

**U.S. Department of Labor**

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**Issue Date: 21 January 2003**

**CASE NO.: 2002-LCA-00024**

**IN THE MATTER OF**

**ADMINISTRATOR, WAGE AND HOUR DIVISION,  
Prosecuting Party**

**v.**

**NOVINVEST, LLC,  
Respondent**

**APPEARANCES:**

**THOMAS C. SHANAHAN, ESQ.  
For the Administrator**

**JAY SOLOMON, ESQ.  
For the Respondent**

**BEFORE: LARRY W. PRICE  
Administrative Law Judge**

**DECISION AND ORDER**

This proceeding arises under the Immigration and Nationality Act, as amended by the Immigration Act of 1990 and amended in 1991, 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n) and 1184(c) (hereinafter "the Act") and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I. Under the Act, an employer may hire workers from "specialty occupations" to work in the United States for prescribed periods of time. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. These workers are issued H-1B visas by the Department of State upon approval by the Immigration and Naturalization Service ("INS"). 20 C.F.R. § 655.705(b). An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the United States Department of Labor ("DOL") by filing a Labor Condition Agreement ("LCA") before the worker is given an H-1B visa. 8 U.S.C. § 1182(n). An LCA filed by an employer must set forth, inter alia, the wage rate and working conditions for the H-1B employee. 8 U.S.C. § 1182(n)(1)(D);

20 C.F.R. §§ 655.731 and 655.732. Upon certification of the LCA by the DOL, the employer is required to pay the wage and implement the working conditions set forth in the LCA. 8 U.S.C. § 1182(n)(2). In this case, the Administrator, Wage and Hour Division (“Prosecuting Party” or “Administrator”) alleges that Respondent owes back wages to four men employed to work as computer specialists in Atlanta, Georgia. For the reasons stated below, I find Respondent to be liable for back wages in the amount of \$57,860.27.

## **STATEMENT OF THE CASE**

On August 6, 2001, Philip Peshin, an H-1B nonimmigrant worker from Russia, filed a complaint with the DOL’s Wage and Hour Division (“WHD”), alleging H-1B violations by Respondent Novinvest. Peshin’s complaint alleged that he had arrived in the United States prepared to work but instead was benched by Novinvest. According to Peshin’s complaint, Novinvest never placed him on a job and refused to pay him, although he was not terminated. Thomasenia Shepherd, a WHD investigator, then held a conference with Ed Hyken, the president of Novinvest, on September 21, 2001. After investigating Peshin’s claims, the Administrator concluded that Novinvest had committed potential violations within the twelve-month window.

After the initial meeting with Hyken, Shepherd asked for documentation on the dates that his other H-1B workers had come into the country and the dates that Novinvest began paying them. Hyken emailed three other H-1B employees and asked them to confirm a request for unpaid leave of absence for previous dates during which they had not been working. On November 29, 2001, the WHD investigator, having concluded that all four employees had been benched in violation of the Act, calculated the amount of back wages owed by Novinvest to each person. In addition, the other three H-1B employees later filed complaints with WHD.

On July 29, 2002, WHD informed Hyken that through its investigation, it had concluded that Novinvest had violated the Act by failing to pay wages as required. Within fifteen days of the notice, Hyken timely requested an administrative hearing to review the Administrator’s determination. The case was referred to me, and I conducted a hearing in this matter on October 29, 2002, in Atlanta, Georgia. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 20 C.F.R. Part 18. At the hearing, I admitted Joint Exhibit (“JX”) 1, Prosecution Exhibits (“PX”) 1-33 and Respondent’s Exhibits (“RX”) 1 and 2. The record was held open after the hearing to allow the parties to submit closing briefs. Both parties submitted briefs by January 1, 2003, and the record was closed. On January 15, 2003, the record was reopened to accept Respondent’s response to Administrator’s post-hearing brief, and the record is now closed.

## STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. Novinvest, LLC (“Respondent”) is a Georgia corporation doing business at 6 West Druid Hills Drive, Atlanta, Georgia 31126.
2. Respondent is, or was at all times relevant to this action, engaged in the business of computer consulting.
3. Respondent filed an “LCA” or “Labor Condition Application for H-1B Nonimmigrants” on September 7, 1999. (PX 1). The LCA seeks ten programmer analysts for the period November 1999 through November 2002 for the Atlanta area and another ten programmer analysts for the same period in the San Francisco area. For the Atlanta area, the LCA lists a pay rate of \$35,872 and a prevailing wage of \$37,759. For the San Francisco area, the LCA lists a pay rate of \$45,128 and a prevailing wage of \$47,503. The LCA was certified on or about September 11, 1999, ETA Case No. 04344842.
4. Respondent filed an “LCA” or “Labor Condition Application for H-1B Nonimmigrants” on September 25, 2000. (PX 2). The LCA seeks fifteen programmer analysts for the Atlanta area. The LCA lists a pay rate of \$37,960 and a prevailing wage of \$39,957. The LCA was certified on or about October 6, 2000, ETA Case No. 04365259.
5. The Administrator initiated an investigation of Respondent as the result of a written complaint from H-1B Nonimmigrant Worker Philip Peshin (“Peshin”), received by the Administrator on or about August 6, 2001. The Administrator properly concluded that there were potential violations within the twelve-month window. (PX 3).
6. Peshin arrived in the United States on February 22, 2001. (PX 3, 4). He signed an employment agreement with Respondent the next day, February 23, 2001. (PX 5).
7. Alex Koloskov arrived in the United States on March 12, 2001. (PX 6).
8. Igor Politykin arrived in the United States on March 30, 2000. (PX 8).
9. Igor Viazovoi arrived in the United States on April 17, 2001. (PX 11).
10. The prevailing wage for Peshin’s position was \$39,957 per year, or \$3,329.75 per calendar month. Peshin received no pay from Respondent for at least the period of March 22, 2001, through May 22, 2001.

