



Issue Date: 26 May 2006

CASE NO: 2005 LCA 36

In the Matter of:

ZHAOLIN MAO,
Prosecuting Party,

v.

GEORGE NASSER, d/b/a
NASSER ENGINEERING & COMPUTING SERVICES,
Respondent.

DECISION AND ORDER

Statement of the Case

This proceeding involves a claim under the Immigration and Nationality Act, as amended (“INA”), 8 U.S.C. § 1101-1537, and implementing regulations at 20 CFR Part 655, Subparts H and I (2004)¹ by the Prosecuting Party, Zhaolin Mao (“Mao”), for pay and benefits pursuant to an H-1B Labor Condition Application (“LCA”) under §§ 655.700, *et. seq.* Mao filed his complaint with the Wage and Hour Division of the Employment Standards Division (“ESA”) of the United States Department of Labor (“DOL”) on January 26, 2005, alleging that Respondent, Mahmoud George Nasser (“Nasser”) d/b/a Nasser Engineering and Computing Services (“NECS”),² had failed to pay him as an H-1B worker the higher of the prevailing or actual wage. He explained that “Employee went months without compensation,” or for time off due to a decision by the employer (e.g. for lack of work, or for time needed to acquire a license or permit); that Employer failed to pay [him] for lack of work; and that “Employee was benched for months at a time.” Mao did not complain to ESA of Nasser’s failure to provide health benefits or any other fringe benefits under § 655.731(c)(7)(i).

¹ All references to regulations herein are to sections or parts contained in Title 20, Code of Federal Regulations, unless otherwise indicated.

² Because NECS is apparently a partnership, not a corporation, and since Nasser, essentially, runs all aspects of the company as Chief Executive Officer, reference to “Nasser” refers to Nasser in his capacity as proprietor and CEO of the company, and includes NECS, unless otherwise indicated. “Respondent” refers to the collective entity, Nasser d/b/a/ Nasser Engineering and Computer Services which is defending against the claim by the Prosecuting Party, Mao, before this tribunal. “NECS” is used where the company itself is referred to with particularity.

Under the INA, 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); § 655.700. Upon approval by the Immigration and Naturalization Service ("INS") such workers are issued H-1B visas by the Department of State which permit such employment. § 655.705(b). An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from DOL by filing an LCA as a condition precedent to the award of 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); §§ 655.731 and 655.732. Upon certification of the LCA by DOL, the employer is required to comply with the wage and working conditions requirements of the LCA. 8 U.S.C. § 1182(n)(2); § 655.731(c)(7).

By letter dated July 8, 2005, Nasser was notified by the District Director in Houston, Texas, U.S. Department of Labor, Wage & Hour Division, that the Wage and Hour Division investigation pursuant to the H-1B provisions of the INA, as amended, 8 U.S.C. § 1182(n), had been completed and no violation found. The record of Mao's complaint was annexed to the letter.³ There is no evidence of record that the notice was served on Mao, but, as he was entitled to do under § 655.820, Mao filed a timely request for a hearing by letter dated July 22, 2005, within the requisite fifteen days of the determination, and the case was referred to the Office of Administrative Law Judges for a hearing and determination. Mao's letter alleged that his employment with NECS was not effectively terminated, that his nonproductive status was due to a lack of assigned work by his employer, that no report of termination was sent to INS, that he actually did some work for NECS, and that his employer did not provide him with health insurance as required by § 655.805(a)(2).

Respondent's Motion for Summary Judgment and in the Alternative Final Position Statement filed on October 14, 2005, was implicitly denied by the Notice of Hearing and Order dated October 18, 2005, because it was facially evident that material facts were in dispute. It was specifically denied on that ground at the hearing. (Tr. 11). The hearing was conducted pursuant to § 655.825, *et seq.*, in Houston, Texas, on October 27-28, 2005. Mao appeared *pro se* and testified.⁴ Respondent appeared with counsel and testified. Evidence was received and the parties have submitted written closing argument, which has been duly considered.⁵ Credibility determinations have been made as indicated.

³ The letter from the Director and attached complaint were not formally offered by any party or admitted into evidence at the hearing, but are indispensably and undisputedly part of the essential record, and are considered accordingly. Respondent offered the Administrator's Determination of no violation dated July 15, 2005, as RX J post hearing. Since the document is deemed part of the essential record, there is no need to receive it as evidence post hearing.

⁴ Mao's written and spoken English were imperfect, but were determined to be serviceable and adequately comprehensible to proceed with the hearing and to establish an adequate record upon which to render a fair decision. Mao indicated that he was unable to afford or obtain an attorney, but was obviously an intelligent man, with higher education in both China and the United States, and was capable of prosecuting his claims *pro se*, as was born out during and after the hearing.

⁵ Prosecuting Party's Exhibits 1-19 were received in evidence; Respondent Employer's Exhibits B, C, D, E, F, G, L were received in evidence. With its brief, Respondent submitted Exhibits J, K, M, N, O, P, which had not been offered or received in evidence at the hearing, and to which Mao responded, not knowing whether they would be allowed to be submitted after the hearing. No motion accompanied the submission of those exhibits. RX-J is the Administrator's Determination of no violation and notice to Nasser dated July 15, 2005, which is properly part of the record; RX-M, N, O, P are a series of e-mails from Nasser to Mao purportedly sent on November 7, 2003; RX-K

Issues

1. Did Mao materially misrepresent his qualifications to Nasser in relation to his employment by Nasser so as to have any substantial effect upon Mao's employment status?
2. Did Respondent fail or refuse to offer or provide Mao with health insurance as required by applicable regulations including § 655.731(c)(3)?
3. What salary was Mao entitled to during his employment by Respondent?
4. Whether there was a *bona fide* termination of Mao's employment relationship by Respondent in accordance with the H-1B requirements of the INA under § 655.731(c)(7)(ii) , and, if so, when did such termination occur?
5. Whether Mao was in nonproductive status or "benched" by Respondent because of a lack of work or any other employment related cause for any period of time or times after June 14, 2002, for which he was entitled to be paid his regular salary at the rate prescribed pursuant to the LCA or some other amount?
6. Does any portion of the time after June 14, 2002, qualify as time when Mao was not entitled to be paid under the LCA because of a period of nonproductive status due to conditions unrelated to employment which took Mao away from his duties at his voluntary request and convenience or rendered him unable to work under § 655.731(c)(7)(ii)?
7. Whether Respondent owes Mao pay for any period after June 14, 2002?
8. Whether Respondent owes Mao additional pay for the two months of July and August 2002 when Nasser paid Mao at the reduced rate of \$3000 per month?
9. Are Respondent's exhibits J, K, M, N, O, and P, annexed to Respondent's brief, which were not offered or admitted into evidence at the hearing, and which have been objected to, but responded to, by Mao, admissible in evidence and properly considered as part of the evidentiary record?

Findings of Fact

Attributes of Nasser Engineering and Computing Services and its Business

Nasser is the owner and Chief Executive Officer of NECS, a business partnership, which is in the business since 1994 of software development, engineering, and consulting services serving the utility industry, primarily in Texas. Nasser's specialization is computing within

is an exchange of emails between Nasser and Mao on November 10, 2003. These exhibits are not properly offered or received post hearing and have not been considered. Consequently, Mao's responses to them have also not been considered.

applied mathematics, and he has a Ph.D. in mathematics. At the time of its H-1B petition on behalf of Mao, Nasser represented that the Company had six employees and that its corporate office was located in Houston, Texas. Since 1998 NECS has had only one client, Reliant Energy, which had become CenterPoint Energy after deregulation.

NECS has provided specialized expertise in the domain area utilized by Reliant Energy, variously through sole source procurement or competitive bidding. The company relies on consultants and subcontractors, mostly paid by the hour, to do its business. To that end Nasser personally selected candidates with specialized expertise with master's or Ph.D. degrees to provide expertise to Reliant Energy which that company did not possess internally. (Tr. 197-99, 200, 202-03, 205, 206, 215-16, 244). Because of the unpredictability of the procurement process, Nasser hired needed personnel for projects after contracts had been awarded. (Tr. 205-06, 210, 212). He would then pay his personnel hired for the project from the contract start date to the contract end date. Because of his continuing relationships with other companies, Nasser usually employed his experts on an as needed basis and then would release them back to their companies when no longer needed. (Tr. 212).

NECS hired Mao, its only salaried employee other than Nasser, in connection with a sole source procurement to provide Reliant Energy with a senior software developer to provide ongoing maintenance, repairs, and upgrades to a specific computer application. Nasser had previously employed only one nonimmigrant worker in 1999 or 2000, who had gone to another company which had offered a longer term relationship and sponsorship of a green card. Reliant Energy and Nasser agreed that the candidate would possess certain qualifications and that Reliant Energy would review candidates' resumes and make the selection. (Tr. 203-04, 217-19, 244). Nasser testified that he was looking for a senior software programmer candidate with a master's degree in electrical engineering or computer science with five or ten years of experience that he would then recommend to his client. (Tr. 220, 232). He testified that, though he probably would not hire someone with less than a master's degree, a bachelor's degree might do if the candidate had sufficient expertise. (Tr. 220, 223). Verbal and written communications skills and being able to function in an organization were also important qualifications. (Tr. 223-24). Thus, Nasser conceded that the requirement for a master's degree in computer science was not absolute.

