

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 10 March 2005**

CASE NO.: 2004-LCA-00021

In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION  
Prosecuting Party

v.

PEGASUS CONSULTING GROUP, INC.  
Respondent

Appearances:

Roy D. Ruggiero, Esq.  
For Respondent

Susan B. Jacobs, Esq.  
For Prosecuting Party

Before: Janice K. Bullard  
Administrative Law Judge

**DECISION AND ORDER**

**I. JURISDICTION**

This is a proceeding pursuant to 20 C.F.R. Part § 655, et seq., promulgated to implement the H-1B provisions of the Immigration and Nationality Act (“the Act”, hereinafter), 8 U.S.C. §§ 1101(a)(15)(H)(i)(B) and 1182(n), and in accordance with 29 C.F.R. Part 18 (the Rules of Practice and Procedure of the Office of Administrative Law Judges).

Under the Act, an employer may hire nonimmigrant workers from other countries to work in the United States in “specialty occupations” for prescribed periods of time. 8 U.S.C. § 1101(a)(15)(H)(i)(B). Such 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). In order for the H-1B visa to be issued, the employer must file a Labor Condition Application (“LCA”) with the Department of Labor (“DOL”), and describe the wage rate and working conditions for the prospective employee. 8 U.S.C. § 1182(n)(1)(D); 20 C.F.R. §§ 655.731 and

732. Once DOL certifies the LCA, INS can then approve the nonimmigrant's H-1B visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. §§ 655.700 (a)(3).

## **II. PROCEDURAL HISTORY**

On February 4, 2004, the Administrator of the Wage and Hour Division ("Administrator", hereinafter) issued a Notice and Determination that Pegasus Consulting Group, Inc., ("Respondent", hereinafter) had failed to pay employee Rajnarayanan Krishnamoorthy in accordance with the H-1B visa program. The Administrator also sought civil money penalties. On February 16, 2004, Respondent filed a timely request for a hearing before the Office of Administrative Law Judges for the U.S. Department of Labor ("OALJ"). The case was assigned to me and pursuant to my Notice of Hearing issued February 25, 2004, I scheduled a hearing in the matter for March 22, 2004. Respondent requested a continuance because a material witness was out of the country, and eventually, the matter was rescheduled and a hearing was held on August 10 and 11, 2004. At the hearing, I admitted to the record a joint exhibit identified as ALJX 1; 21 Exhibits submitted by the Prosecuting Party ("the Administrator" hereinafter), identified at AX 1 through AX 21; and 14 Exhibits submitted by the Respondent, identified as EX 1 through 14. Briefs were filed by the parties on February 1, 2005.<sup>1</sup> The Administrator subsequently asked leave to file a reply brief, but I herewith deny that request.

At the hearing, extensive discussion was held regarding the probative value of certain evidence, most pointedly, that involving a prior investigation of Respondent conducted by the Administrator. A hearing on the Administrator's findings was held, and a Decision and Order was issued on November 13, 2002 by Administrative Law Judge Ralph A. Romano. I admitted the evidence regarding that investigation and its disposition for very limited purposes, and I find little probative value in the Decision and Order that on its face would suggest that I am bound by the disposition in that case. Moreover, although I may be persuaded by Judge Romano's conclusions, they are not binding on my findings in the instant matter before me, and I find no reason to go beyond the evidence presented relative to the specific charge underlying the instant matter that would support review of the record in the matter before Judge Romano.

Respondent's exhibit EX 11, which is a transcript of a conversation between two individuals, one of whom is Respondent's President, has little probative value, and although admitted, has been given limited weight.

## **III. THE PARTIES' CONTENTIONS**

Administrator contends that Respondent willfully failed to pay required wages to an employee that it had hired under the H-1B program, Rajnarayanan Krishnamoorthy. Administrator asserts that Respondent did not pay the wage required under its LCA when Mr. Krishnamoorthy worked on projects for the company, and also did not pay him when he was in nonproductive status. Administrator further argues that civil money penalties are appropriate.

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<sup>1</sup> The filing of briefs was delayed because I allowed additional time for Respondent to attempt to secure information from the Immigration and Naturalization Service through a request under the Freedom of Information Act, 5 U.S.C. 552.

Respondent contends that it complied with all requirements of the H-1B program, and moreover asserts that its employment relationship with Mr. Krishnamoorthy had been terminated, thereby eliminating the requirement to pay him. In addition, Respondent argues that the Department of Labor lacks authority to determine whether a “bona fide” termination of the employment relationship has been effected. Respondent also argues that civil money penalties are inappropriate.

#### **IV. ISSUES**

The issues presented for adjudication are:

- (1) Whether Respondent violated the Act by failing to pay wages to Rajnarayanan Krishnamoorthy during a period identified in his LCA for employment with Respondent;
- (2) If so, what is the appropriate remedy.

#### **V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

##### **A. Summary of H-1B Process**

Pursuant to the Act and its implementing regulations, certain classes of aliens who are not considered “immigrants” may work in the United States for prescribed periods of time and prescribed purposes. 8 U.S.C. § 1101(a)(15). One class of such aliens, known as “H-1B workers” are issued specific visas to work on a temporary basis in “specialty occupations”. 8 U.S.C. § 1101(a)(15)(H); 20 C.F.R. § 655.700(c)(1). A “specialty occupation” is one that requires theoretical and practical application of highly specialized knowledge and attainment of a bachelor’s degree or higher in the specialty. 8 U.S.C. § 1184(i); 20 C.F.R. § 655.715. Visas issued to such workers are limited to a six-year period of admission and are restricted in number in any fiscal year. 8 U.S.C. § 1184(g).

INS identifies and defines the occupations covered by the H-1B category and determines an individual’s qualifications. The U.S. Department of Labor (“DOL”) administers and enforces the labor conditions applications (“LCA”) relating to the alien’s employment. 20 C.F.R. § 655.705. Employers who seek to hire individuals under an H-1B visa must first file a LCA with DOL, and certification of the application is required before INS approves the visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); see also 20 C.F.R. Part 655, Subparts H and I. In the LCA, the employer must represent the number of employees to be hired, their occupational classification, the actual or required wage rate, the prevailing wage rate and the source of such wage data, the period of employment and the date of need. 20 C.F.R. §§ 655.730 -734; 8 U.S.C. § 1182(n).

