



Issue Date: 15 November 2006

In the Matter of:

RAGHU SHASHANK ARRAMREDDY¹

Complainant

v.

Case No.: 2006-LCA-00020

IK SOLUTIONS, INC.

Respondent

APPEARANCES:

Raghu Shashank Arramreddy, *Pro se*

Michelle Perry, Esq.
On Behalf of Respondent

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER

DENIAL OF CLAIM

This matter arises under the Immigration and Nationality Act H-1B visa program, 8 U.S.C. § 1101 (a)(15)(H)(i)(b) (“Act”) and the implementing regulations at 20 C.F.R. part 655, Subparts H and I, 20 C.F.R. § 655.700 et seq.

The Administrator of the Wage and Hour Division (“Administrator”) issued a determination letter pursuant to 20 C.F.R. § 655.815 to IK Solutions, Inc. (“Respondent”) on March 29, 2006, asserting that Respondent failed to pay wages as required in the amount of \$3,200.00 (thirty two hundred dollars) to Mr. Raghu Shashank Arramreddy, an H-1B non-immigrant.² The Administrator also asserted that the Respondent did not comply with the

¹ Having satisfied the amount of back pay that the Administrator had found the Respondent owed to the Complainant, the Administrator of the Wage and Hour Division concluded that there no longer existed any issues in dispute between the Administrator and the Respondent and, accordingly, requested withdrawal from the scheduled hearings while retaining the right to participate in future proceedings.

² For purposes of identification, the following notations are used in reference to the evidence in the record: “TR” refers to the transcript, “CX” refers to the Complainant’s exhibits, and “RX” refers to the Respondent’s exhibits.

provisions H or I in violation of 20 C.F.R. § 655.730 for having failed to obtain LCAs that accurately stated the area of intended employment. This Claim is brought against IK Solutions, Inc. by the complainant, Mr. Raghu Shashank Arramreddy. He was advised that he has a right to representation, but chose not to obtain counsel.

Mr. Arramreddy asserts that the Administrator's conclusion that Respondent owes Complainant back pay of \$3200 is inaccurate and falls short of the amount he is actually due. He claims that he is owed back pay and other damages in excess of \$3200.00 as a result of INA H1-B visa program violations committed against him by IK Solutions, Inc. IK Solutions contends that the complainant has received all back pay he was entitled to based on the Administrator's findings. Furthermore, any amount requested by the complainant in this action is in excess of what Respondent is obligated to pay pursuant to 20 C.F.R. §§ 655.731(c)(6)(i) and (ii) and 20 C.F.R. § 655.731(c)(7)(ii).

STATUTORY FRAMEWORK

The H-1B visa program permits employers to temporarily employ non-immigrants to fill specialized jobs in the United States. The Act requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage, in order to protect U.S. workers and their wages. Under the Act, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must receive permission from the U.S. Department of Labor ("DOL") before the alien may obtain an H-1B visa. The Act defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. § 1184(i)(1). To receive permission from the DOL, the Act requires an employer seeking permission to employ an H-1B worker to submit a Labor Condition Application ("LCA") to the DOL. *See* 8 U.S.C. § 1182(n)(1); ***In the Matter of Eva Kolbusz-Kline v. Technical Career Institute***, Case No. 93-LCA-004, 1994 WL 897284, at *3 (July 18, 1994). Only after the employer receives the Department's certification of its LCA may the INS approve an alien's H-1B visa petition. 8 U.S.C. § 1101(a)(15)(H)(1)(B); 20 C.F.R. § 655.700.

The Act provides that the LCA filed by the employer with the Department must include a statement to the effect that the employer is offering to an alien status as an H-1B non-immigrant, that wages for H1-B visa holders are at least equal to the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is higher, based on the best information available at the time of filing the application. 8 U.S.C. § 1182(n)(1)(A).