By letter dated January 20, 2001, Nasser extended NECS's offer to Mao to join the company as a Senior Software Developer with starting annual salary of \$48,000 starting January 29, 2001. He stated, "As a full time employee you will be entitled to all standard employee benefits such as Holidays, Vacation, Sick days. Your health insurance will be activated within 60 days from your starting date above. We plan to sponsor you with an H1 Visa, and upon your arrival in Houston we should pursue this process." (RX C; PX 1; Tr. 101, 225, 233-34). Nasser testified that the market for skills of the type Mao had was exceedingly tight at the time and that most of his candidates were from Mainland China. (Tr. 226-27). Mao was recommended to Nasser by someone Nasser knew. (Tr. 228-29). Nasser did not have a specific recollection of the interview, nor could he remember whether Dan Martinez of Reliant Energy had conducted an interview of Mao. (Tr. 230-34). Nasser testified that he hired Mao because he met Nasser's requirements for the position, which Nasser testified he understood from Mao to include an M.S. in computer science. (Tr. 234).

NECS represented in the February 17, 2001, letter to INS that it would fully comply with the terms of the LCA and all laws and regulations regarding H-1B nonimmigrant workers, though the nature of the employment was “at will,” and that in the event that Mao were dismissed from the Company before the end of his authorized period, the Company would be responsible for the reasonable costs of his return abroad if he so chose. (RX E).

Mao accepted the offered position and moved to Houston, Texas, to begin the H-1B application process. (Tr. 236-37; EX-E). Nasser assisted Mao by engaging legal assistance and filing an application on his behalf for an LCA under the H-1B program under the INA. While Mao was still employed but apparently benched by his previous employer, Nasser subcontracted Mao from that employer and allegedly paid him on an hourly basis for work actually performed. (Tr. 88-89, 92-95, 236-37).

Mao maintains that he was employed by Nasser as an H-1B nonimmigrant from May 2001 to February 25, 2004, when his H-1B visa expired. (Tr. 157). He claims that he finished a project for Nasser’s client Reliant Energy in June 2002, and remained on standby for work thereafter. He contends that he worked on a project application for Nasser from November to December 2002, and was informed that there was a prospect for another project. (Tr. 19).

Mao’s Qualifications

By notice dated May 22, 2001, Mao was approved as an H-1B nonimmigrant worker on a temporary basis performing a specialty occupation as a Computer Engineer for NECS from May 1, 2001, to February 25, 2004. (PX 2). Mao had previously worked for a different employer in a valid H-1B status from October 1, 1999, to some time around the date of the new application. (Tr. 86-87; RX E). NECS represented in its LCA petition that it needed a Computer Engineer to analyze data processing requirements, to plan systems, and to provide system capabilities required for projected work loads of a few utility providers. The Computer Engineer was required to research, design and develop computer programs related to the Company’s eMIS Solutions, apparently a proprietary software program.

Following the job offer which was directed to Mao in Akron, Ohio, by letter dated January 20, 2001, Nasser represented to the INS in the LCA Petition by letter dated February 17, 2001, and signed by Nasser, as Chief Executive Officer (“CEO”) of NECS, that Mao, who was currently in H-1B status from another employer, was well qualified for the full time position as Computer Engineer on a temporary basis for three years because he had a Bachelor’s degree in Mathematics from Fudan University, a Master’s degree in Applied Mathematics from the University of Akron, and had taken extensive courses in Computer Science, including Window Programming (Visual C++), Data Communication, Advanced Network, which would lead to a Master’s degree in Computer Science. Mao was represented as having received extensive training on Microsoft and Oracle Internet programs, as evidenced by certificates awarded. Mao’s background included approximately four years work as a Computer Programmer and System Analyst, and work on various projects utilizing his mathematics and computer knowledge. The LCA Petition included Mao’s resume which indicated “M.S. in Computer Science, 2001.” (RX E; Tr. 83-85).

Nasser testified that he was misled by Mao and his resume, and that he did not know that Mao did not have an M.S. degree in computer science at the time he interviewed Mao. He testified that he learned that Mao did not have an M.S. degree in computer science at the hearing, and that he would not have referred Mao to Reliant Energy as qualified had he known. (Tr. 229-34, 238-40; RX E). At the hearing Mao testified that he did not yet have a master's degree in computer science, or so represent, but he had taken courses in computer science toward, and just short of, a degree. (Tr. 80, 84-86).

Since the H-1B petition was filed March 8, 2001, and Nasser's letter to the Immigration and Naturalization Service dated February 17, 2001, stated, "While in the University of Akron, Mr. Mao has taken extensive courses in Computer Science..., and such study will lead to a Master degree (sic) in Computer Science from the same university," it defies credulity that Nasser was misled as to the status of Mao's computer science degree. (RX E). Mao testified, and his resume reflected, that he expected an M.S. in computer science in 2001, but his move to Houston had prevented him from completing some requirements for his degree. (Tr. 84-86). Since the job offer was dated January 20, 2001, the interview must have been conducted in late 2000 or within the first three weeks of January 2001, so that the award of the M.S. degree in computer science would have had to have been in the future, barring extraordinary circumstances not of record.

Health Benefits

Nasser's offer letter stated that Nasser would offer him health insurance, but Mao contends that that Nasser did not offer him health insurance, and that he never had health insurance when he was employed by NECS. (Tr. 20). The job offer letter stated that Mao's health insurance would be activated within sixty days of his starting date which was identified as January 29, 2001, in the letter. However, this was not done. (Tr. 21; PX 1). Mao did not begin work on January 29, 2001, because he had to await the H-1B approval and did not receive notice until May. (Tr. 24).

Mao denies that he was offered health insurance and denies that he refused or waived it. (Tr. 108). But he had no relevant documentation. (Tr. 202, 22-23; PX 1). Mao also did not know what portion of the premium he would have been expected to pay. (Tr. 107-08) Mao testified that he underwent a medical examination for life insurance that was abnormal in April 2002, approximately a year after he started work; that he was rejected for life insurance by a letter dated April 30, 2002, with an attached lab report, which he received from the insurance company; and that he immediately asked Nasser for health insurance.⁶ Born on October 1, 1946, he would have been approximately 56 at the time he applied for life insurance in April 2002. (Tr. 20-23, 58-65; PX 11). He asserts that he never received health insurance coverage, that his health has been damaged by his inability to afford or obtain medical treatment, and that he needs medical attention urgently in accordance with recommendation of a clinic doctor (PX 14).

⁶ Mao was questioned by the court on the obviously erroneous premise that the insurance examination occurred as Mao began to work in 2001, rather than a year later in 2002. However, any confusion is clearly resolved by the record.

It may reasonably be inferred that Mao did not know he had a health problem until April 2002, approximately a year after Mao began work for Nasser, and so he might have rejected health insurance when offered, as Nasser testified, or because of timidity or otherwise, failed to act to accept and activate it after the offer of health insurance. Mao admitted that he had not requested health insurance when he thought he was in good health. (Tr. 61-63). Mao testified that he sent Nasser an e-mail request for health insurance after he was rejected for life insurance, but that the e-mail is lost because Mao had closed his AOL account in December 2002 and Nasser had not produced the email as requested on discovery. Mao testified that Nasser did not respond to his request. By his own account Mao only asked Nasser for health insurance that once, apparently because he concluded that if Nasser did not respond, he did not want to provide the health insurance. (Tr. 61-64, 110-11). Thus, there is no evidence that he followed up in any way prior to April 2002 the statement in the job offer letter that health insurance would be activated within sixty days of his employment. Mao's offer in his pleadings to waive his claim for health insurance if he were awarded back pay is immaterial.

Nasser contends that, in accordance with the terms of his offer letter, within sixty days following Mao's May 2001 starting date with NECS, Mao was in fact offered health benefits like all other NECS employees; that in early May Nasser had his payroll service, A&L Business Services, prepare quotes and benefits for Mao and another employee. Nasser testified that in May 2001 in his office he explained to Mao that he would have several insurance companies' health benefit programs to choose from, but that Mao responded, "No, you do not have to worry about, [sic] I have coverage under by my wife, [sic] do not waste your money, I do not want to waste mine." Nasser testified that he reassured Mao that he was entitled to health benefits, but that Mao declined, and no further discussion or communication by e-mail or otherwise regarding health benefits occurred. (Tr. 13-18, 50, 249-51, 255; DX J).

Mao categorically denied telling Nasser that he had health insurance covered by his wife, though he testified that his wife was employed in New York beginning January 2001, and that she had her own health insurance. (Tr. 24, 108). Mao testified that he never discussed health insurance with Nasser in 2001. (Tr. 108-10). Mao testified that his wife began her employment at about the same time he did, and so he should have got his health insurance from his employer. (Tr. 24). There is no documentation in the record other than the offer letter regarding the obligatory offer of health insurance, of the discussion, of the investigation of available health insurance plans, of Nasser's alleged offer, or of Mao's alleged rejection or waiver. (Tr. 23).

Nasser asserts that he never received any e-mails during Mao's employment with NECS or after Mao's alleged termination requesting or demanding health benefits, and that Mao's first assertion that he had been denied health benefits was when he appealed the Administrator's Determination pursuant to § 655.815. (Tr. 13-18, 50, 251, 255; DX J). Nasser produced evidence that Mao attested under oath in connection with his wage claim before the Texas Workforce Commission on or about May 26, 2004, that NECS owed him no fringe benefits. (EX G). The record of Mao's complaint to ESA identifies claims for pay, but not health benefits, which was one of the options specifically included on the form.