After the LCA is certified, the employer submits a copy of the certified LCA to the INS along with the nonimmigrant alien’s visa petition to request H-1B classification for the worker. 20 C.F.R. § 655.700. If the visa is approved, the employer may hire the H-1B worker. Employers are required to pay H-1B workers beginning on the date when the nonimmigrant first is admitted to the United States pursuant to the LCA. 20 C.F.R. § 655.731(c)(6). Employers are

required to pay H-1B employees the required wage for both productive and nonproductive time. Employment-related nonproductive time, or “benching”, results from lack of available work or lack of the individual’s license or permit. 8 U.S.C. § 1182(n)(2)(c)(vii); 20 C.F.R. § 655.731(c)(7)(i). The employer’s duty to pay the required wage ends when a bona fide termination occurs, but if the employer rehires the “laid off” employee, a bona fide termination is not established. 20 C.F.R. § 655.731(c). An employer need not pay wages for H-1B visa workers in nonproductive status at their voluntary request or convenience. *Id.* The employer must notify the INS that it has terminated the employment relationship so that the INS may revoke approval of the H-1B visa. 8 C.F.R. § 214.2(h)(11). Employers must notify INS that the employment relationship has been terminated so that the visa petition may be canceled. 20 C.F.R. § 655.731(7)(ii); 8 C.F.R. § 214.2(h)(11); 8 C.F.R. § 214.2(h)(4)(iii)(E).

B. Summary of the Evidence

*Testimonial Evidence*

The following summary of the testimony of the witnesses who appeared at the hearing emphasizes those facts that I consider most probative and relevant to my findings. However, in reaching my findings of fact and conclusions of law, I have carefully considered all of the testimony of all of the witness, taking into account all relevant and probative evidence. I have evaluated the testimonial evidence by assessing its inherent consistency and consistency with other evidence of record. I have also made assessments of the credibility of the witnesses, considering the source of information, its reasonableness, its consistency with other evidence, and the demeanor and behavior of the witnesses.

Rajnarayanan Krishnamoorthy

Mr. Krishnamoorthy is a software consultant who in 1997 responded to a newspaper advertisement placed by Respondent for workers with his particular skills. Tr. at 31. He was hired by Respondent and began training in its office in India on January 5, 1998. Tr. at 32. He was required to pay a deposit of the equivalent of \$5,000.00 to Respondent, which he expected to be repaid after he joined Respondent’s project in the United States. *Id.* After training with Respondent, Mr. Krishnamoorthy went to the United States in October, 1998, and traveled to Boston with three colleagues. Tr. at 34. His first assignment was in New Hampshire, working on a project that Mr. Krishnamoorthy called “the Auto Desk Project”. *Id.* He worked on that project until the end of February, 1999, at pay based on \$60,000.00 per year. Tr. at 35. Mr. Krishnamoorthy was not assigned to another project, and continued to be paid through April, 1999. Tr. at 36. He received no wage payments in May, 1999, but noted that a deposit for the pay period covering May 1 through May 15, 1999 had been made to his bank account and then debited. Tr. at 37, 38. Mr. Krishnamoorthy was paid every two weeks. Tr. at 111.

Towards the end of May, 1999, Mr. Krishnamoorthy was called by Mr. Sam Zaharis<sup>2</sup>, who offered him the option of staying in the States with no additional pay, or returning to India at Respondent’s expense. Tr. at 37. Mr. Krishnamoorthy admitted that Mr. Zaharis offered him a position with Pegasus Software in India, but denied that Zaharis told him there was no longer a

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<sup>2</sup> Sam Zaharis has the position of Chief Financial Officer for Respondent.

position for him in the United States. Tr. at 71-72. He understood Zaharis to say there was no current project (Tr. at 71-72), and that if he were to stay in the States, he would not be paid unless he was put on another project, at which time he would receive back pay. Tr. at 38; 76. Mr. Zaharis advised him that he would continue to receive medical insurance coverage, which in fact he did receive. Tr. at 37, 39. Mr. Krishnamoorthy was in Nashua, New Hampshire when he talked with Mr. Zaharis. Tr. at 39. He said he talked with colleagues who had also spoken with Zaharis, and he didn't understand anyone believed he was terminated. Mr. Krishnamoorthy did not receive written notice that his employment had been terminated or that his visa had been revoked. Tr. at 39.

A few days after his conversation with Mr. Zaharis, Mr. Krishnamoorthy learned that some of his colleagues were working directly for Pegasus on an "Internal Project", which apparently he had not been invited to join. Tr. at 39-40. Mr. Krishnamoorthy then reported to Respondent's offices in New Jersey to ask if he could work on the project. Mr. Krishnamoorthy said that Mr. Zaharis told him that he could join the project but would not be paid for his work. Tr. at 40. Mr. Krishnamoorthy moved to New Jersey, and reported to Respondent's offices to work on the project, staying at Respondent's "guesthouse", which he described as two apartments in Woodbridge, New Jersey. Respondent kept the apartments for people who worked on Respondent's projects. Tr. at 40-41; 46. He believed he had Mr. Zaharis' permission to stay at the guesthouse. Tr. at 77. Simultaneously, Krishnamoorthy leased an apartment in Voorhees, New Jersey, that he shared with at least one other Pegasus employee. Tr. at 78-79. He stayed at the guesthouse to save on gas.<sup>3</sup> Tr. at 78-79. Mr. Krishnamoorthy worked on the Internal Project from June to September, full time, five days a week, and filled out time sheets recording his hours. Tr. at 115; 106.

Mr. Krishnamoorthy identified a number of individuals with whom he worked and lived during his time working on the Internal Project. Tr. at 42; 100-104. Mr. Krishnamoorthy worked on the Internal Project for approximately two and ½ months. Id. During his time on the project he attended meetings held by the project manager, Salil Sharma. Id. at 42-43; 97 The work was assigned by Mr. Rao, but the day to day project manager was Mr. Subramanian. Tr. at 98-99.

Mr. Krishnamoorthy recalled getting a telephone call on September 11, 1999 at the guesthouse from Mr. Zaharis, advising him to report by September 13, 1999 to a project in Florida for a client, Tech Data. Tr. at 43. Respondent paid his airfare and expenses for the trip to Florida. Tr. at 43. Once he started working on the Tech Data Project, his pay resumed at the previous rate of \$60,000.00 per year. Tr. at 44. Mr. Krishnamoorthy worked on that project until mid-February, 2000, when he was told by Mr. Singh that he was to report to Respondent's New Jersey office for training on another software program. Tr. at 45-46. He then was assigned to the Fomax Project in Philadelphia, to which he commuted daily from Respondent's apartments where he was staying, by way of a vehicle owned by Respondent. Tr. at 46. He worked on the Fomax Project until July 28, 2000. Tr. at 46.

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<sup>3</sup> I take official notice that the distance between Voorhees, New Jersey and Woodbridge New Jersey is significant, and is approximately 70 miles.