The Act directs the Department of Labor to review the LCA only for completeness or obvious inaccuracies. Unless the Department finds that the application is incomplete or obviously inaccurate, the Department shall provide the certification described by the Act within seven days of the date of the filing of the application. 8 U.S.C. § 1182 (n)(1) and 20 C.F.R. § 655.740.

The Department has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation of the required wages. *See* 20 C.F.R. Part 655 Subpart H. The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid, debarment of the employer from future employment of aliens, civil money penalties, and other relief that the Department deems appropriate. 20 C.F.R. § 655.810 and § 655.855.

BACKGROUND

IK Solutions is a Delaware incorporated information technology firm primarily engaged in nationwide computer consulting services and the placement of professional employees at client sites. The company's office is located in Newark, Delaware.

Sometime in 2004, an offer of employment was made to the Complainant about a position at IK Solutions, Inc. Upon acceptance of the employment offer, IK Solutions filed an I-129 petition for non-immigrant worker visa (H1-B) on behalf of Mr. Arramreddy. The petition was approved and H1-B status was granted to Mr. Arramreddy as of January 5, 2005. The H1-B visa was valid through January 4, 2008. Prior to receiving the H1-B visa, Mr. Arramreddy held an "F-1" student visa and was employed by IK Solutions through Temple University's "Optional Practical Training Program." While in the program, Mr. Arramreddy was directed and monitored by the University.

The record contains two separate offers of employment. (CX 2-18, RX 1, CX 4-31) The first is dated July 18, 2004, and offers the Claimant a job as a Business Analyst at an hourly wage of \$26 per hour. (CX 2-18) The second letter offers the position of Programmer Analyst with an annual salary of \$48,000.00. (RX 1) Only the second letter bears the Complainant's signature. (CX 4-31) Both letters contain a provision that the offer was contingent upon approval of an H1-B petition on behalf of the Complainant and the acceptance of the terms of the employment offer. Otherwise, the two letters contain different terms and conditions.

The events leading up to Mr. Arramreddy's first assignment at an IK Solution's client site in March 2005, are in dispute. Mr. Arramreddy alleges that at all times he was ready, willing, and able to accept assignments on behalf of IK Solutions. In fact, Mr. Arramreddy maintains that throughout this period he was handling inquiries from prospective clients, accepting and conducting phone interviews, and scanning job boards for potential employment leads through the company.

The Respondent alleges that the complainant returned to his home in Maryland in December 2004 because of a family emergency, and that the Respondent attempted, with little success, to contact complainant numerous times between December 2004 and March 2005, in order to determine the complainant's availability and to plan the complainant's next project placement. The Respondent also asserts that the complainant's employment at Maytag and PG&E was cut short because of poor job performance.

Mr. Arramreddy argues that he is owed backpay for the period of time worked at client sites as well as the period of time that he was on "the bench,"³ also referred to as the period of time that he was not in productive status. The Respondent argues that it has no obligation to compensate complainant for the non-productive period because the complainant had voluntarily requested time away to take care of the family emergency and the conditions that lead to this period are unrelated to employment.

Mr. Arramreddy worked at two client sites as an employee of IK Solutions while on H1-B status. The first assignment was located in the Newton, IA offices of the Maytag Corporation ("Maytag") from March 23, 2005 through April 29, 2005. The second assignment was located in the San Francisco, CA office of Pacific Gas & Electric ("PG&E"). The length of Mr. Arramreddy's employment at PG&E is in dispute. At some point in September 2005, the

³ On "the bench" refers to the period of time that the consultant is not actively engaged in work on a client project. This period is usually defined as the time period after a project ends and before a new project begins.

complainant ceased working as an IK Solutions employee and became an employee of B2B Workforce.