Mao offered an assessment by a doctor Chuang of the H.O.P.E. Clinic in Houston dated September 20, 2005, about a month prior to the hearing, to corroborate his claim of significant

health problems which stated, “He is under HOPE clinic care at this moment. He needs medical care for his multiple medical need. [sic] Need medical attention urgently.” A two page laboratory report of contemporaneous test results was attached, which Mao testified was indicative of diabetes as the main problem. (PX 14; Tr. 68-71). Mao explained that he had gone to the clinic four times, the first time on September 20, 2005, on a recommendation because a doctor would see him for five dollars. Mao testified that the examination had been limited by cost to a urine and blood test, but included an eye examination because of the risk of diabetes to his eyesight, and that he got a prescription, but had no money to buy medicine. (Tr. 72-74).

NECS’s Salary Payments to Mao

Mao worked as a subcontractor for Nasser from March 20 to April 15, 2001, and thereafter for Nasser as an employee of NECS, after getting his H-1B visa sponsored by Nasser. Mao was an H-1B employee sponsored by another employer, and NECS subcontracted Mao to work for NECS until his H-1B Visa application filed by NECS was approved. Mao and NECS received notice that the application had been approved on or about May 20, 2001, and Mao was hired by NECS that month pursuant to the offer letter. (PP-2; Tr. 240-41). Prior to May 14, 2001, Nasser indicated that Mao was being paid through the contractor. Nasser testified, though his recollection was admittedly vague, that as a gesture of goodwill, NECS advanced Mao at his request \$3,000 on his first pay period in May 2001 as an employee of NECS, probably because he had financial needs when he first started employment.

Mao explicitly denied that the \$3000 represented a requested advance and insisted that it was salary. Mao testified that the \$3000 related to Mao’s subcontracted work for NECS before he became a regular employee of NECS, in addition to what Nasser paid Telemap Company, Mao’s prior employer, and not an advance for moving costs or other purposes. Mao did not know how the \$3000 was calculated, but thought it was his pay in March. (Tr. 25-26, 93-99; 240-46; PX 2; RX F). Given the subcontract dates, it more probably pertained to the period between March 20 and April 15, 2001, and because it was listed on the salary payment schedule, and there is no documentation of any other purpose, Mao’s suggestion is more credible. No evidence of payments to or by Mao’s prior employer was produced by either party. No exact starting date for Mao’s employment by NECS has been established on the record.

Nasser also testified that Mao was routinely advanced monies over and above his \$4,000 monthly salary prescribed by the contract. (EX-F; Tr. 106, 245-46) Nasser asserted implausibly that it was a clerical error that was never caught. (Tr. 242-44). From May to December 2001, NECS paid Mao the pre-tax amounts listed in the schedule below, which is not disputed as to amount or timing. Nasser contends, however, that the amounts paid were improper and excessive salary payments under the contract. (EX F). There is no documentary evidence explaining why the payments would have exceeded the \$4000 monthly contract amount. For the period from approximately May 1, 2001, to June 29, 2001, Nasser paid Mao \$4,333.33 gross pay per month with no deductions except for taxes. No deductions were made for health insurance premiums during that period. (Tr. 27). Thereafter, until December 3, 2001, Nasser paid Mao \$6,333.33 gross pay per month, which purported to total \$47,666.64 for the year 2001. Except for the amounts paid, there is no evidence of any intent to amend the contract subject to the LCA.

<u>2001</u>	<u>Gross Pay</u>	<u>2002</u>	<u>Gross Pay</u>
May 14, 2001	\$3,000.00	January 1, 2002	\$4,333.33
May 14, 2001	4,333.33	February 4, 2002	4,333.33
June 8, 2001	4,333.33	March 1, 2002	4,333.33
June 29, 2001	4,333.33	April 1, 2002	4,333.33
August 1, 2001	6,333.33	May 1, 2002	4,333.33
August 31, 2001	6,333.33	June 3, 2002	4,333.33
September 28, 2001	6,333.33	July 3, 2002	4,333.33
October 29, 2001	6,333.33	July 31, 2002	3,000.00
<u>December 3, 2001</u>	<u>6,333.33</u>	<u>August 28, 2002</u>	<u>3,000.00</u>
Total Pay Received for 2001	47,666.64	Total pay for 2002	36,333.31

Mao testified that he received these amounts. (Tr. 103-05). He testified that the amounts he was paid in excess of the \$4000 per month prescribed by his contract reflected overtime. (Tr. 106, 113-15). Nasser contends that Mao should have been paid a total of only \$32,000.00 for eight months of employment during 2001 and during 2002, under the terms of the applicable employment contract. Thus, having been actually paid \$36,333.31 in 2002, he received an overpayment and advance of \$4,333.31. Likewise, Nasser contends that Mao received an overpayment of \$15,666.64 in 2001. Nasser contends that overall Mao received total salary advances and overpayments of \$19,999.95 above his agreed upon salary of \$48,000.00 per year. (RX C, F; Tr. 106, 245-46). Nasser denied that Mao's salary was increased or an increase negotiated beyond the contract amount during his employment. (Tr. 247).

Nasser paid Mao \$3000 per month instead of \$4333.33 for July and August, 2002, allegedly because Mao was on notice of termination but on standby for work. Nasser terminated all salary payments thereafter. The total salary Mao was paid in 2002 was evidenced by a W-2 form, whose accuracy was not challenged, in the amount of \$36, 333.31. (PX 3, 4; Tr. 29-33). Mao testified that after his project with Reliant Energy ended in June 2002, Nasser gave him another project at the end of August to prepare for CenterPoint Energy, a Nasser client which had split from Reliant Energy. Mao testified that he studied the project for forty days as the programmer, developing some new skills. However, the project did not materialize. Mao claimed the project was evidence that he was still employed by Nasser, but on nonproductive status, and so entitled to be paid. (Tr. 33-37; PX 5).

Mao asserts that NECS raised his salary to \$52,000 per year, which calculated to \$4333.33 per month, in April 2001 by verbal agreement. Mao alleges that from July to November 2001 he did extra work for NECS pursuant to a verbal agreement that NECS would pay him an extra \$2000 per month. Mao claims that the extra \$2000 per month was variously for extra or overtime work, and that he has not been overpaid. Nasser claims implausibly that it represented salary advances.

When Mao filed a wage claim against NECS with the Texas Work Force Commission on May 26, 2004, seeking unpaid wages of \$15,448, due for 3 25/29 months in nonproductive status because of lack of assigned work, between November 1, 2003, and February 25, 2004, he declared that his rate of pay was \$4000 per month. He made no claim for fringe benefits in that

proceeding. (RX G; Tr. 173-76). Although he had earlier demanded back pay of \$71,700 detailed as overtime pay from Nasser, at the hearing Mao testified that he was not claiming overtime pay. (Tr. 163, 166; RX L). These various conflicting claims by Mao are deemed to reflect the technical confusion of a *pro se* Claimant, and are properly disregarded as immaterial.

End of Mao's Work at Reliant Energy Through August 2002

Although Mao was employed by NECS, he was assigned to work on a project at the offices of Nasser's sole client, Reliant Energy, from June 10, 2001 to June 14, 2002, under the supervision of Dan Martinez, except for the last month. Mao testified that from April 2001 to November 2001 he worked on another project, MHDOP, also for Reliant Energy, for about twenty hours per week during evenings and weekends for which he was paid extra. (Tr. 111-16). Such extra work would be a plausible explanation of his increased pay from \$4,333.33 to \$6,333.33 for the months of July through November 2001.

In early April 2002 Reliant Energy first advised Nasser that Mao's services might no longer be needed because Reliant had decided to perform the work that Mao was doing in house with its own Information Technology ("IT") personnel. (Tr. 256, 258). There is no evidence or suggestion of deficient performance by Mao.

In May 2002 Reliant Energy decided to convert Mao's position to in-house, and transferred Mao to another building for the transition period. Mao continued to perform the duties of the senior software developer position with Reliant Energy, until Mao's position was eliminated on June 14, 2002. (Tr. 115, 117, 258, 260). Nasser advised Mao of the possible elimination of his position in early May 2002. Nasser testified that he suggested that Mao should seek alternative employment because Nasser had no immediate prospects for Mao's further employment by Nasser in computer services. (Tr. 118-20).

On Friday June 14, 2002, or Monday, June 17, 2002, Nasser and Mao met in Nasser's office. Nasser informed Mao that there were no projects for him at that time, but that there was a potential of future projects in the following month. He suggested that Mao take two weeks of paid leave that he was then entitled to and visit his wife in New York. (Tr. 260-61). Nasser testified that he also instructed Mao to start sending out his resume to seek other employment because, if another project did not materialize in the following sixty days, Nasser would have to terminate him. Mao went to New York for two weeks paid vacation until July to visit his wife. (Tr. 122-23). He returned in early July after his two week vacation and reported to Nasser at his Clear Lake office. (Tr. 268-69).

Nasser advised Mao at that time that there were still some projects pending, but that he had found no work for Mao, and gave Mao two options: 1) termination with the possibility of rehire in the event that a project were to materialize; or 2) personal leave and compensation at a reduced rate of 75% for approximately sixty days while he searched for work, possibly in New York where his wife was living. Nasser testified that Mao elected to take personal leave at a reduced rate of pay of \$3000 per month from July to August 2002. (Tr. 268-69).