11. Koloskov received no pay from Respondent for at least the periods March 19, 2001, through May 30, 2001, and October 25, 2001, through February 14, 2002.
12. The prevailing wage for Politykin's position was \$37,759 per year, or \$3,146.58 per calendar month until October 1, 2000.
13. Viazovoi received no pay from Respondent for the period May 1, 2001, through June 30, 2001, and November 2, 2001, through December 6, 2001.
14. WHD's investigator held an initial conference with Respondent on or about September 20, 2001, where she met with Ed Hyken ("Hyken") of Novinvest.
15. There was no work available for Peshin upon his arrival in the United States.
16. Hyken sent an email to Koloskov, on or about September 25, 2001, which stated as follows:

hi alex, we are cleaning up our files, we need a confirmation from you that you requested to go on unpaid leave starting on 3/30/01 until further notice, pls reply to this email with that information, sincerely, ed

(PX 12).

17. Hyken also sent an email in late September 2001 to Politykin, which stated as follows:

hi igor, we need to receive an email from you confirming that you requested to go on leave of absence without pay effective 9/14/01, please copy and paste that sentence in your reply email, sincerely, ed

(PX 14).

18. Hyken also sent an email to Viazovoi, on or about September 25, 2001, which stated as follows:

hi igor, we are cleaning up our files, we need a confirmation from you that you requested to go on unpaid leave starting on 4/30/01 until further notice, pls reply to this email with that information, sincerely, ed

(PX 15).

19. Respondent produced to WHD emails from Koloskov and Viazovoi and claimed that the emails constitute bona fide voluntary requests for leave. (PX 16).
20. As a condition of employment, Respondent demanded that Peshin, Koloskov, Politykin and Viazovoi sign promissory notes and/or agreements agreeing to pay \$5,000 to Respondent to cover costs allegedly incurred by Respondent.
21. WHD's calculations of unpaid wages allow credit to the Respondent for certain expenses, attributed to the H-1B workers in the amounts set forth below:

Peshin:	\$3,175.90
Koloskov:	\$1,800
Politykin:	\$0
Viazovoi:	\$400
22. The H-1B workers experienced periods of nonproductive status.
23. Respondent did not notify the INS that the H-1B workers in this case terminated employment before or during the periods of nonproductive status.

## ISSUES

The Prosecuting Party and the Respondent each filed pre-hearing submissions and post-hearing briefs. The parties raised the following issues during the course of the hearing and in their briefs.

1. Whether Respondent met its wage obligations to each H-1B worker in nonproductive status as required by 20 C.F.R. § 655.731(c)(7)(i).
2. If Respondent did not pay wages to each of its H-1B workers during periods of nonproductive status, whether Respondent is entitled to an exception to its wage obligations, as set forth in 20 C.F.R. § 655.731(c)(7)(ii).
3. Whether Respondent violated its wage obligations under the Act and 20 C.F.R. § 755.731 by charging each H-1B worker a \$5,000 early termination penalty to cover what Respondent characterized as costs associated with hiring, processing and training each H-1B worker.
4. The amount of back wages to which each H-1B worker is entitled.

## FINDINGS OF FACT

In addition to the facts stipulated above, I make these additional findings of fact based upon the testimony of witnesses at the hearing and the evidence submitted by both parties:

1. I found H-1B nonimmigrant workers Alex Kosolov, Igor Viazovoi and Igor Politykin to be credible witnesses and have weighed their testimony accordingly.
2. Edward Hyken is the president and controlling member of Novinvest, LLC. (Tr. 17). Hyken has a college degree in computer science and a graduate degree in finance and marketing. (Tr. 21). He formerly worked for Anderson Consulting and Lehman Brothers. (Tr. 21).
3. Novinvest places software developers at clients' sites in exchange for a fee. (Tr. 20). Novinvest provides its H-1B employees with an employee handbook which includes an "employee employment agreement" which sets forth the company policies. (Tr. 23-24; PX 5). The employee handbook does not specify whether or not employees are required to sign the employment agreement. (Tr. 23-24; PX 5).
4. According to Novinvest policy, if an employee leaves the company prior to completing one year of service, he or she owes the company a prorated portion of \$5,000. (Tr. 45; PX 5, p. 5). This figure is Novinvest's estimate of the investment expended to hire, process and train an employee and is treated as an interest-free loan by the company. (Tr. 45, 53; PX 5, p. 5). None of the employees in question ever received the \$5,000. (Tr. 72). Hyken also never produced receipts for the \$5,000. (Tr. 74).
5. Novinvest sponsored Philip Peshin for the H-1B visa, and he came to the United States to work for Novinvest. Novinvest paid for his plane ticket. (Tr. 25; PX 3). Peshin was represented as an employee in a April 2001 letter written by a human resources manager at Novinvest. (Tr. 21-22, 31-32; PX 32). Although Peshin left the Atlanta area at some point after his arrival in 2001, Hyken was still able to locate him and send him checks for food and gasoline on April 25, 2001. (Tr. 28; PX 33). Peshin never made a written request for leave, and Hyken never sent a termination letter to Peshin. (Tr. 32-33).
6. On May 22, 2001, Peshin resigned from Novinvest after he found another employer who would sponsor his H-1B visa. (PX 3). On August 6, 2001, WHD received an H-1B violation complaint from Peshin. (PX 3). According to the complaint, when Peshin arrived in the United States, he was not placed at a client site. (PX 3). Instead, he made a resume, passed some programmer qualification tests and became certified as a Sun Java developer.(PX 3). When Peshin asked Hyken whether he would be terminated, Hyken told him to keep waiting for an assignment, although

Hyken never paid him. (PX 3). After Peshin left Novinvest, he received a bill with expenses that he owed the company. (PX 3). Novinvest then filed a civil action against Peshin to recover these expenses. (PX 3).