Mr. Arramreddy initiated a complaint with the Employment Standards Administration alleging that IK Solutions had failed to pay complainant wages for productive work.. (CX 1-16) An investigation was conducted into whether IK Solutions had failed to pay complainant earned wages as well as wages for non-productive time between work placements at client sites. Ron Zylstra, Wage and Hour investigator for the Department of Labor, concluded that the complainant did not make himself available for work during the non-productive periods from January 5, 2005 through March 23, 2005 and again from April 30, 2005 through July 9, 2005; spending the entire between projects at his home in Maryland instead of at IK Solution's offices in Newark, Delaware. Accordingly, investigator determined that the complainant was not owed back pay for the non-productive period. (EX 8) However, the investigator did find that IK Solutions owed back pay to complainant for the months of July and August because it had failed to compensate complainant for all of the hours complainant had worked during this period at PG&E. The Respondent was ordered to pay complainant back pay for all work performed at PG&E. The pay was to be based on an hourly rate of \$25/hour. (EX 8) The investigation also showed that the complainant became the exclusive employee of B2B on September 19, 2005.

The complainant testified himself but did not offer the testimony of any other witnesses. The complainant did submit eight exhibits; four were put into the record and four others were marked for identification.⁴ The Respondent submitted the testimony of Mr. Harishu Koya, HR Director at IK Solutions. The Respondent submitted ten exhibits into evidence.⁵

SUMMARY OF EVIDENCE

Testimony of Complainant

Raghu Shashank Arramreddy

Mr. Raghu Shashank Arramreddy testified that he joined IK Solutions in July 2004 while on an F-1 student visa. He worked with IK Solutions while on a university sponsored "Optional Practical Training" (OPT) program. (TR 7-8) Mr. Arramreddy received \$3200.00 from IK Solutions as back pay for the months of August and September. (TR 8) He received an offer employment from IK Solutions in July 2004 contingent upon approval of an H1-B visa, which was ultimately issued on January 5, 2005. Mr. Arramreddy, relying on the I-129 petition signed by Pundu Mudunuri, HR Manager at IK Solutions, alleged that his annual salary was \$48,000 and that IK had failed to pay him for a period of five months, totaling \$20,000. (TR 12-13) At the beginning of his employment with IK Solutions in January 2005, Mr. Arramreddy lived in Maryland receiving job requirements from IK Solutions via the internet. He also claimed to have been on several phone interviews during this time. (TR 14)

Starting on January 5, 2005, Mr. Arramreddy was communicating with several people at IK Solutions, including Sidiv, Angeli, Lalita, Harishu Koya, and Moorman. Mr. Arramreddy testified that he was getting emails, phone calls and accepting interviews. Mr. Arramreddy

⁴ Complainant's exhibits marked as CX1 – CX4.

⁵ Respondent's exhibits marked as RX1, RX3 – RX7, and RX 9 – RX11. RX2 and RX8 were not admitted into the record for evaluation but were marked for purposes of identification. RX 2 is one of two letters of employment. The complainant maintains that he did not sign this specific letter of employment dated August 23, 2004. RX 8 is the Dept. Of Labor investigator's report.

claims he was ready, willing, and able to work and was, in fact, getting requirements during this time.

On cross examination, Mr. Arramreddy stated that he was at a client site in December 2004, a project he was placed on through IK Solutions. Three weeks later Mr. Arramreddy's position at the client site ended and he went back to Maryland instead of IK Solution's Delaware office. (TR 25-26) He denied going back to Maryland in order to take care of his sister who had been in a car accident in October, 2004. (TR 26) Mr. Arramreddy claims that he was actively engaged in the recruiting process whether in Maryland or in Delaware. After the complainant's first assignment at Maytag Corp. from March to April, he did not return to the Delaware office but came back to Maryland. (TR 33) Mr. Arramreddy's visits to the IK office in Delaware was for the purpose of collecting his back pay. (TR 43, 47) At no time between June 20 and July 11, a non-productive period, did Mr. Arramreddy report to the Delaware office of IK Solutions. (TR 47) Mr. Arramreddy alleges that IK Solutions was obligated to pay him \$4000.00 a month (\$48,000/year), whether or not he was on a project at a client site. (TR 56-62) Complainant also testified that he moved in with his sister in Maryland on or about January 1, 2005 and that he was in constant contact with various recruiters at IK Solutions. (TR 64-68)