Mr. Krishnamoorthy recalled that on July 27, 2000, he was asked to meet with the President of Pegasus, Mr. Paul Parmar, at his office. Tr. at 47. Mr. Parmar asked Mr. Krishnamoorthy if he had applied for employment elsewhere, and Mr. Krishnamoorthy admitted that he had, but was uncertain if he would leave Respondent for another job. Tr. at 47. Mr. Parmar instructed Mr. Krishnamoorthy to decide whether he wanted to work for Pegasus, and submit a resignation letter if he did not. Id. Mr. Krishnamoorthy subsequently decided to accept a position with another company, and submitted a resignation letter to Mr. Parmar. Tr. at 48; ALJX 1. Mr. Krishnamoorthy was not paid his salary for the month of July, 2000. Tr. at 48. On August 1, 2000, he received a letter advising him that his company-paid medical insurance was being canceled, and advising him of his rights to continued medical insurance under COBRA. Tr. at 50. Mr. Krishnamoorthy had not received such a letter previously, when he had no projects in 1999. Id. Mr. Krishnamoorthy spoke with Mr. Parmar at his home in Michigan in late August or early September, 2000, at which time Mr. Parmar offered him work on a project in California, which Mr. Krishnamoorthy declined. Tr. at 51. During his conversation with Parmar he did not bring up the fact that he thought Respondent owed him money, because he did not have the figures compiled, and he wasn't prepared for the call. Tr. at 58.

In a letter dated June 19, 2000, Mr. Krishnamoorthy signed an acknowledgement that he would receive reimbursement of the security deposit he had paid Respondent in India, and also acknowledged that Respondent owed him no past due amounts. Tr. at 49; AX 8. Mr. Krishnamoorthy felt compelled to sign the acknowledgement in order to receive a refund of his deposit, and also to secure his position with Respondent. Tr. at 50; 83-86.

After he left Pegasus, and after his last conversation with Mr. Parmar, Mr. Krishnamoorthy sent an e-mail to Mr. Dan Pachelli<sup>4</sup> in which he asked for the salary he was due for the month of July, 2000, and also for vacation pay and miscellaneous expenses that he believed he was due. Tr. at 60-61, 65; EX 4. He did not include the amount he was not paid in 1999 when he was either not on a project or working on the Internal Project, and never made a demand to anyone at Pegasus after he left for the 1999 wages. Tr. at 61-63. Mr. Krishnamoorthy at first explained his failure to make the request on his workload (TR. at 64), but later admitted that he wasn't sure what he was due for the benching period until consulting with colleagues who had been awarded back wages in litigation. Tr. at 65. Krishnamoorthy described contacting DOL by letter sometime in 2001 about not receiving his wages from Pegasus after he learned that other individuals had received payments. Tr. at 53-56. He recalled responding to a letter from the DOL that inquired into his employment with Respondent Tr. at 53. He was not familiar with DOL's jurisdiction until he talked to other people. Tr. at 110-11. According to Krishnamoorthy, Mr. Pachelli advised him that the company didn't owe him any additional money for various reasons. Tr. at 66. Mr. Krishnamoorthy believed it would be futile to make demands for other payments. Tr. at 67. He did not ask Mr. Zaharis for his back pay when he spoke with him in September of 1999 because he thought he'd get back pay once he returned to work for Respondent Tr. at 91. After he returned to work, he asked Zaharis if he would get his back pay and was told no. Tr. at 92.

Mr. Krishnamoorthy admitted that he expected his employment with Respondent to be temporary, but thought it would last the three years covered by his visa. Tr. at 69. Mr.

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<sup>4</sup> Mr. Pachelli is employed as payroll and benefits manager. Tr. at 306.

Krishnamoorthy's new employer applied for a new visa, and he joined that company on September 19, 2000 after it was approved. Tr. at 109.

### Ronald Rehl

Mr. Rehl has been an investigator for the United States Department of Labor's Wage and Hour Division since 1997. Tr. at 125. He investigated Mr. Krishnamoorthy's complaint involving his wages while employed by Respondent, and also conducted an investigation of Respondent's payment of wages to other individuals who worked for Pegasus under H-1B visas. Tr. at 125-127. Mr. Rehl's investigation involved discussions with Mr. Krishnamoorthy, other employees of Pegasus, and company officials, as well as reviewing documentation relating to Mr. Krishnamoorthy's visa and employment. Tr. at 129-133; AX 11, AX 12, AX 13, AX 14, AX 16, AX 20. His investigation revealed that the LCA certified for Mr. Krishnamoorthy included a prevailing wage of \$38,125.00, but that Mr. Krishnamoorthy's actual wages were \$60,000.00 per year. Tr. at 130, 136; AX 16. The investigation further revealed that Mr. Krishnamoorthy was paid \$38,625.12 in 1999. Tr. at 136; AX 18. Mr. Rehl reviewed documentation provided by Respondent that indicated that Mr. Krishnamoorthy had been terminated by Respondent on July 27, 2000. AX 19; Tr. at 137. As the result of his investigation, Mr. Rehl concluded that Respondent had improperly failed to pay Mr. Krishnamoorthy for the period from May, 1999 until September, 1999. Tr. at 138.

Mr. Rehl computed back wages due to Mr. Krishnamoorthy using a combination of the prevailing wage rate and the actual salary that had been paid to Mr. Krishnamoorthy. Tr. at 141-143; AX 15. For the period of time when Mr. Krishnamoorthy was nonproductive, or "benched", Mr. Rehl used the prevailing wage rate of \$38,145, for a weekly sum of \$733.56 to calculate back wages due. Tr. at 142. For the period when he determined that Mr. Krishnamoorthy had worked on the Internal Project and the Fomax Project, he used his actual rate of pay, which was computed at \$1153.85 a week. Tr. at 142-143; 163-164. Based upon his review of the records, and his interviews with Mr. Krishnamoorthy and other employees, Mr. Rehl used June 1, 1999 as the date when Mr. Krishnamoorthy began to work on the Internal Project until September, 1999, and then for wages due for the month of July, 2000. AX 20; Tr. at 143. Mr. Rehl found that Respondent had failed to pay \$24,857.39 in back wages. AX 17; Tr. at 144; 165-166. Mr. Rehl didn't "believe there was any indication that he was actually terminated" before July, 2000. Tr. at 166-168.

Mr. Rehl also concluded that Respondent's violations were willful, and he computed civil money penalties in the amount of \$5,000.00, which is the maximum amount of penalty per violation permitted under prevailing regulations. Tr. at 145. Mr. Rehl based his determination of Respondent's willfulness on the fact that Mr. Krishnamoorthy's complaint had been made previously by other employees, and that as the result of a prior investigation into those complaints, "Pegasus understood that they had to pay employees while they were on the bench in a nonproductive period". Tr. at 144.

In the course of his investigation, Mr. Rehl sought corroboration of Mr. Krishnamoorthy's assertion that he had worked on Respondent's Internal Project in Woodbridge New Jersey, and spoke with other individuals who verified that Krishnamoorthy had been with

them in Woodbridge. Tr. at 139. Mr. Rehl discussed his findings with Mr. Zaharis, and then with Respondent's attorney. Tr. at 140-141.