Nasser paid Mao at a reduced rate of \$3000 per months for the months of July and August 2002. Mao was allegedly performing no services at those times. Nasser testified that he had asked Mao to do some preparation in July 2002 when NECS was submitting a proposal. (Tr. 320). Between early July and August 30, 2002, Mao contacted Nasser several times by telephone to inquire about possible work. (Tr. 278). No work for Mao materialized during the sixty days up to August 30, 2002, when Nasser and Mao met in Nasser's office. (Tr. 274-77).

Nasser identified the project scope and plan table of contents which Mao identified as PX 15 as a proposal NECS had submitted around July 2002, but had not won. (Tr. 213-15). Nasser explained that such proposals were generally prepared by him, often with contributions by candidates likely to perform the work contributing their time on a contingency basis. (Tr. 214). Mao testified that Nasser asked him to prepare a project from Reliant Energy in June 2002 and he identified the exhibit purporting to be a table of contents of a project scope an plan with the NECS logo upon it. He indicated that it was a big new project wanted by the manager of IT of Reliant Energy requiring new skills. Like another project to which he referred, this project required use of the J2EE program. (Tr. 71-72; PX 15).

The Purported Termination, August 30, 2002

Nasser testified on direct examination that he drafted a letter purporting to terminate Mao's employment by Nasser, that he signed it, and was prepared to present it to Mao at the August 30, 2002, meeting in the Clear View office of NECS. Nasser testified that, though he had the letter on his desk ready for delivery to Mao, he discussed, and may have shown, but did not actually deliver the letter to Mao at that time because Mao asked Nasser for six months of unpaid leave so that his changed status would not have to be reported to the INS. Nasser testified that he reassured Mao that he would help him in any way that did not involve financial or legal responsibility, and Mao, distraught, pleaded with him not to notify INS of the termination. Nasser testified that he granted Mao ninety days of unpaid personal leave with the idea that at the end of ninety days there might be the prospect of a project. (RX B; Tr. 272-77, 321).

Mao categorically denied getting a termination letter, and characterized Nasser's testimony in this regard as false. He testified that numerous e-mails from Nasser did not mention termination, even when Mao asked Nasser to pay him, or in connection with Mao's Texas Worker Commission hearing, and that in a lot of e-mails Nasser told him some project was expected or pending, so that he waited for such a project. He therefore claimed that he had been "benched" and that he should have been paid for his nonproductive time. (Tr. 76, 183, 277).

Mao testified on cross-examination that Nasser's counsel had given him the letter, not Nasser, shortly before the hearing, and denied categorically having received the termination letter after having a conversation with Nasser at his office in August 2002. Mao testified that Nasser did not mention that he was terminated in their e-mail communications. (Tr. 183). Mao denied pleading with Nasser for more time to allow his wife to obtain her visa, and pleading with Nasser not to notify INS that his job with NECS had ended August 31, 2002. (Tr. 136, 183; RX B). Mao testified that his wife had applied for a labor certificate in 2001, the first step to get a green card which she had not got at the time of the hearing, and that he had told Nasser of this

well before August 2002, and probably in 2001. (Tr. 136-38). Mao asserts that Nasser had never informed him that his employment had been terminated before February 25, 2004, so that he never asked Nasser not to report him to the INS. Mao also insisted that he was not worried about being reported to the INS because he could apply for an H4 visa in order to stay in the United States legally. (Tr. 139).

The copy of the termination letter in evidence bears no acknowledgement that Mao received it. Nasser's testimony on cross-examination to the effect that Mao initialed the termination letter cover is sufficiently inconsistent with his testimony on direct examination to impeach its credibility. (Tr. 272-77, 332-33). Thus, although Nasser may have prepared the termination letter, he did not deliver the letter to Mao at or near the August 30, 2002, date that it bears.

Mao's Requests for Pay

Mao testified that he had not been employed since he had stopped working at NECS. (Tr. 129). Mao testified that he had been living subsequently, after Nasser stopped paying him, on savings, the sale of some stock, use of his credit card, and on borrowed money from a friend. (Tr. 128). Mao testified that in September 2002 Nasser said he would pay him in December; that he did not ask for a paycheck in October; and that when he asked Nasser for a paycheck in December 2002, Nasser said there was no project, no budget. (Tr. 157-58). To the extent that Mao depended upon Nasser's good will to retain his H-1B status, Mao had a disincentive to press too hard for pay or other compensation, at least until shortly before his visa was scheduled to expire, because, presumably remaining on H-1B status was to his advantage.

On January 18, 2004, Mao sent Nasser an e-mail letter requesting pay that he was allegedly owed for certain overtime work in June 2001 which he alleged that Nasser had promised him, and also for the Foreclosure Application which he had finished in December 2002 and for which he had not been paid. (PX 13; Tr. 66-68, 158-59). Nasser alleges that Mao made his first formal demand for money on January 18, 2004, less than one month before Mao's H-1B visa expired, and made a variety of demands thereafter regarding payment of credit card bills, overtime, and waiting time for projects back to 2002. (PX 13, EX L). His undocumented e-mail request for pay in December 2002, other than the alleged request in September 2002, was the only evidence of any previous request for pay that Mao made after August or September 2002. (Tr. 158-60).

Mao followed up with another e-mail request for pay on January 21, 2004, outlining his desperate financial circumstances. He testified without contradiction that this was the third time he asked for money. (Tr. 160; RX L). He declared that he was without money, and was facing bankruptcy; that in November 2003 Nasser had said that as a salaried employee he could not get pay for overtime, and that Mao had been paid a bonus instead. Mao denied receiving any bonus. Nasser replied to Mao's e-mail, "You have been paid for every hour worked. You asked for a family leave and I did. I informed you I have no more projects for you, and to utilize your leave to find another position...I need time to consult with an immigration attorney who should handle your situation for me." Mao attempted to detail his claim for overtime by e-mail on February 25,

2004, which Nasser rejected, roughly three hours later, and it appears that communications broke off thereafter.

Mao's "Personal Leave" Without Pay and the Parties' Contacts After August 30, 2002

After August 28, 2002, Nasser did not pay Mao any additional compensation for services or otherwise. However, Nasser agreed to defer notification of the INS and to give Mao unpaid personal time or personal leave in what were essentially three month increments. Nasser requested Mao to contact him prior to the expiration of the ninety day periods and to provide verification of Mao's wife's application for a green card, which Nasser testified was a reason Mao used to justify personal leave and deferral of notice to the INS. Nasser testified that he reiterated to Mao that he had been terminated and that there was no work for him and that because he had opted to take personal leave Nasser would not notify the INS. (Tr. 273-74, 285).

August – December 2002

At the August 30, 2002, meeting, Nasser offered to loan Mao office materials to review, and Mao borrowed a J2EE book and some materials related to a foreclosure program with which Nasser was involved. (Tr. 129, 271, 283) Nasser testified that, notwithstanding, he advised Mao that his taking these materials was not obligatory, was deemed to be at his initiative, required no work product, and that his employment with NECS had been terminated. (Tr. 283). Mao testified that he did some preparatory work when he returned from New York, and visited Nasser in his office often in June and July, and denied that he was bored. (Tr. 129-31). Mao testified that it might have been in October that he first learned that there would probably not be any more work for him. Mao insisted that he was not told by Nasser to find another job until October because of the prospects of getting another project. Mao testified that his last work for NEGS was when he finished a foreclosure application project for Nasser which was related to an ancillary business. (Tr. 121-22, 132).

Mao testified that in September 2002 Nasser told him he wanted to update an older system called Message Tech, Version 2.0 on a server in his office and gave Mao the project, asking him to read and to prepare for the project, which Mao was interested in working on. The project was to involve cooperation with a professor at a later stage, but the professor was busy in September with the beginning of school. Apparently the project did not materialize; Nasser did not get the project; and the project ended after the preparation, but Mao did not know why. (Tr. 75-76; PX 16).

Mao testified that Nasser asked him to prepare for a project with CenterPoint, a client of Nasser, which required knowledge of a program styled J@EE (Java 2 Enterprise Edition), which was contained in a book loaned him by Nasser. He returned the book to Nasser's office, to which Mao had the key, in mid November as evidenced by an e-mail to Nasser from Mao dated November 18, 2002, which also answered some questions for Nasser, and confirmed his phone number and provided a new e-mail address. (PX 6; Tr. 36-40).

Mao testified that in November 2002 Nasser asked him to work on a project styled "Foreclosure Data System," and that he was writing or creating a document related to the

database related to Houston foreclosures and Nasser's real estate business in November and December. The instructions were apparently provided by Nasser in longhand on a piece of scratchpad paper. Nasser testified that there were no communications between Nasser and Mao about that project until December 12, 2002. (Tr. 284-85). Mao testified that he e-mailed Nasser that he had finished the project and wanted to meet with him to demonstrate what he had done on December 12, 2002. When they met the following Monday or Tuesday pursuant to an exchange of e-mails, Mao gave Nasser a letter requesting personal leave through December at that meeting, as Nasser had requested. (PX 7; Tr. 40-44).

Within the ninety day period, Mao e-mailed Nasser requesting a meeting, which Nasser scheduled on December 16, 2002. Nasser testified that he reiterated his request that Mao bring verification that his wife was still in the process of obtaining her green card. Mao did not bring the verification requested, but requested another ninety days of unpaid leave, which Nasser allowed upon Mao's assurance that the regulations gave him latitude to allow him unpaid personal time upon his request, and that Mao's wife would receive her green card prior to expiration of the ninety days. Nasser agreed to defer notification of INS of Mao's alleged termination for another ninety days. (Tr. 285, 287).