Testimony of Respondent's Witness

Harishu Koya

On August 23, 2004, Mr. Arramreddy was offered the position of programmer/analyst at an annual salary of \$48,000. Mr. Koya testified that the offer letter of August 23, 2004, was issued by Mohan Gatti, an IK recruiter, and signed by Mr. Koya. (TR 84-85) Mr. Koya also stated that two people witnessed the signature by complainant, although Mr. Koya was not there as a witness. (TR 84, 106) The complainant returned home to Maryland in September 2004 and December 2004 without spending any time at the IK office in Delaware after January 2005. In January complainant mentioned that he had to take care of sister because of an emergency. (TR 87) In January 2005, Mr. Arramreddy was asked to come to the Delaware office in order to be available for work. The complainant visited the office once or twice to state that he could do the work from Maryland. (TR 89) The testimony is that IK Solutions had sent Mr. Arramreddy many recruiting calls, but he only responded to a few of them. (TR 90) "I and my sales team attempted to contact Mr. Arramreddy many times. He responded only a few times. He was not participating in interviews on behalf of IK Solutions." (TR 89-90)

Mr. Arramreddy did come into the IK office in June because he was notified that IK was considering terminating him because of performance issues at client sites and his unavailability to work at IK offices. (TR 94) Mr. Koya testified that based on his understanding of the employment terms, Mr. Arramreddy was to be paid a salary regardless of the number of hours that he worked on a project at a client site. (TR 111) Once an employee is on H1-B status the salary would be paid on a monthly basis. (TR 136) However, Mr. Arramreddy was required to come to the Respondent's office when he was on "the bench." During this time recruiters would be sending out requirements all of the time but the employee must be ready and able to accept an assignment. The entire computer consulting business runs on email and phone. (TR 112-113)

Mr. Koya testified that he personally spoke with complainant in January or February and was told that complainant needed to take care of his sister who had been in an accident. Mr. Koya stated that the complainant reiterated this to this him on a number of separate occasions. (TR 134) The Complainant could get paid during periods when he was on "the bench" only if he

continuously was available, ready and willing to work and came to the Respondent's offices in Delaware. (TR 135) Mr. Koya concedes that the Respondent is not disputing the terms of the wage offered to the complainant, that complainant was to receive an annual salary of \$48,000 or \$4000 per month. In addition, complainant must either be in-house at IK Solutions offices or at the client site if a project has been assigned. (TR 144) IK Solutions actually has a policy that for the first eight months employees need to be at a client site or in the IK Solutions offices because they are not yet experienced enough. (TR 151) The complainant did not ask permission to work from his home in Maryland, he just took it on his own. (TR 151)

The Complainant's Exhibits

Exhibit CX 1 (Pages 1 – 17)

A March 29, 2006, letter of determination from Employment Standards Administration detailing IK Solutions' specific violations of H1-B regulations. (page 6 – 9)

A March 31, 2006, letter with an enclosed check in the amount of \$3,200 from IK Solutions. The check covers the amount owed to complainant based on the DOL investigator's findings. (page 10)

DOL summary of unpaid wages form sent to the complainant on March 8, 2006. (page 12)

DOL acknowledgement of receipt of WH-4 form submitted by the complainant. (page 13)

A copy of the complainant's completed WH-4 form. (page 15-17)

Exhibit CX 2 (Pages 1 – 20)

Copy of I-129 notice of action letter, dated October 25, 2004. (page 1)

I-129 petition for non-immigrant worker. (pages 3-8)

Labor Condition Application for H1-B Nonimmigrants. (pages 10-13)

IK Solutions' submission of petition for H1-B classification. (pages 14-17)

Copy of unsigned July 18, 2004 letter of employment. (pages 18-20)

Exhibit CX 3 (Pages 1 – 7)

Letter from US bank regarding stop payment. (pages 1-2)

Pay slip for period: 8/1/2005 to 8/31/2005. (page 5)

Pay slip for period: 7/1/2005 to 7/31/2005. (page 6)

Pay slip for period: 5/1/2005 to 5/31/2005. (page 7)

Exhibit CX 4 (Pages 1 – 47)

Email correspondence between the complainant and IK Solutions regarding the Respondent's failure to make wage payments on time as well as requests by the Respondent's for the complainant's contact information and whereabouts.