### Paul Parmar

Mr. Parmar is the President of Pegasus Consulting Group, which provides computer related strategy and management consulting to its clients. Tr. at 189-190. Mr. Parmar explained that Pegasus Systems is not legally related to Respondent, but admitted that Pegasus Consulting relies upon Pegasus Systems to provide trained professionals to work on its projects under the H-1B visa program. Tr. at 191-193. Mr. Parmar has been involved in recruiting "the talent" that trains in India with Pegasus Systems before coming to the United States and working for Pegasus Consulting. Tr. at 193-194. Mr. Parmar explained that he required participants to pay a security deposit before beginning their training in India, because the program was expensive to provide, and the deposit acted as an incentive for their continued participation. Tr. at 194-195. He estimated that 150 individuals were hired for Respondent through this method, including Mr. Krishnamoorthy. Tr. at 197.

Mr. Parmar explained that although the LCA set a lower prevailing wage than what Respondent was required to pay, he had decided to pay \$60,000.00 to their people because they were doing something a little different from straight software work. Tr. at 196. He described a downturn in his business in 1999 and 2000 that required him to put a lot of people on "downtime" for two months. Tr. at 198. Mr. Parmar was reluctant to lay people off at first, but when it became apparent to him that business wasn't improving, he concluded that people would have to return to India. Tr. at 198-199. He made the decision to lay people off in March, 1999. Tr. at 200-201. He directed Mr. Zaharis to conduct cost analysis to determine how many people could be retained and how many should be returned. Tr. at 202. In addition, he identified individuals with specific "skill sets" who would be retained in the United States, in the event that business would pick up. Tr. at 202-203. Mr. Parmar hoped to avoid losing the people he had identified as most valuable, and he and other management officials devised a scripted message to deliver to people identified for lay off. Tr. at 204. Mr. Krishnamoorthy was among those employees who were advised that there was no work and he could stay and hope for work in the future, or he could choose to return to India. Tr. at 206. He estimated that Respondent laid off more than 20 people in 1999. Tr. at 210. Mr. Parmar admitted that Respondent did not give Krishnamoorthy a written notice of termination in 1999, nor revoke his H-1B visa. Tr. at 216. Respondent did not receive any notice from INS that Krishnamoorthy's visa had been revoked or canceled in 1999. Tr. at 220.

According to Mr. Parmar "the Internal Project" was not a real project, as it did not produce anything, but rather was a training opportunity for people to improve their SAP skills. Tr. at 199-200; 211. Certain people were selected according to their skill level to receive the training, and they were paid for their time on the project. Tr. at 211-212. Mr. Salil Sharma created the training model and established the criteria for participants in this training project. Tr. at 212. Mr. Parmar was positive that Krishnamoorthy was not among those selected to be trained because he had to find him to speak with him about his availability for the Tech Data Project in September, 1999. *Id.* He thought that the Tech Data Project was better suited to Mr. Krishnamoorthy's skills, as it was a management consulting assignment. Tr. at 213. Mr. Parmar

did not recall Mr. Krishnamoorthy being present in Woodbridge during the time the Internal Project was ongoing.

When employees were advised in 1999 that there was no work for them, they expressed concern about their medical insurance coverage, and Mr. Parmar decided to continue paying it, as a form of severance pay. Tr. at 209; 251. He did not feel it was necessary to advise INS of the employees' terminations because he had not known that action was required. Tr. at 253. Mr. Parmar advised that it is Respondent's current practice to advise INS of all terminations and resignations. Id.

#### Sotorios (Sam) Zaharis

Mr. Zaharis is currently employed by Respondent as Chief Financial Officer, and has held other positions with the company since his employment began in 1998. Tr. at 274-275. He is responsible for business development and assessing litigation risks as well as reviewing work and projects that are related to finance, which is his field of expertise. Tr. at 275. Mr. Zaharis was aware that Respondent experienced a decline in business in 1999 that required him to review the company's financial prospects. Tr. at 276. As the result of his review, he concluded that Respondent would not be able to retain many of the consultants whose projects were coming to an end, and for whom no other projects were waiting for assignment. Id. He spoke with each of the individuals who were designated for termination throughout 1999, starting with the first group in May, 1999. Id. If he was able to speak with them in person because they were located near Respondent's offices, he did, but otherwise he spoke with many individuals by telephone. Tr. at 277. He relied upon notes that he made to be assured that he had communicated the same information to each person with whom he spoke about termination. Tr. at 278; EX 5. Mr. Zaharis emphasized to the employees that Respondent had no reason to expect improvement in securing clients and advised them that they were terminated from their employment in the United States. Tr. at 280-281. He encouraged those employees for whom he saw no work in the foreseeable future to return to India where they could continue their training with the Indian company with whom they had started their employment. Tr. at 281-282.

Mr. Zaharis recalled calling Mr. Krishnamoorthy to tell him he was terminated, and referred to notes he made that documented the conversation. Tr. at 283; EX 5. He did not specifically recall his conversation with Mr. Krishnamoorthy, as he had delivered the same message to dozens of people during the course of 1999. Tr. at 285. Every employee who was terminated, including Mr. Krishnamoorthy, was offered a ticket back to India for themselves and their families, including Mr. Krishnamoorthy. Tr. at 286. Mr. Zaharis disputed Mr. Krishnamoorthy's recollection that he had been given two options. The only option that Mr. Zaharis offered was the option to return to India at Respondent's expense. Tr. at 287. Mr. Krishnamoorthy had no further job duties or obligations after the telephone conversation, as the termination was immediately effective. Tr. at 288. Employees were given two weeks to settle their affairs and advise him of whether they would accept the offer of employment by the Indian entity. Tr. at 288-289. Mr. Zaharis estimated that he delivered his "termination speech" to between 30 and 50 employees. Tr. at 292-293.

Mr. Zaharis was assigned the responsibility in 1999 to recruit approximately one dozen people to work on the Internal Project, which he estimated lasted about one month. Tr. at 293. These individuals were paid \$5,000.00 for participating in that project. Id.; EX 10, EX 11. Mr. Krishnamoorthy was not among the individuals selected for the project. Tr. at 296. Mr. Zaharis used payroll records to explain that in the early part of 2000, Mr. Krishnamoorthy was paid approximately \$1,200.00 for vacation pay due from 1999, which brought his total compensation in that year to approximately \$40,000.00. Tr. at 301. Mr. Zaharis denied telling Mr. Krishnamoorthy that he could work on the project but would not be paid. Tr. at 339. His office was situated close to the area where people worked on that project, and he had occasion to visit the area. Tr. at 340. He did not recall ever seeing Mr. Krishnamoorthy there. Tr. at 341. In addition, the rehired consultants were provided access cards to the facility for security reasons, and Mr. Krishnamoorthy was not issued one. Tr. at 349.