7. On September 12, 2001, Novinvest obtained a judgment against Peshin in the amount of \$8,789.45, which included the \$5,000 investment fee and other cash advances from Novinvest to Peshin. (PX 21). Peshin has since returned to Russia. (Tr. 83).
8. Thomasenia Shepherd from WHD began investigating Novinvest for potential H-1B violations after Peshin filed his complaint, which alleged that he had resigned after Novinvest failed to place him with any contractors during the period between February 22, 2001, and May 22, 2001. (Tr. 56-57; PX 3). During the investigation, Hyken explained to Shepherd that Peshin had special skills which made it difficult for him to be placed with just any client. (Tr. 58). Hyken also told Shepherd that Peshin had taken a month to spend time with his wife and had been sick for a week. (Tr. 58, 61; PX 16). Hyken did not have any documentation indicating that Peshin had requested unpaid leave for that period of time. (Tr. 59).
9. Novinvest also employed Koloskov, Politykin and Viazovoi. (Tr. 34). After Shepherd asked Hyken to provide written confirmation of these employees' requests for unpaid leave, Hyken emailed Koloskov, Politykin and Viazovoi and asked them to confirm that they had requested unpaid leave on previous dates during which they were not working. (Tr. 35-44, 76; PX 12, 14, 15). Hyken then faxed the emails and other documentation to Shepherd. (PX 16). Hyken never told these workers the reason for his email request. (Tr. 44). The emails received by WHD had been edited, and Hyken did not include Politykin's email with his documentation. (PX 12, 14, 15, 16, 18).
10. Koloskov came to the United States as an H-1B worker for Novinvest. (Tr. 85-86). Koloskov purchased his own plane ticket, and when he arrived in the United States, he had about \$200. (Tr. 86). About four days after Koloskov's arrival, Hyken gave him some money. (Tr. 87). Although Koloskov was ready to work two days after his arrival, he was not placed with a contractor until about four months later. (Tr. 87-88). In the meantime, Hyken told Koloskov to work on his resume and improve his computer skills. (Tr. 88).
11. Koloskov did not ask Hyken to put him on unpaid leave from March 2001 until his contract with Extendia, a Novinvest client, began. (Tr. 89; PX 6). Hyken never suggested to Koloskov how he could earn money during this initial benching period. (Tr. 90). Hyken never told Koloskov that he might have to terminate him because there was no work available. (Tr. 90).

12. Koloskov also never asked Hyken to put him on unpaid leave when his contract with Extendia ended a few months later. (Tr. 90, 91; PX 6). Hyken never told Koloskov that he might have to terminate him because there was no work available, but he did tell Koloskov to send his resume out and try to find another computer job in which he could continue to work for Novinvest. (Tr. 91-92). Hyken also suggested that Koloskov try to find a job at Kroger. (Tr. 91; PX 6).
13. On September 25, 2001, Koloskov received an email from Hyken asking him to confirm that he went on unpaid leave from March 30, 2001, until further notice. (Tr. 92-93; PX 6; PX 12). Although Koloskov had not asked to go on unpaid leave at the time and did not understand what Hyken was asking him to do, he wrote the email because he trusted Hyken and did not think he should refuse to do what his boss asked. (Tr. 93-94; PX 6; PX 17). Koloskov's reply to the email read: "I confirm that I requested to go on unpaid leave starting on 3/30/01 until further notice." (PX 17).
14. Koloskov did not request to go on voluntary unpaid leave effective October 25, 2001, but because he was feeling pressured to do so, he did sign a document to that effect sometime in December 2001. (Tr. 94-95; PX 6; RX 1). Koloskov testified he had no reason to ask for leave at that time but did ask Hyken about money because he had not been paid since his contract with Extendia ended. (Tr. 95). In addition, on November 12, 2001, Hyken had refused to pay Koloskov's health insurance. (PX 6).
15. Koloskov resigned from Novinvest in February 2002 after finding another job. (Tr. 95, 98; PX 6). He looked for another job because he had not been paid for several months by Novinvest nor received any health insurance, and he had housing, food and family expenses. (Tr. 95; PX 6). In a document dated February 22, 2002, Koloskov filed a complaint against Novinvest with WHD. (PX 6). Koloskov prepared this complaint himself and did not copy it from someone else. (Tr. 98).
16. Hyken sued Koloskov for the balance of the \$5,000 investment fee included in the employment contract. (Tr. 95; PX 6; PX 22). On March 15, 2002, a judgment was entered against Koloskov in the amount of \$2,347.52. (Tr. 97). Koloskov has repaid \$1,200 of this amount to date. (Tr. 97-98).
17. Viazovoi came to the United States as an H-1B worker for Novinvest. (Tr. 104; PX 11). He purchased his plane ticket to America and arrived with \$1,000. (Tr. 104). Novinvest provided Viazovoi with a place to stay. (Tr. 104; PX 11). He was ready to work immediately but did not get his first project until two months after he arrived. (Tr. 104-05; PX 11). Hyken told Viazovoi to find a job on his own by sending electronic resumes to other companies which could then contract with Novinvest for computer projects. (Tr. 105-06; PX 11).

18. Viazovoi worked on a project for Extendia from July 5, 2001 until October 25, 2001. (Tr. 107; PX 11). Novinvest did not give Viazovoi any more projects after this job ended. (Tr. 107). Hyken told Viazovoi to keep searching for jobs on the internet and suggested that he work at Kroger or at a gas station in the meantime. (Tr. 107; PX 11). Novinvest also discontinued Viazovoi's health insurance. (PX 11).
19. Viazovoi did not ask Hyken to put him on unpaid leave in late October 2001. (Tr. 107, 109). Hyken never said he would terminate Viazovoi, nor did Viazovoi ever ask Hyken not to terminate him. (Tr. 108, 110).
20. Although Viazovoi had not requested to go on leave at the time of April 30, 2001, he did confirm a request for unpaid leave in response to an email from Hyken on September 26, 2001.<sup>1</sup> (Tr. 108-09; PX 11; PX 15). Viazovoi was confused about the term "until further notice" in the email but trusted Hyken. (Tr. 109). Although Viazovoi did not feel comfortable writing the email, he sent it because he felt pressured and was afraid that he could be fired. (Tr. 108-09, 114-15). Viazovoi's email read in part, "ok about unpaid leave starting on 4/30/01 until further notice." (PX 15).
21. As per the terms of the Novinvest employment agreement regarding the \$5,000 investment fee, Novinvest obtained a judgment against Viazovoi in the amount of \$1,666.66<sup>2</sup> on September 23, 2002. (Tr. 110-11; PX 11). Viazovoi has repaid about \$50 or \$55<sup>3</sup> of this sum to date. (Tr. 111).
22. Viazovoi wrote the complaint that he filed with WHD, which was dated April 23, 2002. (Tr. 111-12; PX 11).
23. Politykin came to the United States as an H-1B worker for Novinvest. (Tr. 117; PX 8). Although he paid for his airfare, Novinvest later reimbursed him for his plane ticket. (Tr. 117). He arrived in the United States with \$200. (Tr. 117). Although Politykin was ready to work when he arrived, he did not get his first project from Novinvest until two months later. (Tr. 118; PX 8). In the meantime, he got certified as a programmer. (Tr. 118; PX 8).
24. Hyken told Politykin to stay home during the first two months after he arrived, but he did not ask Politykin to go on unpaid leave at that time, nor did he suggest that

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<sup>1</sup> Although Viazovoi testified that he received the email on December 26, 2001, the email is dated September 26, 2001, and was stipulated to in Stipulation 18, infra.