The Respondent's Exhibits

Exhibit RX 1 (Pages 1 – 4)

A copy of an August 23, 2004, letter of employment signed by the complainant but not signed by a representative of the Respondent.

Exhibit RX 2 (Page 1)

A copy of the I-129 Notice of Action indicating approval of the petition.

Exhibit RX 3 (Pages 1 – 2)

A letter submitted by Mohan Gadde, termed “affidavit”. The letter is a narrative explanation of the events leading up to the current cause of action from the Respondent’s perspective. The letter has not been notarized.

Exhibit RX 4 (Pages 1 – 7)

Copies of complainant’s timesheets while employed at Maytag Corporation from March 23, 2005 to April 29, 2005.

Exhibit RX 5 (Pages 1 – 11)

Copies of complainant’s timesheets while employed on the IBM - PG&E project through B2B.

Exhibit RX 6

Respondent’s phone records showing calls made to the complainant during the time complainant was an employee at IK Solutions.

Exhibit RX 7 (Pages 1 – 3)

Copies of Complainant’s earnings statements.

Exhibit RX 8 (Pages 1 – 12)

A copy of the narrative report submitted by the DOL investigator setting forth his conclusions and findings.

Exhibit RX 9 (Page 1)

Respondent’s withdrawal of H1-B petition on behalf of the Complainant.

Exhibit RX 10 (Pages 1 – 3)

Letter of determination from the DOL Wage and Hour Division Administrator citing specific H1-B violations by the Respondent.

Exhibit RX 11 (Pages 1 – 9)

Wage statements, cancelled check, and DOL employment benefits and compensation form showing Respondent’s payment of back wages owed to the Complainant.

ISSUES

1. Has the Respondent paid the full amount of back pay owed to the Complainant for the productive period that the Complainant was working at Maytag Corp. and PG&E.
2. Is the Respondent obligated to provide compensation to the Complainant for the non-productive period while the Complainant was an employee of the Respondent.

DISCUSSION

For purposes of adjudication I need not consider the time the Complainant was employed by the Respondent prior to January 5, 2005 because the Respondent is not required to pay the

Complainant the required wages listed on the LCA for work done prior to the Complainant attaining H1-B status. *See* 20 C.F.R. § 655.731. The Complainant obtained H1-B status on January 5, 2005. (RX 2).

The first issue concerns the amount of back pay owed to the Complainant while in productive status. The Complainant has submitted two letters of employment: the first is dated July 18, 2004, and offers the complainant a position as a Business Analyst at a rate of \$26 per hour. (CX 2-18) The letter has not been signed. The second letter is dated August 23, 2004, and offers the Complainant a position as a programmer/Analyst at an annual salary of \$48,000. (CX 4-31) The letter is signed only by the Respondent. The significant distinction between the two letters is the term of payment. Although the first letter states payment in terms of an hourly rate, both the Complainant and Respondent conceded in the hearing that they had agreed to an annual salary of \$48,000. (TR 24, 51-52, 73, 143). In fact, the Labor Condition Application (LCA) specifies a salary of \$48,000. (CX 2-9). The Respondent concedes that once an employee is on H1-B status they are paid on a monthly basis according to their salary and not based on the number of hours billed at the client site. (TR 130). Therefore, I find that the evidence establishes that the Complainant was employed by the Respondent at an annual salary of \$48,000. The Respondent was obligated to compensate the Complainant based on this salary and not according to the number of hours worked at the client site.