Mr. Zaharis recalled that Mr. Krishnamoorthy was rehired by Respondent in September, 1999. Tr. at 302. Mr. Zaharis did not recall personally offering Mr. Krishnamoorthy employment at that time, but allowed that it would have been part of his role to have done so. Id. He recalled having several conversations with Mr. Krishnamoorthy, and denied that Krishnamoorthy ever made a demand for payment. Tr. at 303. Mr. Zaharis recalled Mr. Krishnamoorthy's e-mail requesting money for a period in 2000. Id.; EX 4. He recalled that Respondent communicated to Mr. Krishnamoorthy its position that it owed no additional money to him because he failed to give proper notice when he resigned his position after transferring his H-1B visa to another company. Tr. at 304. Respondent made deductions in reliance upon a clause in its employment contract with Krishnamoorthy. Tr. at 305. Mr. Zaharis could not recall whether he or Respondent's payroll manager, Mr. Pachelli, informed Mr. Krishnamoorthy of the reason for the deduction. Id. Mr. Zaharis explained that after working for Respondent in a consulting capacity for 12 months, employees would receive a refund of a deposit they had paid in India. Tr. at 309. Mr. Krishnamoorthy acknowledged that he was eligible for such refund and also signed a statement that no other monies were due to him. Id.; AX 8. Mr. Zaharis denied that Krishnamoorthy had ever demanded refund of the deposit, and further denied that he was pressured to sign the document in June, 2000. Tr. at 310.

Mr. Zaharis recalled meeting with Mr. Rehl upon the conclusion of his investigation of Respondent, but denied that Respondent failed to provide requested information to the Department of Labor. Tr. at 317. He recalled that he thought it prudent to suspend Respondent's response to the investigator's findings until the litigation of the first investigation was concluded. Tr. at 316-317. Zaharis recalled that Mr. Rehl disclosed that he had found improprieties with respect to the purported 1999 termination of Mr. Krishnamoorthy, and again with respect to his payment in July, 2000, but could not recall the specifics of their discussion regarding the status of Mr. Krishnamoorthy's visa. Tr. at 317-318. Mr. Zaharis could not recall an instance where Respondent learned that an individual had transferred a visa, or applied for a new one. Tr. at 318-319. He asserted that the only notification that Respondent received regarding change of status of an individual's H-1B visa was confirmation from INS after Respondent sought to terminate or cancel an individual's visa. Id. Mr. Zaharis understood that INS, and not employers, had the authority to cancel visas. Tr. at 335.

Mr. Zaharis confirmed that Respondent had not canceled Mr. Krishnamoorthy's visa in 1999 after he was advised there was no more work, nor did they file a new one when he was brought back to work in September, 1999. Tr. at 321. It was Respondent's policy to pay employees who were benched in 1999. Tr. at 322-323. He believed that Mr. Krishnamoorthy was terminated at the end of May, 1999, and could not explain why he received no payments for the month of May. Tr. at 338.

### Neeraj Jain

Mr. Jain had been employed by Respondent from 1998 until April 2004, but had been laid off by Pegasus in 1999. Tr. at 355. He held several positions with the company, the last being the practice director. Id. In that capacity, he was responsible for assisting project teams resolve problems and perform other compliance and problem resolution duties. Tr. at 356. He began his career with Pegasus in India, where he trained with Pegasus Systems before joining Pegasus Consulting in the United States. Tr. at 357. Mr. Jain was familiar with the concept of "being on the bench" and was paid by Respondent for unproductive time. Tr. at 359. In June, 1999, he was on the bench in Michigan when he received a call from Mr. Zaharis who told him that he was terminated because the company could not find new projects. Id. He was offered a ticket back to India, and he requested some time to consider the offer. Id. Mr. Jain was expecting Mr. Zaharis' call, because he had received a telephone call from his friend, Mr. Krishnamoorthy, who told him that Zaharis had a similar conversation with him and other people who were on the bench. Tr. at 360.

After speaking with Mr. Zaharis, Mr. Jain understood that he no longer could expect work from Pegasus, and if he wanted to stay in the United States, he needed to find a new job very quickly, and at the same time prepare himself to return to India if he could not. Tr. at 361. Mr. Jain understood that he was required to transfer his visa within 30 days. Tr. at 361. He saw no option other than find a job quickly, or return to India. Tr. at 363. He was fortunate to find another company that agreed to take him on in less than 4 weeks, and he transferred his H-1B visa towards the end of July, 1999. Tr. at 364. Mr. Jain rejoined Pegasus in September, 1999, to work on the Tech Data Project in Florida, where he worked with Mr. Krishnamoorthy. Tr. at 366. He recalled that Mr. Krishnamoorthy told him that he had "parked" his visa, which is the practice where an individual transfers his visa to a company willing to accept it so that the employee is not illegally in the country. Tr. at 367. Mr. Jain's understanding was that there is no limit on the number of times a visa could be transferred, and that he also could have a visa with two different companies that spanned the same time period. Tr. at 371. He also understood that the employer who originally secured the visa, in this case, Pegasus, need not be told that the visa was transferred to another employer. Tr. at 378. Although he transferred his visa to S3 Consulting in August, 1999, following his termination from Pegasus, he did not actually work for that company. Tr. at 372. Mr. Jain admitted that he had in effect parked his visa with S3 Consulting, although he had hoped to be assigned a project. Tr. at 373.

Mr. Jain returned to Pegasus on September 6, 1999. Tr. at 373. When he returned, he did not need to fill out any paperwork to come back on the payroll, although he recalled discussing renegotiations of his salary. Tr. at 380. Mr. Jain received a notice of termination when he left

Respondent's employment, advising him of his final date of employment. Tr. at 381. He transferred his visa from Respondent to his subsequent and current Employer. Tr. at 382.

### Salil Sharma

Mr. Sharma has been employed by Respondent for nine years as the Vice President of Technology. Tr. at 386. His primary responsibility is to provide technical solutions to Respondent's clients and to maintain Respondent's infrastructure. Tr. at 386-387. He recalled that sometime in late June, 1999 through early August, 1999, he was assigned the role of project manager for the Internal Project, which employed 12 people. Tr. at 387-388. He knows Krishnamoorthy, and denied that he was selected to work on the project. Tr. at 388. Mr. Sharma was at the site where the project was underway on a daily basis, planning the project, conducting meetings, assessing the project's progress. Tr. at 389. Mr. Sharma never saw Mr. Krishnamoorthy at any of the project meetings. Tr. at 390. Mr. Sharma recommended that the project be terminated because the participants were more focused on finding new employment than on the project, and management accepted his suggestion and terminated the project in early August. Tr. at 391.

### Stipulation regarding testimony of Bhavesh Patel

Mr. Patel was actively involved in interviewing candidates for positions with Pegasus. Tr. at 393. The parties stipulated that Mr. Patel would have testified that at the time of their initial recruitment in India, employees were advised that the position was temporary, and that if projects were concluded and work was no longer available, they would be expected to return to India for continued training, and to wait for other potential assignments. Tr. at 392. In addition, Mr. Patel was on site as project manager with Mr. Krishnamoorthy in July, 2000, when he learned that Krishnamoorthy had obtained a visa with a different employer. Tr. at 394.