<sup>2</sup> Although the parties stipulated to the amount of judgment, it is unclear from the record whether the amount was \$1,666.66 (as typed) or \$1,660.66 (as written out). The judgment is not included in the record, but the Administrator's brief uses the figure \$1,666 for its calculations. In the absence of any contrary evidence, I have decided to use the figure typed out in the record: \$1,666.66.

<sup>3</sup> The record is unclear as to whether Viazovoi has paid \$50.55 or \$55. (Tr. 111).

Politykin look for another H-1B employer. (Tr. 118-19). Politykin did receive some payment during this time but was not paid the salary he had been promised. (Tr. 118). Politykin later reimbursed Novinvest for all the money it paid him during this time except for his housing expenses, which totaled about \$800. (Tr. 118; PX 8).

25. Politykin began his first project on June 1, 2000, with SSBC Systems, and he worked there for one year and three months, until August 21, 2001. (Tr. 119; PX 8). Once this project was finished, Novinvest stopped paying Politykin his salary and did not give him another project but did not fire him. (Tr. 119-20). Instead, Hyken suggested Politykin go to work at Kroger. (Tr. 120; PX 8). Politykin did not ask Hyken to place him on unpaid leave so he would not lose his H-1B status. (Tr. 120).
26. In an email dated October 11, 2001, Hyken requested that Politykin go on unpaid leave retroactively effective to September 14, 2001. (Tr. 122). Although Hyken's email to Politykin implied that Politykin had asked to go on unpaid leave, Politykin had never done so. (Tr. 122, 123, 124). In his reply to the email, Politykin stated, "I confirm that in accordance with the request of Novinvest LLC, I agreed to go on leave of absence without pay effective September 14, 2001." (Tr. 122; PX 18).
27. Politykin began looking for another H-1B employer in mid-October 2001 after Novinvest refused to sponsor him for a green card, despite Hyken's earlier written promise to do so. (Tr. 127; PX 8; PX 28). Politykin resigned on November 15, 2001, when he found another employer. (Tr. 120; PX 8). He needed another job because he had to take care of his family and housing expenses. (Tr. 120).
28. Politykin prepared his complaint to WHD based on a previous complaint filed by another worker but did not seek any other assistance in writing the complaint. (Tr. 121). Politykin affirmed that, as his complaint stated, his wife had been in the office with him when Hyken told him he should go work at Kroger. (Tr. 126-27; PX 8).
29. On November 30, 2001, Politykin received a letter from Novinvest informing him that he owed the company \$3,547.50 of the \$5,000 investment fee. (PX 8). Novinvest then filed a civil action against Politykin to recover this sum. (PX 8).
30. After Politykin, Viazovoi and Koloskov filed their complaints with WHD, Shepherd investigated and discovered benching violations with regard to these employees. (Tr. 61; PX 6, 8, 11). According to Shepherd's calculations, Novinvest owes a total of \$48,846.09 in back wages for all four complainants. (Tr. 62-63; PX 29).
31. Koloskov's wage rate was \$39,957.00. (Tr. 63; PX 2). In calculating the back wages owed to him, Shepherd allowed Novinvest a one-week grace period after Koloskov's arrival in the United States. (Tr. 64). Since Koloskov was ready and willing to work but was not placed on assignment for several months after his arrival, Shepherd

concluded that he had been benched during the period between March 19, 2001, and May 30, 2001. (Tr. 64). Koloskov also was benched during the period between October 25, 2001, and February 14, 2002, his last date of employment with Novinvest. (Tr. 65).

32. According to Shepherd's calculations, Novinvest owes \$19,010.39 to Koloskov in back wages. (Tr. 66, PX 24). Shepherd gave Novinvest a credit of \$1,800 for expenses such as rent and food money but did not include the \$5,000 penalty. (Tr. 66-67; PX 24).
33. Politykin was benched when he was available for work but was not placed on assignment for the period between April 1, 2000, and May 30, 2000. (Tr. 68-69). Shepherd calculated back wages owed to Politykin for this period of time based upon the prevailing wage rate for that period according to the applicable LCA (\$37,759). (Tr. 68, 125; PX 1).
34. Once Politykin began working on June 1, 2000, his actual wage, which was \$46,152, also became his required wage because it was higher than the prevailing wage set forth in the LCA. (Tr. 69). However, although Novinvest did increase Politykin's salary to \$43,000 in October 2000, Politykin testified he was never paid \$46,000. (Tr. 125; PX 28). During the time between May 28, 2000, to June 10, 2000, Politykin was paid less than the prevailing wage, so Shepherd calculated the additional pay he should have received, which came to \$438.26. (Tr. 69-70).
35. Politykin was also benched from August 22, 2001, to November 22, 2001. (Tr. 69). On December 2, 2000, Politykin's salary increased to \$50,000, which then became his actual wage/required wage. (Tr. 69-70, 125; PX 28). According to Shepherd's calculations, the total amount of back wages due to Politykin is \$16,521.36. (Tr. 71, PX 25).
36. Peshin was benched from February 22, 2001, to May 22, 2001, when he resigned. (Tr. 71). Shepherd gave Novinvest a thirty-day grace period to account for the time when Peshin was sick and when his wife was visiting the United States. (Tr. 71-72). According to Shepherd's calculations, Novinvest owes \$3,483.60 in back wages to Peshin. (Tr. 72; PX 26). Shepherd credited Novinvest for expenses the company paid on behalf of Peshin. (Tr. 72; PX 26).
37. Viazovoi's wage rate was \$38,000. (Tr. 84). Viazovoi was benched from April 17, 2001, to April 24, 2001, and from May 1, 2001, to June 30, 2001. (Tr. 73). Shepherd gave Novinvest a two-week grace period and computed back wages only for the May-June dates listed above. (Tr. 73; PX 27). Viazovoi was benched again from November 2, 2001, to December 6, 2001, when he resigned. (Tr. 73).