Pertinent H1-B regulations require that the Employer pay the H1-B worker at the specified prevailing wage rate as soon as the worker “enters into employment” with the employer. “[T]he H1-B nonimmigrant is considered to ‘enter into employment’ when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going on an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.” 20 C.F.R. § 655.731(c)(6)(i). Furthermore, “Even if the H1-B nonimmigrant has not yet ‘entered into employment’ with the employer...the employer that has had an LCA certified and an H1-B petition approved...” shall pay the nonimmigrant the required wage 60 days after the nonimmigrant becomes eligible to work for the employer if the nonimmigrant is already present in the U.S. on the date of the approval. *See* 20 C.F.R. § 655.731(c)(6)(ii).

Prior to receiving the H1-B visa Mr. Arramreddy was on an F-1 student visa and was working with the Respondent and receiving practical training through a program sponsored by Temple University. There is considerable disagreement between the Complainant and the Respondent concerning the time period following the receipt of the H1-B visa and up to the date that the Complainant began working on the Maytag project on March 23, 2005.

In December 2004, upon completion of work the Complainant was performing for the Respondent while on an F-1 student visa, the Complainant returned to his home in Maryland. The Complainant asserts that while he was in Maryland he was ready, willing and able to work on assignments at anytime prior to and after January 5, 2005, the date of H1-B visa issuance. He maintains that he was responding to calls from the Respondent’s recruiters, submitting resumes and participating in interviews with potential clients. The Complainant has submitted very little evidence regarding these activities other than his own testimony and admission by the Respondent on cross-examination that the Complainant did contact the Respondent on several occasions, but far too few and substantially disproportional to the number of times the Respondent attempted to contact the Complainant regarding the latter’s availability for work.

For their part, the Respondent maintains that they made attempts to contact the Complainant on numerous occasions without success. In support of their position, the

Respondent has submitted phone records indicating the number of calls and the date and time that the Complainant's phone number was called. (RX 6) The Respondent maintains that the Complainant had returned to Maryland because the Complainant's sister was in a car accident and required assistance and support. The Complainant did not refute the fact that his sister was in an accident but did deny that returning to Maryland was for this particular purpose. The Complainant denies the Respondent's assertion that the Complainant was required to report to the Respondent's offices. Mr. Harishu Koya testified that the Respondent had a policy of requiring all new employees with less than eight months of experience with the Respondent to report to the Respondent's offices in Delaware. (TR 151) Mr.Koya testified that there were no other employees in the Complainant's position that were allowed to work from home.

It is evident from the Complainant's testimony that he did not report for orientation or training at the Respondent's Delaware office. The evidence is not as clear on whether the Complainant was available for work or otherwise under the control of the Respondent at any time after January 5, 2005 and prior to the beginning of the Maytag project on March 23, 2005. The Complainant's explanation for this time period is completely diametrical to that of the Respondent. Following the termination of Complainant's project in December 2004, the Complainant returned to Maryland and, according to both the Respondent, the Complainant had not asked for leave and took it upon himself to continue the recruiting process while living in Maryland. The Complainant has not submitted evidence demonstrating that he did, in fact, participate in interviews, respond to calls from recruiters, and submit resumes in response to potential client projects while living in Maryland.

As the prosecuting party, the Complainant has the burden of proving each of his allegations. As the prosecuting party, the burden of proof falls on Mr. Arramreddy, not IK Solutions. The Administrative Procedure Act provides, "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). Further, 20 C.F.R. § 655.820(b)(1) provides that, in the event a hearing before an administrative law judge is properly requested, the party requesting the hearing shall be the "prosecuting party," while the employer shall be the "respondent."⁶ This is not to be confused with the burden of proof imposed on the employer to develop and maintain documentation sufficient to support statements in an LCA. 20 CFR § 655.740(c). I find that the Complainant has failed to establish, by a preponderance of the evidence, that he "entered into employment" with Respondent prior to March 23, 2005. Nevertheless, a nonimmigrant who has not yet entered into employment is still entitled to be

⁶ See 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence §63 (2d ed. 1994) (" [The] broadest and most accepted idea [is] . . . that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims.").