### *Affidavit & Declaration Testimony*

#### Affidavit of Sathiyamoorthi Koteeswaran (EX 13)

Mr. Koteeswaran stated that he works for America International Group, Inc, but was employed by Pegasus Software in India in 1998, and went on to work for Respondent in the United States once his H-1B visa was approved. He worked on the Auto Desk Project until it ended in April, 1999. He did not receive further assignments from Respondent after that time, and was paid for his benched period. In May, 1999, he was advised that because of lack of work, his position in the United States was terminated, but he was offered a position with Pegasus in India, and was offered a plane ticket to return. He sought alternative employment in the United States rather than return to India. He understood that his job with Pegasus ended May, 1, 1999, and he received his last paycheck in mid-May, 1999. In late 1999, Mr. Koteeswaran learned that Respondent was seeking SAP consultants, which is his field of expertise, and he inquired about returning to Respondent. He was rehired by Pegasus, and commenced work on or about December 8, 1999. He renegotiated his employment contract with Respondent before returning to their employ. He was assigned to additional projects thereafter, and has been paid all compensation to which he is owed.

*Documentary and Other Evidence*

Respondent's Exhibits

- EX 1 DOL Form WH 55
- EX 2 Pegasus Employee Conference Announcement
- EX 3 List of Attendees at Annual Conference and Conference Agenda
- EX 4 E-mail dated September 25, 2000
- EX 5 Notes by Sam Zaharis
- EX 6 Vacation Accrual Sheet for 1999
- EX 7 Receipt of June 30, 2000 signed by Mr. Krishnamoorthy
- EX 8 Pegasus Worksheet of final payment due Mr. Krishnamoorthy
- EX 9 Personnel records referring to Marender N. Kehemani
- EX 10 Copies of checks paid to employees in 1999
- EX 11 Portions of ADP Payroll register for period 12/15 -12/31/99
- EX 12 Transcript of conversation between Paul Parmar and Veeraju Bikkani
- EX 13 Affidavit of Sathiyamoorthi Koteeswaran
- EX 14 Transcript of Proceedings of February 26, 2002

Administrator's Exhibits

- AX 1 Employment Agreement between Pegasus and Krishnamoorthy dated December 15, 1997
- AX 2 Employment Agreement between Pegasus and Krishnamoorthy dated April 1, 1998
- AX 3 H-1B visa Petition for Krishnamoorthy
- AX 4 INS Form 1797B dated August 24, 1998
- AX 5 Letter of September 23, 1998

- AX 6 Earnings Statements dated 5/17/99, 10/1/99 and 7/17/00
- AX 7 W-2s from 1999 and 2000 for Krishnamoorthy
- AX 8 Letter dated June 19, 2000
- AX 9 Letter dated August 1, 2000
- AX 10 Interview Statements of Krishnananda Adka & Venkatesan Iyengar
- AX 11 Payroll register dated 7/17/00
- AX12 Employee Earnings Record dated 9/30/00
- AX 13 Letter of August 3, 2000
- AX 14 Letter of November 21, 2000
- AX 15 DOL Determination
- AX 16 Labor Condition Application filed by Pegasus on December 19, 1997 (Case No. 348138)
- AX 17 DOL WH 55
- AX 18 Pegasus H-1B 1999 Payroll
- AX 19 DOL information request
- AX 20 DOL Follow up
- AX 21 Decision and Order of November 13, 2002 of ALJ Ralph A. Romano

C. Discussion

1. DOL Has Inherent Authority to Determine Whether Bona Fide Termination Was Effected.

The Act delegates to the Secretary of DOL the authority to enforce an employer's obligations under a certified LCA. The Act directs DOL 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 [the Act]." 8 U.S.C. § 1182(n)(2)(A). Among the conditions of employment cited in Respondent's LCA was the amount it proposed to pay Krishnamoorthy, the date his employment was expected to begin, and the period of time it expected Mr. Krishnamoorthy's employment to last. In addition, the Act expects employers to pay employees unless a bona fide termination has occurred. 20 C.F.R. § 655.731 (c)(7)(11).

In order to accomplish its enforcement mandate, DOL has implicit authority to determine whether an employee working under an H-1B visa who was not in pay status was involuntarily or voluntarily nonproductive. See, 20 C.F.R. § 655.731 (c); 8 U.S.C. § 1182(n)(2)(c)(vii)(III). Such inquiry should disclose whether the employer was or was not in compliance with the conditions of employment that it established in an LCA. The authority to determine whether non pay status occurred because of a bona fide termination is implied in the authority to determine compliance with the LCA, and specifically, with the regulatory directive that “[p]ayment need not be made if there has been a bona fide termination of the employment relationship.” 20 C.F.R. § 655.731 (c)(7)(11). I do not find that a determination that a bona fide termination occurred is dispositive of the question of the duration of an employee’s employment, as has been argued by Respondent. Although a finding that a bona fide termination occurred might suggest the end point of a period of employment, in the case before me, there is no assertion that Respondent violated any LCA relating to how long Mr. Krishnamoorthy worked for Pegasus. Accordingly, I need not address the duration of his employment.

I find that DOL properly inquired into whether Mr. Krishnamoorthy’s nonproductive time was attributable to a bona fide termination, and moreover, to make a reasonable interpretation of what that means.

2. Respondent Violated the Act by Failing to Pay Wages to Mr. Krishnamoorthy Between May 1, 1999 through September 12, 1999.

It is undisputed that Respondent did not pay Krishnamoorthy for the period between May 1, 1999 through September 12, 1999. There is also no doubt that Respondent was familiar with its obligation to pay employees for involuntary nonproductive time, and Respondent’s President testified that the costs of paying employees for time “on the bench”, and the bleak prospects for future business, prompted him to ask his Chief Financial Officer to calculate the costs of shedding H-1B workers from the payroll. Tr. at 202. The record credibly reflects that Mr. Zaharis made it clear to those employees who were not selected to remain on the payroll that the company had no work for them. See, Testimony of Zaharis, Jain, Koteeswaran, and to some degree, Krishnamoorthy. I am convinced that those employees understood that Respondent did not consider them to be “on the bench”, and that they had no reason to believe that they would receive further remuneration from Respondent.

The fact that Respondent failed to include Mr. Krishnamoorthy on its list of employees, and that Respondent’s payroll records do not disclose any payments to him for periods between May, 1999 and mid-September, 1999 support Respondent’s belief that he was not an employee of Pegasus during this period. EX 2, 3. I place little weight on Respondent’s continuation of Mr. Krishnamoorthy’s medical benefits for a period of time as an indicia of his continued employment, as the record does not discuss the cost to Pegasus of terminating and then reviving such benefits within a period of months. I also find the testimony that employees who were identified as superfluous were given the opportunity to accept a plane ticket for their return to India, and were offered employment there, is credible and consistent.