December 2002 – March 2003

Mao asserts that he actually took personal leave of three months from December 23, 2002 to March 22, 2003. (Tr. 147-49). He further asserts that on December 13, 2002, Nasser e-mailed him, "I'm leaving early today lets do it at 10 a.m. Monday...bring the letter too," and that the letter referred to was Mao's request for personal leave for three months from December 23, 2002, which he signed, dated, and submitted. (Tr. 331) He testified that he had handed a letter requesting personal leave to Nasser personally in December 2002, but he did not have a copy of the letter. (Tr. 142-43). Mao testified that he thought he was still an employee of NECS at the time. (Tr. 143). Mao asserts that the leave begun on December 23, 2002, just after he finished the Foreclosure Data system project for Nasser, and that this was the only personal leave he took. It was apparently Mao's intention that this three month period would qualify as a period of nonproductive status due to conditions unrelated to employment which would take Mao away from his duties at his voluntary request and convenience pursuant to § 655.731(c)(7)(ii) so that he would not claim or be entitled to pay. Nasser was vague and could not recall how many personal leaves Mao took, suggesting three or four, but admitting he could not remember. (Tr. 326).

Nasser allegedly did not have any further communication with Mao until Mao e-mailed him on March 4, 2003, regarding his W-2 form for 2002. The W-2 form had allegedly been sent in January 2003 by Nasser's A&L Business Services to Mao's last known address, which allegedly had changed without notification of NECS. (Tr. 287-88; PX 8) On March 7, 2003, Mao went to NECS's Clear Lake office to retrieve his W-2 form from the desk he had used while employed with NECS. Nasser had indicated he would "leave it on top of your desk by the PC," and also involved Nasser's request that Mao install MS Office computer program and to "setup the exec application for me to use" on Nasser's PC when Mao went to the office to pick up the W-2. Mao testified that there was evidence that he was employed by NECS at the time, though he only used the desk very occasionally, probably less than once per month, he did not use the

same computer, and he did not see Nasser at the office between March and November 2003. (Tr. 44-48, 52-53, 288; PX 8). He had been allowed to keep a key to the office to use the computers for his job search. (Tr. 289). Apparently Mao met at least briefly with Nasser at that time, because Nasser's computer allegedly had recently crashed, he was in the process of attempting to restore it, and had been unable to locate NECS's copy of Microsoft Office, which he suspected that Mao might have borrowed, since it was not unusual for programmers to borrow NECS's software. Since Mao replied that he had his own copy of Microsoft Office, Nasser requested that he bring it so that it could be installed on Nasser's computer. (Tr. 288; PX 8).

There may have been substantial additional correspondence, as Mao alleged and Nasser did not deny, but there is no record of such correspondence because Mao had lost most of his records of any such correspondence when he terminated his account with AOL in late 2002. In response to Mao's request for discovery of such correspondence, Nasser declared that his computer had "crashed" in late 2002 or early 2003, and that he had been unable to recover any computer correspondence during that period.⁷ Nasser testified at the hearing that because the computer did not contain much sensitive data other than e-mails, he did not attempt to retrieve the data, and, therefore, did not have any e-mail communications between Nasser and Mao between 2002 and early 2003. (Tr. 263-64).

March – December 2003

A few days after Mao's March 7, 2003, visit to NECS's Clear Lake office, Nasser and Mao met to discuss the expiration of Mao's second ninety day personal leave. Nasser testified that he told Mao that he had to notify INS of the August 30, 2002, termination, but Mao allegedly begged for more personal time. Nasser testified that he showed Mao the August 30, 2002, termination letter and invoked NECS's duty to notify INS, but Mao begged for another six month extension. (Tr. 290-92). Nasser testified that he advised Mao that if an attorney advised that NECS could allow any more unpaid leave it would be allowed; otherwise INS would be notified, and Nasser instructed Mao to leave the office assuming that Nasser would notify INS, but for Mao to keep Nasser informed of his whereabouts. (Tr. 291-92). Nasser deferred notification of INS, but testified that he discovered that Mao's cellular and home telephone numbers had been disconnected, and that he received no reply to e-mails sent to Mao's AOL and Yahoo accounts. (Tr. 293). Nasser testified that he periodically but futilely attempted to contact Mao over the next eight months, and allegedly concluded that Mao was attempting to avoid him and the INS. (Tr. 293, 333).

Mao denies that he took six months personal leave beginning in March 2003. Mao points to Nasser's statement in his final statement of position filed on October 7, 2005, before the hearing, to the effect that "March 2003 Meeting between Mr. Nasser and Mr. Mao, where Mr. Nasser instructed Mr. Mao that he had no other alternative to notify immigration as he could not longer give him additional personal time to wait for his wife's green card," as establishing that there was no personal leave granted after March 2003.

⁷ Mao's discovery requests were met with the objection of untimeliness and an assertion by Nasser that the requested e-mails were not available or under his control. There was no follow up.

Mao testified that he traveled in 2003 a total of about a month and a half on personal leave when he went to Los Angeles, once in February 2003 for about ten days, and traveled once for thirty-eight days from November 23 to the end of the year, December 31, 2003. Mao maintained that the period from November 23 to December 31, 2003, was not personal leave, and that he had informed Nasser where he was going and how to contact him in case a project materialized so that Mao could be called back to Houston on short notice. Mao testified that he did not look for work while he was in Los Angeles. (Tr. 140-41, 151-52).

Mao denied that he disappeared or hid in 2003, and asserts that he did not move during that calendar year, that his phone number, mailing address, and e-mail address, except for the AOL account, did not change after December 2002, and that he responded in twenty-four hours when Nasser sent him an e-mail on November 7, 2003. Mao admitted that he did not contact or communicate with Nasser from the end of March 2003 until November 2003, when they had an e-mail exchange and Nasser indicated that a project was expected. (Tr. 181). Mao met with Nasser in November when he turned in the key to the NECS office. (Tr. 154-57) Mao confirmed that he had returned the metal key to the NECS office, but not the electronic key a week prior to the NECS scheduled office move. Mao asked for a meeting regarding the project Nasser had mentioned, but Nasser put him off, saying it was premature to discuss the project which had not materialized, and again Nasser requested the contact address and that Mao return the key. As part of the exchange regarding Mao's return of the key "of the door of our office to you" and request to meet to discuss a project "mentioned on Monday," Nasser wrote in an email dated 11/13/03 regarding the return of the key, and, declaring, "its too early/premature to discuss...I will let you know if the project materialize. I still don't have a contact address for you please provide ASAP. (sic)" (PX 10, p.1; Tr. 55-57).

Mao's AOL account had been closed in 2003, but his Yahoo account had continued in operation. Nasser had contacted him on the Yahoo e-mail address, which Nasser obviously had. Nasser testified that he sent numerous e-mails to Mao between April and October in an effort to establish contact, but without response, until November 7, 2003, through Mao's Yahoo account.⁸ (Tr. 293-94). E-mail contact in which Nasser transmitted a "Please call me ASAP" to Mao, who responded on November 10, 2003, enthusing about the prospect of a new project, saying he had been waiting a long time, to which Nasser responded an hour and a half later, "I'm not sure why did you wait when you were instructed to contact me after your personal leave. I clearly told you that by the end of your personal leave you must either have another position or I would have no choice but to lay you off...Let's hope this project materialize [sic] otherwise." Mao then explained that he had been waiting because Nasser had told him not to call because Nasser would call him. (PX 9; RX K; Tr. 48-54).

Nasser testified that on the weekend of November 8, 2003, following the attempts to contact Mao on November 7, he and his wife, while driving in the area of the Bay Area Metro Park and Ride, encountered Mao with two suitcases walking on the side of the road. During the short ride to an apartment at 16457 El Camino Real in Houston, where Mao asked Nasser to drive him, Mao indicated that he had been in California looking for work, advised that his wife

⁸ Respondent's EX M, N, O, P, which were attached to Respondent's brief and referred to at p. 15, but were not offered or admitted in evidence, cannot be considered. Mao's response thereto is also not considered.

was still waiting for her green card, and asked for a \$400 loan. He was advised to call Nasser on Monday to schedule at meeting at the Clear Lake office. Tr. 296-98, 333-34).

Mao said the incident occurred on December 31, 2003, when he returned from Los Angeles, and that it was the last time he met Nasser. He was certain of the date because Nasser told him about a project expected from Dan Martinez of Reliant Energy and Mao mentioned the project in the January 1, 2004, e-mail. He testified that an e-mail he sent to Nasser on January 1, 2004, thanking him for his help the day before corroborates his recollection of the date when Nasser and his wife picked him up on his return from Los Angeles. Other e-mails he testified corroborate his testimony regarding his efforts to notify Nasser that he was going to Los Angeles November 23 and would return December 31, 2003, and how he could be contacted in the event that a project materialized. (Tr. 152-53, 180-81, 192-94; PX 17, 18, 19).

Mao denied asking Nasser to extend his H-1B visa when he encountered Nasser and his wife on December 31, 2003, or at any other time. He said he planned to change his visa to H4, but had not done so at the time of the hearing because the application depended on the outcome of the instant case. (Tr. 176-77). He said he looked for work without success before his H-1B visa expired, but did not look after February 25, 2004, because he could not work with an H-4 visa. (Tr. 177-78). Nasser frequently admitted a poor memory for details, and Mao appears to have been the better historian. To the extent that it matters, Mao's recollection of the date of this encounter is more credible.