38. According to Shepherd's calculations, the total amount of back wages due to Viazovoi is \$9,830.74. (Tr. 73; PX 27). Shepherd gave Novinvest a \$400 credit on expenses paid for Viazovoi's benefit. (Tr. 73; PX 27).
39. Shepherd told Hyken he could not assess the \$5,000 investment fee against the H-1B nonimmigrant workers because employees have the right to leave employment at any time they wish to do so. (Tr. 72).

## **DISCUSSION**

### **I. THE H-1B PROGRAM: OVERVIEW OF REGULATORY SCHEME**

The H-1B program is a voluntary program which allows employers to employ nonimmigrant aliens admitted to the United States under H-1B visas to fill specialized jobs not filled by U.S. workers. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n) and 1184(c). "The statute, among other things, requires that an employer pay an H-1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers." 65 Fed. Reg. 80,110 (2000). Under the INA, as amended by the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 4978 (1990), and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991), an employer wishing to employ an alien in a specialty occupation is required to file an LCA specifying the wage rates and working conditions with the DOL, which must certify the LCA in order for the INS to approve an H-1B visa for the alien. Final Rules implementing administration and enforcement of the H-1B program, found at 20 C.F.R. Part 655 Sub-parts H and I, were promulgated by the DOL effective January 19, 1995. 59 Fed. Reg. 65,646 *et seq.* (1994). Those regulations established "a system for the receipt and investigation of complaints, as well as for the imposition of fines and penalties for misrepresentation or for failure to fulfill a condition of the labor condition application." 20 C.F.R. § 655.700(a)(4)(1995).

According to the regulations, "DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application." 20 C.F.R. § 655.740(c) (1995). Upon certification of an LCA, the regulations imposed on the employer the responsibility of developing and maintaining "sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its labor condition application and the accuracy of information provided in the event that such statement or information is challenged." 20 C.F.R. § 655.710(c)(4) (1995). As originally passed, it was a violation of the Act for the employer to fail to provide notice of the LCA to its employees, to fail to meet the wage rates or working conditions set forth in the LCA, to misrepresent a material fact in the LCA or to fail to make the LCA and accompanying documentation available to the public. Employers violating the Act were subject to civil money penalties of up to \$1,000 per violation, debarment for one year and payment of back pay to the H-1B employees. See Section 305(c)(3) of IMMACT.

The next significant change in the statutory provisions governing the H-1B program were the amendments contained in the American Competitiveness and Workforce Improvement Act of 1998 (“ACWIA”), Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999 (Pub. L. No. 105-277, 112 Stat. 2681 (1998)), signed into law on October 21, 1998. The ACWIA contained substantive and procedural changes to the H-1B program, including a temporary increase in the total number of H-1B visas which may be granted (effective fiscal year 1999, beginning October 1, 1998), protection against displacement of United States workers in case of “H-1B dependent employers” and expansion of the investigative authority of the DOL absent a complaint by an employee, none of which provisions impact the case at hand. See Sections 411, 412 and 413 (b), (c), (d) and (e) of the ACWIA. Section 413(a) of the ACWIA, however, increased enforcement and penalties in the H-1B program by substantially revising Section 212(b)(2)(C) of the INA, 8 U.S.C. § 1182(n)(2)(C). The amendments to Section 212(n)(2)(C) include, among other changes, a prohibition against “benching” an H-1B employee for business reasons or due to the employee’s lack of a permit or license.<sup>4</sup> The Administrator seeks to enforce this provision against Respondent.

It is the granting of the H-1B visa which triggers the obligations of the employer to the employee, including the start of employment. See 20 C.F.R. § 655.705(c)(4) (1995) and (2002).<sup>5</sup> The pivotal language of the H-1B program was enacted as part of IMMACT and still contains the following language:

(n) Labor condition application

(1) No alien may be admitted or provided status as an H-1B nonimmigrant . . . unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as [an H-1B nonimmigrant] wages that are at least

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<sup>4</sup> This provision codified the anti-benching regulation previously found at 29 C.F.R. § 655.731(c)(5), enjoined from enforcement in National Ass’n of Manufacturers v. U.S. Dep’t of Labor, 1996 WL 420868 (D.D.C. 1996). 65 Fed. Reg. 80,169 (2000).

<sup>5</sup> That section originally provided: “The employer should not allow the nonimmigrant worker to begin work, even though a labor condition application has been certified by DOL, until INS grants the worker authorization to work in the United States for that employer.” The same language has been retained in the new version, but additional language has been added.

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application, and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

8 U.S.C. § 1182(n)(1)(A) (emphases added). The 1991 amendments added this additional direction: “The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in [this Act] within 7 days of the date of the filing of the application.” 8 U.S.C. § 1182(n)(1). In language in effect since 1990, the statute also prescribes a framework for enforcement proceedings and sanctions. 8 U.S.C. § 1182(n)(2)(A) directs the Department to

establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner’s failure to meet a condition specified in an application submitted under [this Act] or a petitioner’s misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization . . . . The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

It is that investigative process, instigated in this case after Peshin filed his complaint, which led to the letter of determination and imposition of remedies against Respondent for the violations found by the Administrator. The specific requirements of the statute and regulations raised by the alleged violations and remedies imposed by the Administrator are addressed below.

## II. APPLICABLE STANDARDS

20 C.F.R. § 655.731(c)(7)(i) (2002) specifies, “If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (*e.g.*, because of lack of assigned work), . . . the employer is required to pay the salaried employee the full pro-rata amount due . . . at the required wage for the occupation listed on the LCA.”

The C.F.R. also denotes certain circumstances in which the H-1B employer is *not* required to pay wages to the H-1B nonimmigrant worker. Thus, “If an H-1B nonimmigrant 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 a sick relative) or render the nonimmigrant unable to work (*e.g.*, maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period,” subject to certain provisions not relevant here. 20 C.F.R. § 655.731(c)(7)(ii) (2002).