I acknowledge that in other labor relationships, the information that Mr. Zaharis conveyed to employees in his communications in May, 1999, would constitute termination of

employment. Indeed, by offering employees airfare to return to India, Respondent met at least one requirement imposed upon the termination of the employment relationship. See, 20 C.F.R. § 655.731 (c)(7)(11); 8 C.F.R. § 214.2(h)(iii)(E). In addition, the record reflects that at least some of the severed employees took measures to assure that they would remain in the United States legally by looking for other employment, and by finding other employers willing to accept a transfer of their visas. Such actions are consistent with the acts of individuals who believe that they no longer have a job, and will no longer be paid “bench time”. I find it reasonable to accord credibility to Mr. Jain’s testimony that Mr. Krishnamoorthy sought to assure that he would stay in the States by taking similar action, despite his contention that he did not. I make this observation as foundation for my conclusion that I do not find Mr. Krishnamoorthy’s testimony on this issue totally credible, without making a determination on this issue of whether it is permissible for H-1B workers to transfer their visas for brief periods of time. Mr. Krishnamoorthy took an apartment in Voorhees, New Jersey, with several other individuals, and his explanation for that decision is not entirely credible. At the time, he asserted he was working for Respondent some distance away in Woodbridge, New Jersey and staying at apartments paid for by Respondent. Tr. at 75-81. It is reasonable to conclude that he moved to Voorhees in hopes of finding other work, which supports finding that he understood that he was no longer working for Respondent. In any event, it is reasonable to conclude that he was seeking other work because he had no source of income at the time. Tr. at 78.

Despite the aforesaid facts, I am unable to conclude that Respondent effected a bona fide termination in circumstances related to working conditions under an H-1B visa. It is undisputed that Respondent sought out Mr. Krishnamoorthy for re-employment in September, 1999, and indeed, rehired him and assigned him to projects. Other individuals who had been let go in May, 1999, were also rehired at that time and shortly thereafter. Both Mr. Parmar and Mr. Zaharis used the term that they sought to “lay off” people in May, 1999. Tr. at 199, 105, 175-176. Although not the sole determinative factor, I place weight upon the fact that Respondent did not notify INS that it had terminated its employment relationship with Krishnamoorthy in May, 1999. I find it significant that Mr. Parmar’s testimony demonstrates his familiarity with the H-1B visa process, yet the evidence reflects noncompliance with program requirements. It is significant that Respondent failed to fulfill the INS notification requirement when it severed Mr. Krishnamoorthy’s employment, but fulfilled the requirement of offering to pay his return flight to India. I conclude that based upon Respondent’s experience with employees hired under the H-1B program, and the acknowledged financial advantage to employees of working in the United States as opposed to India<sup>5</sup>, Respondent took a calculated risk that most laid off employees would refuse the offer of plane fare to India, and would seek to “park” their visas in the hope that Respondent’s business might pick up. Mr. Parmar admitted that employees were told that “rather than hiring any new employee, we would consider them for new employment. So I’m pretty sure we may have made representations but said, you know, as soon as there’s work, you would be the first ones to be considered, but that wasn’t in tune with you have to go back to India.” Tr. at 206.

I note that Respondent did not hesitate to notify INS when Mr. Krishnamoorthy initiated the severance of the employment relationship in July, 2000. Respondent notified INS within a

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<sup>5</sup> The record indicates that employees of Pegasus Systems in India earned far less money than employees of Pegasus Consulting in the United States.

month that the employment relationship had been terminated. AX 13. In addition, in contrast to its continuation of Krishnamoorthy's medical insurance in May, 1999, Respondent advised Krishnamoorthy on August 1, 2000, that his medical insurance was terminated as of July 29, 2000. AX 9. This inconsistent conduct adds weight to my conclusion that Respondent sought to save money by implementing a lay off in May, 1999, which is impermissible under the rules that apply to employment under an H-1B visa. The rules clearly require an employer to effect a bona fide termination, or pay employees for nonproductive time. I find that the circumstances in the instant matter fit squarely within those described by DOL in its preamble to the regulations, wherein a "lay off" of an employee followed by his subsequent rehire is not considered a bona fide termination without cancellation of his H-1B petition, or its transfer to an interim employer for whom the individual was working. See 20 C.F.R. Part 655.

The regulations recognize that a transfer of a visa to a subsequent employer may be sufficient to indicate that a bona fide termination occurred. In the case before me, some individuals whose employment with Respondent was severed in May, 1999, "parked" their visas with other potential employers. There is disputed evidence that Mr. Krishnamoorthy also transferred his visa sometime after May, 1999, and before he returned to work for Respondent in September, 1999. I find it unnecessary to determine if Mr. Krishnamoorthy had transferred his visa to another employer during that period, because there is no evidence that he performed work for anyone else. (Indeed, he alleges that he worked at Respondent's offices on an Internal Project). I find that the mere transfer of a visa is insufficient to demonstrate that the H-1B visa worker was working for another employer under an H-1B petition, transferred or otherwise, as required by the regulations. The record is clear that Mr. Krishnamoorthy did not return to his home country before being rehired, nor did he experience a change in his visa status before being rehired. See, Preamble to 20 C.F.R. Part 655, page 80171.

I place little weight on the conflict in the record regarding whether Krishnamoorthy requested back wages. Neither do I find it probative to my determination on the issues to decide whether Mr. Krishnamoorthy signed a receipt for refund of a pre-employment deposit under duress or coercion. Whether Krishnamoorthy is due back pay is not dependent upon his subjective belief that the money is due him. I do not find resolution of this issue material in any way to a determination of whether Respondent was obligated to pay him for nonproductive time.

Accordingly, I find that the record establishes that Respondent did not effect a bona fide termination when it "laid off" Mr. Krishnamoorthy in May, 1999. Accordingly, Respondent is responsible for compensating him for the period between May 1, 1999, and September 12, 1999.

3. Respondent Violated the Act by Failing to Pay Wages to Mr. Krishnamoorthy in July, 2000.

The evidence is uncontroverted that Krishnamoorthy was not paid for the work he performed for Respondent in July, 2000. AX 6, AX 12, AX 19; Tr. at 226. Respondent characterized its failure to make the payments as a deduction contemplated by its employment contract with Mr. Krishnamoorthy. Tr. at 323-325. The Act and prevailing regulations allow certain deductions from pay due to H-1B visa workers, but an early termination penalty, which is how I have classified this deduction, is clearly prohibited. 8 U.S.C. § 1182(n)(2)(c)(vi)(I); 20

C.F.R. § 655.731(c)(10)(i). Regardless of the validity of the employment agreement (execution of which is in dispute; Tr. 33, 106; AX 1, AX 2), I find that Respondent violated the Act by not paying Mr. Krishnamoorthy for his productive time in July, 2000.

4. Respondent is Responsible to Pay Krishnamoorthy \$26,500.00 in Back Wages for the Period from May 1, 1999 through September 12, 1999, and for July, 2000.

