasury Financial Manual § 4-2085.20 (Claims for restricted proceeds shall be processed by the agency responsible for originally

³Those conditions were not met in Nguyen Thi Hao, B-253096.3, Aug. 11, 1995, and My Anh Company, 73 Comp. Gen. 111 (1994), and the claims there were denied. Those cases are thus distinguishable from Xie Qianhao, supra.

authorizing issuance of those proceeds). Thus, in regard to the Vietnamese claims which arose in 1975, you are instructed to remand those claims which have not been finally adjudicated by the responsible agencies to those agencies for initial adjudications. The employing agency should be advised that it has the initial duty to determine whether it withheld payment and whether it established a liability its books in each case. Unless it did so, the claim is barred by 31 U.S.C. § 3702(b). Obviously, only if it is determined that the claim is not barred can questions of the legitimacy of the claim or the adequacy of documentation for the claim be reached. In regard to burden of proof issues, see British, Dutch and Italian Claims for Fuel and Services for U.S. Navy Vessels, 67 Comp. Gen. 52 (1987) and 4 C.F.R. § 31.7 (1995).

Insofar as B-254067-O.M., December 2, 1993, and Phan Manh Luong, B-244976-O.M., Oct. 17, 1991, may be inconsistent with this memorandum, they are hereby modified.

B-270008-O.M.

November 20, 1995

DIGEST

Claims arising from the evacuation of Vietnam in 1975 are barred under the 6-year statute of limitations in 31 U.S.C. § 3702(b) unless they meet an exception to this rule as established by law. To qualify for the exception, claimants, including former Vietnamese employees, must clearly meet the standard set forth both in 31 U.S.C. § 3329 (1988), and in the regulations issued under this statute by the Secretary of the Treasury found in 31 C.F.R. Part 211 (1994) and I Treasury Financial Manual (TFM) § 4-2085 (1988). To meet the statutory exception, an employee must show: (1) that a payment that would otherwise have been transmitted to the employee was withheld under 31 C.F.R. § 211.1 (1994); and (2) that either (a) the payment was placed in a "special deposit account" and held in trust for the employee, if the statutory provision (31 U.S.C. § 3329(b)(4)) is literally followed, or (b) if the provisions of the Treasury Financial Manual (Volume I, Section 2085.10) are applied, the amount of the payment has been established as a liability on the books of the employing agency for the benefit of the employee. The requirements for meeting this exception are to be strictly construed. Only if these requirements are met may the employing agency entertain such a claim. Insofar as B-254067-O.M., December 2, 1993, and Phan Manh Luong, B-244976-O.M., October 17, 1991, may be inconsistent with this memorandum, they are hereby modified.