A. *Benching Violations*

As noted in the Findings of Fact, I found Koloskov, Politykin and Viazovoi to be credible witnesses, and I believed their accounts of the events that occurred after they arrived in the United States. While their status as employees of Novinvest is not in question, Novinvest has alleged that Peshin was never an employee of the company because he “never engaged in productive employment.” While Novinvest argues that an employer/employee relationship between itself and Peshin never commenced, the evidence in this case contradicts Novinvest’s claims. First, Peshin signed an employment contract with Novinvest the day after he arrived in the United States. Secondly, Hyken paid Peshin’s food and gas expenses during his period of nonproductive status. While Peshin did not testify at the hearing, he was the first H-1B worker to file a complaint against Novinvest with WHD, and his complaint to the WHD contained a similar version of events to the ones each of the other three employees described at the hearing. In addition, Shepherd apparently found Peshin to be credible, because after she spoke to Peshin during her investigation, she concluded that he had been illegally benched. While I am not bound to accept the Administrator’s determinations, in this case I accept as fact the version of events related by Peshin in his complaint. Accordingly, I find that Peshin was an employee of Novinvest at the time of his period of nonproductive status.

The evidence has shown that each employee arrived ready to work, and each employee experienced a period of nonproductive status, ranging from a few weeks to a few months, upon arriving in Atlanta. During these initial periods of nonproductive status, Novinvest did not pay wages to any of the employees. According to Koloskov, Politykin and Viazovoi, they never requested voluntary unpaid leave during their periods of nonproductive status, and they only wrote emails to that effect after being requested to do so by Hyken, who was their boss. These employees were afraid to refuse Hyken’s request, because he was sponsoring their H-1B visas and they did not want to be fired and have to leave the country. Nonetheless, they never asked Hyken to terminate them. Other than Hyken’s testimony that Peshin was initially unavailable for work due to illness and traveling, there is no evidence to indicate that the periods of nonproductive status in question were due to conditions unrelated to employment. In fact, these periods of nonproductive status were *directly* related to employment, because Hyken did not have jobs for these workers when they arrived. Having accepted as credible the accounts of each of these H-1B nonimmigrant workers, I therefore find that Novinvest did “bench” each of these workers upon their arrival in the United States.

Even assuming Hyken’s testimony about Peshin’s illness and traveling activities is accurate, Shepherd gave Novinvest a one-month grace period when calculating Peshin’s back wages. Recognizing that H-1B nonimmigrant workers often have to take care of all sorts of details upon

arriving in the United States, including finding a place to live, getting a driver's license and so forth, Shepherd allotted grace periods of allowable nonproductive status to Novinvest for the other three workers as well. Other than Peshin, who left Novinvest without ever having had any productive employment with the company, the remaining three H-1B workers did eventually have projects for which they were paid. However, each of these employees experienced yet another period of nonproductive status directly related to employment when the projects ended. During these periods, the employees were once again benched without pay. Each employee eventually resigned from the company after finding other employment.

In sum, these periods of nonproductive status clearly fall within the requirements of 20 C.F.R. § 655.731(c)(7)(i) because Novinvest had no assigned work ready for any of these employees upon their respective arrivals in the United States. Novinvest has failed to produce credible evidence to support a finding that its benching of these workers fell within the "voluntary request and convenience" exceptions of 20 C.F.R. § 655.731(c)(7)(ii). Consequently, Novinvest was required to pay the required wage to each employee during these periods of nonproductive status. Novinvest therefore now owes back wages to all four employees for these periods of time.

#### *B. Periods of Benching and Back Wages Owed*

In its brief, Novinvest argues that, even if it does owe back wages for the employees, the Administrator has made some incorrect calculations based on erroneous information, both with regard to wage rates and to the dates of certain benching periods. For example, when Peshin submitted his complaint to the WHD, he included a copy of an LCA, which Shepherd then used to calculate back wages owed to Peshin based on the actual wage listed on the LCA. Novinvest argues that Peshin submitted an LCA which did not apply to him because it had been submitted and certified after Novinvest's petition for a non-immigrant worker, submitted on behalf of Peshin, had already been approved. While Novinvest's argument seems sound, nonetheless, Novinvest has already stipulated, through counsel, that the prevailing wage for Peshin's position was \$39,957 per year, or \$3,329.75 per calendar month. Novinvest never moved to amend the stipulation either during or after the hearing. Because Novinvest has stipulated to the prevailing wage contained in the LCA that Peshin included with his complaint, it cannot now raise this issue after the fact.

Novinvest also argues that the Administrator improperly calculated the back wages for Politykin by relying on an incorrect definition of the term "actual wage." As noted above, employers are required to pay their H-1B nonimmigrant workers either the actual wage or the prevailing wage listed on the LCA, whichever is greater. The regulations define actual wage as "the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question." 20 C.F.R. § 655.731(a)(1) (2002). However, if there are no other employees with similar experience and qualification, "the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer." *Id.* The Administrator has argued that Politykin's actual wage became \$46,152 in June 2002, apparently because he was being paid that much while he was working on his SSBC Systems project. The WHD investigator determined this information from looking at Politykin's check stubs and payroll register. (Tr. 69). The Administrator then used this

figure to calculate back wages owed to Politykin during his subsequent period of nonproductive status. Novinvest, on the other hand, has argued that since Politykin was not being paid while he remained in nonproductive status, his actual wage was \$0 during the time in question; as such, Novinvest reasons that if it does owe back wages, it only owes back wages based on the prevailing wage, which was less than \$46,152. This argument is self-defeating, because if Novinvest concedes that Politykin should have been paid wages during these periods of nonproductive status, it is therefore bound by the regulations to continue paying Politykin at the same rate he was being paid during his times of productive activity. I find that the Administrator's calculations are in accord with the regulations. Once Novinvest began paying Politykin a higher wage than the prevailing wage, the company had to continue paying him that wage even during periods of nonproductive status.

Novinvest further argues that it does not owe back wages to Koloskov for the period from October 25, 2001, to February 14, 2002, or to Viazovoi from November 2, 2001, to December 6, 2001. The first date of each of these periods represents the beginning of a period of nonproductive status for each of these employees. The second date of each of these periods represents the day that each employee resigned from Novinvest and went to work for another employer. According to Novinvest, both of these employees "ceased employment" on the first day of nonproductive status and were no longer employed by Novinvest. As evidence of this severing of the employer/employee relationship with respect to Koloskov and Viazovoi, Novinvest cites the fact that it stopped paying wages to the employees and cut off their health insurance during this time. However, merely failing to pay its H-1B workers does not relieve an employer of its continuing obligation to do so under the Act. During this period of time, although Novinvest did not have any work for these employees, the employees did not resign, did not ask to be terminated and were never told they would be terminated. According to 20 C.F.R. § 655.731(c)(7)(ii), "Payment need not be made if there has been a *bona fide* termination of the employment relationship." In addition, the employer must "notify the INS that the employment relationship has been terminated so the petition is cancelled." *Id.* In this case, Novinvest never terminated these employees and never notified the INS that these employees had terminated their employment with Novinvest. Novinvest's obligation to pay them the proper wages only ceased upon each employee's termination of the relationship via resignation. Therefore, I find that Novinvest is liable for back wages to Koloskov for the period from October 25, 2001, to February 14, 2002, and to Viazovoi from November 2, 2001, to December 6, 2001.