Compliance Investigator Ronald Rehl computed back wages due to Mr. Krishnamoorthy using different rates of pay. Tr. 141-143; AX 17. For the period from May 1, 1999 through June 1, 1999, Mr. Rehl concluded that Mr. Krishnamoorthy was “benched” and entitled to a pro rata share of the prevailing rate required by the applicable LCA, \$38,145.00 per year. Mr. Rehl concluded that Mr. Krishnamoorthy had worked for Respondent on its Internal Project during the period from June 2, 1999, through September 12, 1999, and used his actual wages, or \$60,000.00 to prorate the amount he concluded was due. Mr. Rehl used Mr. Krishnamoorthy’s actual wage of \$60,000.00 to compute the amount due for July, 2000. Mr. Rehl believed that he had discretion to choose how to calculate back wages due to Mr. Krishnamoorthy. Tr. at 181.

DOL has promulgated regulations that address its duties under the Act, including setting remedies for violations of the statute or regulations that include payment of back wages to workers who were underpaid, debarment of employers from securing workers under the H-1B visa program, the imposition of civil money penalties, and other relief that DOL deems appropriate. 20 C.F.R. § 655.810; § 655.855. 20 C.F.R. § 655.810(a) provides that upon determining that an employer has failed to pay required wages, back wages shall be assessed, and shall be equal to the difference between the amount that was paid and the amount that should have been paid. Pursuant to 20 C.F.R. § 655.840(b):

The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision.

20 C.F.R. § 655.840(b).

I find it appropriate to modify the Administrator’s calculation of back wage payments. Mr. Rehl concluded that Mr. Krishnamoorthy was working on an Internal Project, but I find no corroborative evidence that he did so. In fact, I accord greater credibility to the evidence that reflects that he was not among the individuals invited to participate in this project. Though Mr. Krishnamoorthy’s testimony conflicts with Mr. Zaharis’ testimony about their conversation regarding Krishnamoorthy participating in the project, the record is clear that he was not selected as a participant by Respondent. The project manager denied seeing Mr. Krishnamoorthy at the project; Respondent’s payroll records that reflect payments to individuals for their time on the project do not include Mr. Krishnamoorthy; and Mr. Krishnamoorthy’s testimony about the duration and the purpose of the project is inconsistent with the other evidence of record. However, in rejecting Mr. Krishnamoorthy’s assertion that he worked on the Internal Project, I

do not mean to completely reject his contention that he was present at Respondent's offices during the pendency of the project. Although he was not among the individuals issued a security pass, it is reasonable to conclude that he joined other authorized individuals when they reported to the office, and was not observed. The project manager testified that he was not on site all day, and it is conceivable that his path did not cross Mr. Krishnamoorthy's. Mr. Zaharis believed he would have seen him at the office because of the proximity of the project area to his workspace, but Mr. Zaharis was not directly involved in the oversight of the project, and it is reasonable to find that Mr. Krishnamoorthy was on site at one time or another. I find this a reasonable conclusion in consideration of Mr. Zaharis' concession that he did not know how many employees occupied the residential space that Respondent paid for, and his admission that people came to and went from that space at their convenience. Tr. at 341.

The Administrator concluded that Mr. Krishnamoorthy was working on the project, and therefore was entitled to a prorated share of his salary. I conclude that the project more closely resembled continued training, and individuals who were invited to participate were paid a set fee for their participation that appeared to be unrelated to their actual wage. Therefore, I find Mr. Rehl's rationale for the calculation of wages due to Krishnamoorthy for this period is not fully supported by the record. However, I find it unnecessary to reach a definitive conclusion about whether Mr. Krishnamoorthy participated in the Internal Project. There is no dispute that he was not paid for the period between May 1, 1999 and September 12, 1999, and I have determined that Respondent failed to effect a bona fide termination of the employment relationship. Accordingly, he is entitled to payment for nonproductive time.

In consideration of all of the evidence, I find it appropriate to calculate Krishnamoorthy's back wage payments on the basis of his actual pay from Respondent. I find no reason to compute back wages at a rate other than that required by 20 C.F.R. § 655.731(a), which states that "for the entire period of authorized employment, the required wage rate will be paid to the H-1B nonimmigrants; that is, that the wage shall be the greater of the actual wage rate or the prevailing wage." Although I am mindful that Respondent's total payment to Mr. Krishnamoorthy meets or exceeds the prevailing wage under his H-1B visa, it was Respondent that decided to pay him at a higher rate of pay. Tr. at 196. In the instant matter, Krishnamoorthy's actual wage was determined by Respondent to be \$60,000.00 per annum. Prorated monthly, Mr. Krishnamoorthy's wages would equal \$5,000.00. He was not paid for 4.3 months of nonproductive time. Accordingly, I find that Krishnamoorthy is due back wages in the amount of \$21,500.00 for the period from May 1 through September 12, 1999; and in the amount of \$5,000.00 for July, 2000.

5. The Evidence Does Not Support an Assessment of Civil Money Penalties for Willfulness.

The assessment of civil money penalties is authorized for willful failure to comply with regulations pertaining to the H-1B visa program. 20 C.F.R. § 655.805(a)(9)(b); 8 U.S.C. § 1182(n)(2)(C)(ii)(I). The unreasonable, but not reckless, conduct of an employer in determining its legal obligation does not constitute willfulness. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988).

Mr. Rehl testified that he computed civil money penalties because his investigation into how Krishnamoorthy was paid was a reinvestigation of Respondent. Tr. at 144. I do not find this factually accurate so as to support a finding of willful behavior, because the incidents underlying the instant investigation occurred contemporaneously to the incidents that were involved in the Administrator's earlier investigation of Respondent. Therefore, I cannot find that Respondent failed to pay Mr. Krishnamoorthy despite its knowledge from a prior investigation that its pay practices were improper.

Further, I am not convinced that Respondent recklessly stopped paying Krishnamoorthy in May, 1999, because the evidence reflects that he was advised that there was no work left for him to perform, and was offered a paid ticket to return to India. I also note that Respondent did pay Krishnamoorthy for some period of bench time, which demonstrates that it recognized its obligation to do so. With respect to the non payment in July, 2000, Respondent's President relied upon an employment contract as grounds for deducting Krishnamoorthy's pay, which reflects a reasonable interpretation of Respondent's obligations, and does not demonstrate the level of recklessness necessary to support the imposition of a civil money penalty. Accordingly, I find that the Administrator has failed to meet its burden of establishing that Respondent's conduct was willful so as to warrant assessment of civil money penalties. Accordingly, I dismiss Administrator's claim for such.

## VI. CONCLUSION

Respondent failed to properly effect a bona fide termination of Krishnamoorthy in May 1999, and thereby violated the regulatory mandate to pay H-1B visa workers for unproductive time. In addition, Respondent improperly deducted money from Krishnamoorthy's pay in violation of the prevailing regulations. Back wages are due to Krishnamoorthy, but a civil money penalty is not appropriate.

## ORDER

Respondent is ORDERED to pay the Administrator the sum of \$26,500.00, representing the total of wage deficiencies owed to Rajnarayanan Krishnamoorthy, and is directed to distribute such sum to him.

The Administrator's assessment of civil money penalties is DISMISSED.

**A**

Janice K. Bullard  
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 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 30 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.