The evidence is conflicting as to whether Mao did or did not change his address and phone number during 2003, and whether he kept Nasser apprised of his contact information at all times. Nasser contends that the apartment address where he drove Mao was not the address Mao had given NECS as his contact information on March 5, 2003 (PX 8). Mao's Yahoo e-mail account, however, apparently remained constant. While it is not disputed that Mao closed his AOL e-mail account in late 2002 or 2003, it is not disputed that he maintained his Yahoo account. It seems quite clear that Nasser was able to contact Mao by e-mail on the Yahoo account as needed and without difficulty, so that whether and when there might have been a change of Mao's address and phone number appears to be immaterial to resolution of the issues in this case.

Nasser testified that he and Mao met for the last time at NECS Clear Lake office on November 10, 2003. He denied indicating to Mao that there was a project for him to work on. He testified that he expressed annoyance that Mao had disappeared for eight months and at an e-mail just received from Mao suggesting that he had been waiting for work and that Nasser had indicated that there was a project in prospect. He said that Mao said he had been looking for work all over the country, and requested Nasser to renew his H-1B visa, which Nasser refused (Tr. 293, 298-300, 348 ; EX K; PX 9, 10, 12, 13, 18, 19).

The conflicts as to details of timing and substance do not need to be resolved to establish that there was no action during this period which evidences a good faith termination of the employment relationship, and, on the contrary, that establish that relations between Mao and Nasser were not severed, and that there was an ongoing relationship, though attenuated, which preserved the employment relationship.

January 2004 and After

Mao also cited a test e-mail exchange which he initiated on January 9, 2004, inquiring whether the NECS e-mail box was working, because he had sent Nasser an e-mail on January 1, 2004, he needed the new address of the company, and he wanted to know the status of “the Dan’s project you told me on 12/31/03?” Nasser simply responded that the e-mail was working. Mao testified that this was evidence that he had been told about the project and was waiting for it. (PX 12; Tr. 64-66).

Discussion and Conclusions of Law

Alleged Misrepresentation Regarding Mao’s Qualifications

Mao contends that Nasser’s allegation that he did not know that Mao had no M.S. degree in computer science until the hearing is false. Since there is no suggestion in the record that Mao did not perform competently at his assigned work or that the fact that he had not yet received the M.S. degree in computer science had any effect upon his performance. Mao’s resume, fairly read, did not recite that he had an M.S. degree in computer science. Mao’s interview with Nasser, the details of which Nasser conceded he did not recall, must have been near the end of 2000 or within the first two or three weeks of 2001. Consequently, there was no reasonable possibility that the degree which Mao expected in 2001 could have been awarded at the time of the interview. Moreover, Nasser should have known that Mao would move to Houston in February 2001 to work for NECS, and that he probably could not obtain his degree on schedule from the University in Akron.

In addition, because Nasser suggested in his testimony that experience might be acceptable in lieu of an M.S. degree in an appropriate case, the requirement was not absolute. Thus, Nasser’s contention that Mao misrepresented his degree status in his resume and misled Nasser in the interview is unsupported by evidence and implausible. Even if Nasser had proved that he relied upon misrepresentations as alleged, it would not change the outcome of this case. *See USDOL v. Ken Technologies, Inc.*, 2003-LCA-15 (ALJ July 18, 2003)(deliberate misrepresentation as to qualifications would not avoid wage liability if INS not notified of termination). Moreover, the testimonial assertion seriously impairs Nasser’s credibility, which was further impaired by his admittedly poor recollection of historical details, the style of his testimony, and his demeanor as a witness.

Nasser’s Alleged Failure To Offer or Provide Mao with Health Insurance Coverage

An employer must offer health insurance as a benefit provided as compensation to an H-1B nonimmigrant on the same basis as the employer offers to U.S. workers.⁹ Mao contends that

⁹ § 655.731(c)(3): *Benefits and eligibility for benefits* provided as compensation for services (e.g. . . .paid vacations and holidays; health, life, disability and other insurance plans. . .) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(i) . . .Offers of benefits by employers shall be made in good faith and shall result in the H-1B nonimmigrant(s)’s actual receipt of the benefits that are offered by the employer and elected by the H-1B immigrant(s).

he was never offered or provided with health insurance as required by the LCA, his contract with Nasser, and the applicable regulations, and that Nasser is liable to him for such coverage and the damaging consequences of Mao's failure to be provided timely health care and treatment for significant adverse health conditions. Mao contends that he did not have health insurance when he was employed by NECS. He took a health examination for life insurance in April 2002, approximately one year after he started work for NECS. Important health indexes were abnormal, and disclosed diabetes and abnormal liver functions. Consequently, the life insurance company rejected his request for coverage. Mao says he asked Nasser for health insurance after that, but never got it, and that he lacked money to see doctor, and his health was damaged. He got further evidence of the state of his health from the H.O.P.E. medical clinic on September 20, 2005. (PX 14).

Nasser contends that the employer's duty as outlined in § 655.731(c)(3) and 655.732 requires the employer to make benefits available to an H-1B employee, and do not "mandate that an H-1B employee must have full benefits." Nasser contends that Mao did not assert his claim that he had been denied health benefits until he appealed the Administrator's determination pursuant to § 655.815. Nasser contends that, when Mao started work, he promptly took steps to provide Mao with an opportunity for health care insurance under available commercial sources, but that, when he offered coverage to Mao, Mao waived it, claiming that he had coverage under his wife's health insurance provided by her employer. Nasser's contention is undocumented, and Mao categorically denies that such an offer was made or that he waived health insurance coverage.

It is unexplained how Mao's wife could have such coverage from her employer if she was waiting for her green card, but Nasser's testimony that he made the offer of health insurance is plausible under the circumstances. It is logical that the research and offer would have been done at the beginning of the employment relationship when such matters would have been of primary concern to the parties. The issue reduces largely to Nasser's word against Mao's; and Mao produced no evidence whatever of diligence in pursuing this crucial right if he did not waive it as Nasser testified. It is reasonable to expect that if health care coverage were not forthcoming, he would have made some effort to obtain it within reasonable time and would have maintained some record of that effort.

The job offer letter dated January 20, 2001, from Nasser to Mao, is reasonably construed as a documented offer of health insurance coverage to be activated in sixty days from employment, although the identified starting date was premature. Consequently, Mao had notice of the offer of health coverage and Nasser was aware of the obligation to provide such unless waived.

Mao admits that he did not request health insurance coverage after his employment until after he received his adverse medical examination results in April 2002, whereupon he allegedly e-mailed a request to Nasser for health insurance coverage. Nasser denies any communication

(ii) The benefits received by the H-1B nonimmigrant(s) need not be identical to the benefits received by similarly employer U.S. workers(s)[sic], *provided that* the H-1B nonimmigrant is offered the same benefits package as those workers but voluntarily chooses to receive different benefits (e.g....elects not to receive health insurance because of required employee contributions, or elects to receive different benefits among an array of benefits)...

with Mao about health insurance after his alleged offer and explanation of an impending choice of health insurance plans. Nasser's description of his procedure and offer, and Nasser's description of Mao's response, are plausible, but Nasser's descriptions are undocumented either as to alleged offer or alleged waiver, and Nasser's credibility is generally impaired. On the other hand, the credibility of Mao's contention that he was not offered health insurance coverage is impaired by the job offer letter, and the fact that he waited a year, until he got an adverse medical assessment, before making his alleged e-mail request for health insurance, which is undocumented.

The regulations explicitly allow a nonimmigrant employee to waive health coverage. § 655.731(c)(3)(ii). Mao was secure in his employment with Nasser and Reliant Energy at the time the offer of health insurance should have been made. Nasser would normally bear the burden of documenting the offer and waiver pursuant to the employer's general obligations under the pertinent regulations. § 655.731(b). Although Mao has proved that he did not have coverage, his claim that he was not offered health coverage is disproved by the job offer letter. The job offer letter and Nasser's plausible testimony that he did specifically offer health insurance at an appropriate time, and the plausibility of Mao's inaction, preclude a finding, based on a preponderance of evidence, that Nasser did not offer Mao health insurance as required, even in the absence of a documented waiver.

NECS's Salary Payments to Mao

As employer of an H-1B nonimmigrant Nasser was required to pay Mao at or above the wage rate specified in the LCA, including for time in nonproductive status due to a decision by the employer.¹⁰ Nasser's letter in support of the LCA petition and job offer letter to Mao specified that Mao would be paid an annual salary of \$48,000 per year as a Computer Engineer. Monthly salary payments of \$4000 would have been consistent with the offer. The LCA

¹⁰ § 655.731(a) *Establishing the wage requirement*. The first LCA requirement shall be satisfied when the employer signs [specified forms] attesting that, for the entire period of authorized employment, the required wage rate will be paid to the H-1B immigrants; that is, that the wage shall be the greater of the actual wage rate (as specified in paragraph (a)(1) of this section) or the prevailing wage...The wage requirement includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for services to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(1) The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question...

§ 655.731(c)(7)(i): *Circumstances where wages must be paid*. 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), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full-rate amount due...