Upon review of the evidence, I find that the Administrator correctly calculated the back wages owed and correctly determined the periods of nonproductive status experienced by each worker. WHD has credited Novinvest for certain expenditures paid on behalf of the workers and has also allotted grace periods to Novinvest, such that Novinvest is not responsible for back wages for those periods of time. In accordance with the Administrator's calculations, therefore, I find that Novinvest owes Peshin \$3,483.60 in back wages, Koloskov \$19,010.39 in back wages, Politykin \$16,521.36 in back wages and Viazovoi \$9,830.74 in back wages.

C. \$5,000 “Hiring, Processing and Training” Fee/Early Termination Penalty

The Administrator has argued that, in addition to owing back wages to all four employees, Novinvest also owes Peshin, Koloskov and Viazovoi compensation for the judgment amounts assessed against them for the \$5,000 investment fee that Novinvest sought to recoup when the employees resigned after less than one year of employment. The Administrator argues that this \$5,000, purported to be a business expense used to “hire, train and process” the employees, was in fact an early termination penalty which is not authorized under the Act and its regulations. In its response to the Administrator’s post-hearing brief, Novinvest argues that the Administrator is barred from raising this issue because this violation was not alleged during the Administrator’s investigation. Since the Administrator’s letter of determination did not include a finding on the early termination penalty issue, Respondent reasons that this issue is outside the scope of the hearing under the regulations and that this issue cannot now be decided by this Court.

I. *Is the early termination penalty issue properly before this Court?*

According to the regulations governing hearings before the Office of Administrative Law Judges:

When issues not raised by the request for hearing, prehearing stipulation, or prehearing order are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence may be made on motion of any party at any time; but failure to so amend does not affect the result of the hearing of these issues.

29 C.F.R. § 18.43(c) (2001). In this case, while the early termination penalty issue was not contained in the Administrator’s letter of determination, it was addressed in both parties’ pre-hearing submissions. At that time, Respondent argued that *res judicata* applied to this issue. At the hearing, the Administrator questioned two H-1B workers about the judgment amounts assessed against them in civil actions brought by Novinvest. Novinvest stipulated to the amounts in question. In addition, counsel for Novinvest then proceeded to cross-examine one of the witnesses on that issue. (Tr. 99-100). Clearly, at that point the issue was being tried by implied consent of the parties. At the close of the evidence, the Administrator moved to conform the letter of determination to the evidence introduced at the hearing, specifically with regard to the early termination penalty issue. I then instructed the parties to brief the issue so that I could rule on it in the Decision and Order. While the Administrator addressed this issue in its post-hearing brief, Novinvest only addressed it in its post-hearing response to the Administrator’s brief.

The Administrator’s argument is two-fold: first, that it properly made a motion to conform the letter to the evidence presented, and second, that even if it had not done so, the letter of determination already included a finding that Novinvest failed to meet its wage obligations to the H-

1B workers, and the early termination penalty is encompassed within the meaning of wage obligations under the regulations. The relevant regulation does include both back wages and unauthorized deductions under the general heading of “Satisfaction of Wage Obligation.” See generally 20 C.F.R. § 655.731(c) (2002). Since making unauthorized deductions from an H-1B worker’s paycheck results in failure to pay wages as required under the regulations, and the ALJ is entitled to increase the amount of back wages due,<sup>6</sup> the Administrator reasons that the Court can therefore include the judgment amounts assessed when it makes a finding as to the amount of back wages due to the H-1B workers in this case.

Novinvest, on the other hand, argues that this issue is not properly before this Court and that there is no evidence in the record to support a finding on whether the promissory notes signed by the employees were for permissible liquidated damages or constituted an unauthorized penalty.

I find that this issue is properly before the Court for several reasons. First, I find that the parties impliedly consented to trying this issue during the hearing, thus enabling the Court to decide this issue. Secondly, I find that an unauthorized deduction, if it did occur, would constitute a failure of the employer to pay the required wages under the Act, the very issue both parties requested the Court to decide. I note too that despite Novinvest’s argument that it had no opportunity to rebut the Administrator’s allegations regarding the early termination penalty, its pre-hearing submission clearly indicates its awareness that the Administrator planned to raise the early termination penalty issue at trial, and Novinvest therefore had the opportunity to submit evidence at that time either on the basis of arguing *res judicata* or upon the merits of the argument itself. Novinvest cannot now claim that it did not have the opportunity to make an argument simply because it did not take the opportunity to do so at the time. I further note that, contrary to Novinvest’s argument, the record does contain sufficient evidence to support a finding on the early termination penalty issue. For the foregoing reasons, it is proper for me to decide the early termination penalty issue.

2. *Was the \$5,000 fee an unauthorized deduction under the Act?*

Having determined that this Court may properly decide whether the \$5,000 fee assessed against the H-1b workers in question was an authorized deduction under the Act, I will now discuss the issue itself. According to the regulations, “‘Authorized deductions,’ for purposes of the employer’s satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following sets of criteria,” of which the relevant set of criteria is the following:

- (A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee’s mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

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<sup>6</sup> See Administrator v. Yano Enter., Case No. 2001-LCA-0001 (Feb. 16, 2001).

(B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this “benefit of the employee” standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee’s housing or food are principally for the convenience or benefit of the employer (*e.g.*, employee living at worksite in “on call” status));

(C) Is not a recoupment of the employer’s business expense (*e.g.*, tools and equipment; transportation costs . . .; living expenses when the employee is traveling on the employer’s business . . .). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker’s home country shall not be considered a business expense.);

(D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and

(E) Is an amount that does not exceed the limits set for garnishment of wages . . . under which garnishment(s) may not exceed 25 percent of an employee’s disposable earnings for a workweek.

20 C.F.R. § 655.731(c)(9)(iii) (2002).

Conversely, the regulations also specify deductions which are *not* authorized under the H-1B program, including “a penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.” 20 C.F.R. § 655.731(c)(10)(i) (2002). This regulation draws a distinction between early termination penalties, which are disallowed deductions from the H-1B nonimmigrant worker’s wages, and liquidated damages, which are permitted when the above requirements are fulfilled. Thus:

(A) The employer is not permitted to require (directly or indirectly) that the nonimmigrant pay a penalty for ceasing employment with the employer prior to an agreed date. Therefore, the employer shall not make any deduction from or reduction in the payment of the required wage to collect such a penalty.

(B) The employer is permitted to receive *bona fide* liquidated damages from the H-1B nonimmigrant who ceases employment with the employer prior to an agreed date. However, the requirements of paragraph (c)(9)(iii) of this section must be fully satisfied, if such damages are to be received by the employer via deduction from or reduction in the payment of the required wage.

(C) The distinction between liquidated damages (which are permissible) and a penalty (which is prohibited) is to be made on the

basis of the applicable State law. In general, . . . *liquidated damages* are amounts which are fixed or stipulated by the parties at the inception of the contract, and which are reasonable approximations or estimates of the anticipated or actual damage caused to one party by the other party's breach of the contract. On the other hand, . . . in general, . . . penalties are amounts which (although fixed or stipulated in the contract by the parties) are not reasonable approximations or estimates of such damage.

20 C.F.R. § 655.731(c)(10)(i) (2002). Unauthorized deductions from wages are considered to be non-payment of the wages, and “in the event of an investigation, will result in back wage assessment” and possibly other penalties as well. 20 C.F.R. § 655.731(c)(11) (2002).

Essentially, Novinvest must satisfy two tests in order for the \$5,000 investment fee to be an allowable deduction. First, Novinvest must show that the employees agreed to the policy which included the fee, the fee was intended to benefit the employees, the fee was not simply used to recoup Novinvest's business expenses, the fee did not exceed the cost of the expenses covered and the fee did not exceed federal limits set on garnishment of wages. Then Novinvest must show that the fee represents liquidated damages according to Georgia state law. However, with regard to the first test, Novinvest failed to offer any evidence at hearing or make any argument in its post-hearing brief to indicate that this fee was an allowable deduction under the relevant regulations. While it is undisputed that all four employees signed the employee employment agreement which outlined the \$5,000 fee, and it might be arguable that the fee, whose purported use was to “hire, train and process” employees, was used for the benefit of the employees, no evidence has been submitted to show what expenses were covered and in what amounts. Hyken merely testified that the fee represented “the amount of time and effort that the company invests in the employee.” (Tr. 46). This fee did not include food, housing and insurance expenses which the Administrator credited to Novinvest when calculating the amount of back wages due to each employee. Hyken did not provide any specifics regarding how he arrived at the \$5,000 figure other than mentioning fees paid to foreign recruiters, long distance communications costs and time spent helping to acclimate the employee. (Tr. 53). Novinvest did not submit receipts or any other evidence documenting the cost and value of the expenditures included in the \$5,000 fee. Without the proper documentation it is difficult to determine whether this deduction was authorized or not. Accordingly, I find that the pro-rata deduction of the \$5,000 fee from the wages of these H-1B nonimmigrant workers was not authorized under the Act.

I further note that even if the deduction in question had met all the requirements of 20 C.F.R. § 655.731(iii), *infra*, there is no evidence in the record to substantiate a finding that the \$5,000 fee represented liquidated damages within the meaning of the Act, regulations and Georgia state law. According to Georgia case law, “[d]etermining whether a contract clause constitutes an enforceable liquidated damages provision or an unenforceable penalty is a question of law for the court.” Allied Informatics, Inc. v. Yeruva, 20 Ga. App. 404, 405, 555 S.E. 2d 550 (2001) (citing Lager's, LLC v. Palace Laundry, 247 Ga. App. 260, 265(3), 543 S.E. 2d 773 (2000)). In order to determine whether

the provision is enforceable, the court must decide if 1) the injury caused by the breach is difficult or impossible to accurately estimate, 2) the parties intended to provide for damages rather than a penalty, and 3) the stipulated sum is a reasonable pre-estimate of the probable loss. Yeruva, 20 Ga. App. at 405 (citing Palace Laundry, 247 Ga. App. at 265(3)). Because Novinvest did not provide any information as to how it arrived at the \$5,000 figure, Novinvest has failed to satisfy the Georgia requirements for an enforceable liquidated damages provision, which necessitates that the sum be a reasonable pre-estimate of a probable loss. In addition, there is no evidence to indicate that the parties intended for the fee to be used as a measure of damages rather than as a penalty. Finally, due to the lack of information in the record, there is no way of knowing what expenses, if any, this \$5,000 fee included, which is the only reason that the “injury” caused to Novinvest by a breach of the employment contract would be difficult or impossible to accurately estimate. Consequently, Novinvest is not entitled to compensation from the H-1B nonimmigrant workers in question, as it has not satisfied the requirements for authorized liquidated damages deductions under the Act, regulations and Georgia case law.

Accordingly, I find that Novinvest is liable for the \$5,000 unauthorized deduction from the salaries of its H-1B nonimmigrant employees. Because Novinvest obtained judgments against Peshin, Koloskov and Viazovoi to recoup the \$5,000, or portions thereof, Novinvest must now compensate each worker for the judgment amounts assessed. In addition to back wages, therefore, Novinvest owes \$5,000 to Peshin, \$2,347.52 to Koloskov and \$1,666.66<sup>7</sup> to Viazovoi.

**ORDER**

**IT IS THEREFORE ORDERED** that Respondent shall pay back wages to the following persons in the specified amounts:

Philip Peshin	\$8,483.60
Alex Koloskov	\$21,357.91
Igor Politykin	\$16,521.36
Igor Viazovoi	\$11,497.40

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**LARRY W. PRICE**  
**Administrative Law Judge**

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<sup>7</sup> See Footnote 2, infra.

**NOTICE OF APPEAL RIGHTS:** Pursuant to 20 C.F.R. § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within thirty calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.