(ii) *Circumstances where wages need not be paid*. 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 ill 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...Payment need not be made if there has been a *bona fide* termination of the employment relationship. INS regulations require the employer to notify the INS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

identified the pertinent prevailing wage in Houston, Texas, as \$41,209 per year. However, Mao was never paid \$4000 per month. Rather, Mao was paid \$4,333.33 monthly beginning on May 14, through June 29, 2001, and January 1 through July 3, 2002. He was paid \$6,333.33 monthly beginning August 1 through December 3, 2001, and \$3000 on May 14, 2001, and July 31 and August 28, 2002. Thus, except for the three aberrant \$3000 payments, his monthly salary payments were in excess of the prescribed \$4000 per month, in effect the *actual wage*.

Mao testified plausibly that he received extra pay for extra work pursuant to a verbal agreement. Nasser contends and testified implausibly that he never looked at the books, despite apparently planned changes in salary amounts; that Mao was only entitled to \$4000 per month; and that the excess amounts were either salary advances for unspecified purposes or reflected uncorrected clerical errors which resulted in excess payments to Mao to which he was not entitled, which were never recognized, and for which Nasser is entitled to credit for overpayment. The several months Mao was undeviatingly paid \$4,333.33; the several months from August to December 2001 when the monthly payments were increased by \$2000 to \$6,333.33, and the reversion back to \$4,333.33 from January to July 3, 2002, militates against Nasser's suggestion of clerical error and in favor of Mao's claim of additional pay for additional work. Since those particular monthly payments are in excess of the amount prescribed in the LCA, no underpayment is established.

Absent affirmative evidence of amendment or evidence of an amendment to the LCA, the provisions of the LCA establish the standard against which to measure any deficiency in legally required pay to Mao as a nonimmigrant with H-1B status. When an LCA states a wage amount lower than that prescribed by correspondence of record between the Employer and the Prosecuting Party, particularly if the higher amount was never paid to the Prosecuting Party, DOL would not enforce the private contractual agreement, such as the terms of an offer letter, because DOL's enforcement power derives from the INA and applicable regulations, and thus is limited to the terms contained within the LCA. *See Rajan v. Int'l Business Solutions, Ltd.*, 2003-LCA-12 (ALJ Apr. 30, 2003), *aff'd in part, modified in part, Rajan v. Int'l Business Solutions, Ltd.*, ARB No 03-104, ALJ 2003-LCA-12 (ARB Aug. 31, 2004). 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." § 655.731(a)(1)(2004); § 655.715. If, as in this case, there are no other employees proved to have similar experience and qualifications, "the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer." *Id.*; *see Admin'r, Wage & Hour Div, v. Novinvest, LLC*, 2002-LCA-24 (ALJ Jan. 21, 2003) slip opinion at 13. Thus, the consistently higher salary payments made by Nasser during Mao's productive employment, even though they rose to \$6,333.33 for five months and then reverted back to \$4,333.33, are properly deemed to be Mao's *actual wage* while he was productive, rather than the \$4000 per month derived from an annual salary of \$48,000 specified in the LCA application and offer letter.

Nasser was not entitled under the LCA or regulations to arbitrarily reduce Mao's pay below his actual wage to \$3000 per month with or without his consent while Mao was on

standby during the months of July and August 2002. Nasser was bound by the regulations to continue paying Mao at the same rate he was being paid during his times of productive activity. Once Nasser began consistently paying Mao a higher wage than the prevailing wage, or the initially prescribed contract wage, he had to continue paying him that wage even during periods of nonproductive status. *See Admin'r v. Novinvest, supra* at 13. Therefore Nasser owes Mao \$1,333.33 additional salary for the month of July and \$1, 333.33 additional salary for the month of August 2002.

Normally the grant of the H-1B visa triggers the obligations of the nonimmigrant H-1B employer to the employee, including start of employment. An H-1B nonimmigrant is entitled to receive his required pay beginning on the date when he “enters into employment” with the employer. §655.731(c)(6). Under §655.705(c)(4) Nasser could have allowed Mao to work after NECS filed the H-1B petition for Mao’s benefit which was on or about March 8, 2001. Nasser’s obligation with respect to pay commenced when Mao was considered to have “enter[ed] into employment,” which was the date that Mao as the nonimmigrant “[made himself] available for work or otherwise [came] under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.” 8 U.S.C. § 1182(n)(2)(C)(vii)(I); § 655.731(c)(6)(i). *See Rajan v. Int’l Business Solutions, LTD.*, ARB No. 03-104, ALJ No. 2003-LCA-12 (ARB Aug. 31, 2004) slip opinion at 7.

The offer letter dated January 20, 2001, identified a starting date of January 29, 2001. Mao’s H-1B petition was approved, effective May 1, 2001. Mao worked as a subcontractor for Nasser from March 20 to April 15, 2001, and thereafter as an employee of NERCS. The salary payment of \$4,333.33 paid on May 14, 2001, could have been for the period of approximately April 15 to May 14, and the \$3000, if not advanced for expenses as averred by Nasser, could have related to the period when Mao was subcontracted to Nasser. Both parties agreed that at least a portion of Mao’s salary was paid through the subcontractor. Thus, there is insufficient evidence, in the absence of any particular demand by Mao, to require any adjustment to Mao’s compensation under the governing regulations prior to the May 14, 2001, payments.

Nasser claims that during 2002, Mao was employed from January through August, 2002, when he was terminated, and should have been paid \$32,000 for his services in 2002, but due to additional requested advances, he was paid \$36,333, which included an overpayment of \$4,333.31, which Mao allegedly does not dispute. (EX F; Tr. 106). (EX E, B). Nasser contends that such salary advances totaled \$19,999, but there is no evidence of the cause or purposes of such alleged salary advances or the alleged overpayments. Nasser asserts that NECS should be entitled to credit for the overpayment totaling \$19,999.95, citing *U.S. Dept. of Labor, Adm’r, Wage & Hour Div., Empl’t Stds. Admin. V. Pegasus Consulting Group, Inc.*, ARB Nos. 03-032, 03-033, ALJ No. 2001-LCA-29 (ARB June 30, 2005); (EX F, PX 3) Nasser claims a similar overpayment and credit with respect to Mao’s salary in 2001. Neither claim is supported by evidence or reason, and both are rejected as lacking in credibility and proof.

Was There a Bona Fide Termination of the Employment Relationship between Nasser and Mao?

An employer violates the INA and applicable regulations if, for an employment-related reason, it fails to pay an H-1B nonimmigrant who is in “nonproductive status.” Such employment-related nonproductive status would result from factors such as lack of available work for the nonimmigrant or a nonimmigrant’s lack of a permit or license. 8 U.S.C. § 1182(n)(2)(C)(vii); § 655.731(c)(7)(i). But an employer need not compensate a nonimmigrant if a “*bona fide* termination” of the employment relationship has occurred. § 655.731(c)(7)(ii). In such event, 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(h)(11).

Nasser recognized that the INA’s implementing regulations require that the H-1B nonimmigrant’s employer notify the INS immediately of any changes in the terms and conditions of the employment of a “beneficiary” such as Mao that might affect eligibility as an H-1B nonimmigrant. Nasser knew or should have known that the INA and regulations require the employer to submit a letter to INS advising of the termination of the “beneficiary” in order to cancel the petition, or LCA. Nasser contends, however that a “*bona fide* termination” does not turn solely on whether the petitioner notified INS; that notification of termination to INS constitutes additional, not conclusive, evidence of termination; and that an employer such as NECS need only prove by a preponderance of the evidence that it in fact terminated the H-1B nonimmigrant employee, citing *Administrator, Wage & Hour Div., U.S. Dept. of Labor v. Ken Technologies, Inc.*, ARB Nos. 03-140, ALJ No. 2003-LCA-15 (ARB Sept. 30, 2004) and *Shaikh v. Vision Systems Group, Inc.*, 2004-LCA-5 (ALJ April 1, 2004). Nasser suggests that the former stands for the proposition that a *bona fide* termination does not turn solely on whether the employer notified the INS of the change in employment status, and the latter for the proposition that the absence of demands for unpaid salary for a substantial time period would imply a belief by the nonimmigrant H-1B employee that the employment relationship had ended.

Nasser contends that Mao made repeated inquiries during July and August 2002 about possible work, but that work for Mao did not materialize. Nasser also contends that at no time from August 31, 2002 until the end of 2003 did Mao make any written or oral requests for unpaid salary. Such demands first came in January 2004, after NECS refused to renew his visa and the expiration of his visa in February 2004 was imminent. However, the evidence of inquiries tends to evidence the continuing employment relationship, however attenuated, and Mao’s possible failure to demand his unpaid salary as alleged by Nasser, but denied by Mao, is immaterial under the circumstances.

Mao contends that there was no *bona fide* termination. He contends that Nasser never showed him the termination letter, that he never received any termination letter from Nasser, and that the termination letter Nasser produced bore no acknowledgement of receipt from Mao. Nasser testified that Mao initialed the termination letter cover, but Nasser did not produce the initialed cover, and, under the circumstances, his testimony is not credible. Nasser also testified that he had the letter on his desk but did not deliver it when Mao pleaded for deferral of the report to the INS that termination would have required. It is undisputed that Nasser did not report the termination or any change in the employment relationship to INS until close to or after the expiration of Mao’s H-1B visa on February 25, 2004. It is also undisputed that Nasser did not tender to Mao the costs of his transportation home to China, as would be required following a *bona fide* termination under the LCA.

Mao also denied a variety of assertions made by Nasser to counter Mao's claims. Mao contended that as a salaried employee with an H-1B visa he never asked Nasser for a minimum wage as alleged by Nasser; that, since he was never informed of the termination of employment before February 25, 2004, he never asked Nasser not to report him to the INS; and that he did not have to make such a request because he could stay in the United States legally by changing his visa status to H4, even if his employment were terminated.

Mao's testimony, and Nasser's testimony, and the pertinent circumstances suggest that the termination letter was not delivered to Mao until shortly before the hearing. However, whether the letter was or was not delivered is not critical because of Nasser's failure to report the termination to the INS as required, to tender the costs of Mao's return to China. Moreover, the ongoing relations between the parties and Nasser's agreement to grant "personal leave," albeit purportedly unpaid leave, to Mao, evidence an ongoing employment relationship under the governing H-1B program regulations, or belie a *bona fide* termination of such a relationship. Nasser's self-serving statements and testimony to the effect that the employment relationship was terminated and that, to the extent that it technically continued, Mao was in legitimate unpaid status are unavailing under the circumstances of this case.

Nasser's contentions that he naively did not realize until too late that Mao was, in effect, "setting him up" in order to extort money from Nasser or NECS with the series of communications and actions maintaining ties are essentially immaterial, since Nasser was obligated under the applicable regulations to terminate the employment and report the termination to INS, if a termination had occurred. The parties were not at liberty to contract out of the employer's obligation to the INS under the INA. Nasser's failure to report Mao's alleged change in employment status, and to prove that Mao's nonproductive status, which was unreasonably extended from August 2002, to February 2004, was a absence from work instigated and maintained voluntarily by Mao Mao's voluntary choice, which it obviously was not, confirms that there was no *bona fide* termination.

Nasser contends that the purpose of the prohibition against "benching" without pay was "to prohibit an H-1B nonimmigrant from being employed by another employer during [a period of nonproductive status due to conditions unrelated to employment] unless another employer files a petition on behalf of the worker or the worker adjusts his status with the INA, and is without any legal means of support in the country. 65 Fed. Reg. 80110, 80170-80173 (2004)." Whatever the merit of Nasser's contention in this regard, it seems clear that the provision is not exclusively so dedicated, and that it is also designed to prevent the circumstances which occurred in this case.

Nasser's reliance on the *Ken Technologies* and *Shaikh* cases is misplaced. Shaikh claimed that his resignation from employment by the respondent employer had not been accepted by the employer, and that an actual or implied employment relation was continuing. The respondent employer had not reported the termination to INS. However, Judge Romano held that a variety of factual circumstances including Shaikh's full time employment with another employer, the absence of written demands for unpaid salary for a year, and other indicia indicating an intent to resign and peculiar circumstances suggesting a resignation had occurred,

established termination by Shaikh's unilateral and voluntary decision to resign, notwithstanding the failure of the employer to report the change in status to INS. No such peculiar circumstances exist in this case.

In *Ken Technologies* the employer allegedly discovered immediately after the H-1B claimant's hire and arrival in the United States, that the claimant had deceptively and materially misrepresented his qualifications to the employer. Although the employer allegedly terminated the claimant four days later, and confirmed the termination by letter dated four days after that, and never paid the claimant, Judge Bullard held there was no *bona fide* termination because the employer admittedly failed to notify the INS of the termination. The case was complicated by a refusal of the claimant to leave the United States on demand, a dispute over when the claimant learned of the termination, and other issues. However, Judge Bullard awarded unpaid wages as specified on the LCA beginning thirty days after the date of the claimant's arrival until the day before his departure, because his nonproductive status during that period was due to a decision by the employer not to assign him work following the attempted termination, and because there was deemed to be no *bona fide* termination in the absence of notification of INS that would have relieved the employer of its obligation to pay wages to the claimant pursuant to §§ 65.731(c)(6), 655.731(c)(7)(i) and (ii).

Mao testified and offered documentary evidence of various communications and various work assignments or opportunities which he allegedly performed for Nasser, or for which he allegedly held himself in readiness were they to materialize, as evidence that his employment relationship with Nasser was maintained, and that he was in nonproductive or "benched" status because of employment related lack of work. Thus, Mao contends he is entitled to regular pay for all but three months, from December 23, 2002, to March 22, 2003, when, pursuant to a formal request for leave which, undisputedly, was reduced to writing in a signed and dated letter, he voluntarily took leave without pay with Nasser's consent. He contends that he had just finished a project for Nasser involving a Foreclosure Data system. He contends that the rest of the time after August 2002 to February 25, 2004, he was available for any assignment Nasser could or would provide under his contract.

Virtually all the circumstances surrounding the termination alleged by Nasser and Mao's alleged ongoing availability for work assignments are in dispute. Nasser insisted that he had advised Mao that he would be terminated in the absence of new projects for which he was qualified after August 30, 2002, and that new projects for which he would be qualified were not in existence and were unlikely. Mao insisted that he was not terminated and that he did not have notice that he was terminated. The testimony of both Mao and Nasser proves that Nasser never completely foreclosed the possibility of another project assignment for Mao. But the fact that Nasser kept giving Mao "personal leave," though in three and six month increments, and maintained communications, disprove a *bona fide* termination of the employment relationship. Nasser's failure to report the termination to the INS until after Mao's H-1B status expired is the critical element of proof that there was no *bona fide* termination of the employment relationship that would have relieved Nasser of the liability to pay Mao his full salary.

Mao's Entitlement to Back Wages

Mao is entitled to his salary for the period subsequent to August 30, 2002, when Nasser stopped his pay, until February 25, 2004, when his H-1B visa expired and he was no longer qualified to work. *See Rajan v. Int'l Business Solutions, Ltd.*, 2003-LCA-12 (Apr. 30, 2003), modified, *Rajan v. Int'l Business Solutions, Ltd.*, ARB No. 03-104, ALJ No. 2003-LCA-12 (ARB Aug. 31, 2004). The applicable salary is \$4,333.33 per month, which is effectively an annual salary of \$52,000 per year. This was the amount Nasser paid Mao, on a monthly basis, during the entire time that Mao was engaged in productive work for NECS, with the exception of the five months that Nasser paid Mao \$6,333.33. That increase in pay apparently represented special circumstances, since the payments subsequently reverted to the established monthly salary of \$4,333.33 from January through June 2002 when Mao was productive and for which Mao was paid.

Mao is entitled to the upward adjustment in the salary paid for July and August 2002 in the amount of \$1,333.33 for each of the two months when Mao was initially benched. Mao is entitled to his monthly salary for the months of September 2002 through January 2004, or seventeen months at \$4,333.33 per month, totaling \$73,666.61; plus the fractional month's pay in respect of February 2004, or 24/29 of February 2004, totaling \$3586.20; plus \$2,666.66 for July and August 2002; reduced by three months of unpaid personal leave from December 2002 to March 2003 in the amount of \$12,999.99; or a total back pay of \$66,919.48.

Under § 655.731(c)(11) any unauthorized deduction taken from wages is deemed by DOL to be nonpayment of that amount of wages which would be subject to a back wage assessment and, under specified circumstances, various penalties. Back pay is awarded to make a claimant whole. Such relief can only be achieved if prejudgment interest is compounded. *See EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1098 (6th Cir. 1996), quoting *Sands v. Runyon*, 28 F.3d 1323, 1328 (2d Cir. 1994) and *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993), cert. denied, 510 U.S. 1164 (1994). *See also Doyle v. Hydro Nuclear Services*, ARB Nos. 1999-041, 99-042, and 00-012 ALJ No. 1989-ERA-22 (ARB May 17, 2000); *Rungvichit Yongmahapakorn (Rung) v. Amtel Group of Florida, Inc.*, 2004-LCA-6 (ALJ, Mar. 23, 2004); *Ru8dranath Talukdar et al. v. U.S. Dept. of Veterans Affairs Medical & Regional Office Center, Fargo, ND*, 2002-LCA-25 (ALJ, Apr. 12, 2004).

While the INA does not expressly provide for interest relative to an award of back pay, but analogy to whistleblower legislation and the proposition that a failure of such legislation expressly to provide for such interest does not preclude it, suggests that interest should be payable in this case. *See Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). Post judgment interest should conform to the usual interest rate applied to back pay awards under analogous whistleblower provisions, which is the interest rate for underpayment of federal taxes prescribed at 26 U.S.C. § 6621(a)(2)(short-term Federal rate plus three percentage points). *See Doyle, supra*; *Johnson v. Old Dominion Security*, ALJ Case Nos. 1086-CAA-3, -4, -5, (Sec'y Final D&O, May 29, 1991), slip op. at 326.

ORDER

1. Respondent, Mahmoud George Nasser d/b/a Nasser Engineering and Computing Services, shall promptly pay to the Prosecuting Party, Zhaolin Mao, back salary in accordance with the foregoing findings for the period after August 30, 2002, until February 25, 2004, in the total amount of \$66,919.48.
2. Prosecuting Party is entitled to interest on the award of accrued unpaid salary at the applicable rate of interest which shall be calculated in accordance with 28 U.S.C. § 1961 and this Decision and Order.
3. The Administrator of the Wage and Hour Division, Employment Standards Division, DOL, shall forthwith make such calculations as may be necessary and appropriate with respect to back pay, and all calculations of interest necessary to carry out this order, which calculations, however, shall not delay Respondent's obligation to make immediate payment to the Prosecuting Party.
4. This decision and order shall supersede the Administrator's finding of no violation, which shall be deemed void and without further effect.

A

Edward Terhune Miller
Administrative Law Judge

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, N.W., 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 (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.