An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the U.S. Department of Labor ("DOL") by filing a Labor Condition Application ("LCA") before the worker is given an H-1B visa. 8 U.S.C. § 1182(n). An LCA filed by an employer must set forth, inter alia, the wage rate and working conditions for the H- 1B employee. 8 U.S.C. § 1182(n)(1)(D); 20 CFR §§ 655.731 and 655.732. Upon certification of the LCA by DOL, the employer is required to pay the wage and implement the working conditions set forth in the LCA. 8 U.S.C. § 1182(n)(2). These include hours, shifts, vacation periods, and fringe benefits. *Id.* According to the regulations, "DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application." 20 CFR § 655.740(c). Upon certification of an LCA, the regulations impose on the employer the responsibility of developing and maintaining "sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its labor condition application and the accuracy of information provided in the event that such statement or information is challenged." 20 CFR § 655.710(c)(4).

compensated based on the required wage 60 days after the date the nonimmigrant becomes eligible to work for the employer and the nonimmigrant was present in the U.S. on the date the petition was approved. 20 C.F.R. § 655.731(c)(6)(ii). The Complainant was present in the U.S. on January 5, 2005, the date the I-129 petition was approved. Therefore, absent contrary evidence, the earliest date from which Complainant would be entitled to receive compensation is March 5, 2005.

Next, I consider the Complainant's allegations that he is entitled to compensation for the nonproductive periods.

The Complainant was gainfully employed and submitted timesheets to the Respondent for the period March 23, 2005 to April 29, 2005 and from July 11, 2005 to September 23, 2005. Therefore, the only nonproductive periods during the Complainant's status as an employee with the Respondent was from March 5, 2005 to March 22, 2005 and from April 30, 2005 to July 10, 2005. The issue, therefore, is whether the Complainant is entitled to back pay for the period of nonproductive status.

The Regulations at 20 C.F.R. § 655.731(c)(7)(i) provide that: 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 pro-rata amount due, [...] at the required wage for the occupation listed on the LCA.

Under its "no benching" provisions, the INA requires that an employer pay the required wage specified in the LCA even if the H-1B nonimmigrant employee is in a nonproductive status (i.e., not performing work) because of lack of assigned work or some other employment-related reason. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. §§ 655.731(c)(6)(ii), (7)(i); *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-010 through 01-LCA-025, slip op. at 7 (ARB May 31, 2005); *Rajan v. International Bus.Solutions, Ltd.*, ARB No.03-104, ALJ No. 03-LCA-12, slip op. at 7 (ARB Aug. 31,2004). But an employer need not pay wages to H-1B non-immigrants that are in nonproductive status due to conditions that remove the non-immigrants from their duties at their "voluntary request and convenience" or which render them unable to work, such as a requested leave of absence. 20 C.F.R. § 655.731(c)(7)(ii).

The evidentiary record reveals that the Complainant did not spend any significant amount of time in the Respondent's office. The Complainant testified that he visited the Respondent's office on one or two occasions to request his paycheck. (TR 43-47) The Complainant did not report to work at the Respondent's office at any time between June 20 and July 11, but simply visited once or twice to request his paycheck. (TR 47) The Complainant concedes that after April 29, 2005, he visited the Delaware office of the Respondent to request his paycheck, not to report for work. (TR 43)

Any recruiting activities that the Complainant participated in were conducted from his home in Maryland and not from the Respondent's Delaware office. The Complainant did not see any need for reporting to the Respondent's office since everything was conducted by phone and email. The Complainant did not request leave to go back to Maryland even though Mr. Koya, HR Director at IK Solutions, testified that he informed Complainant it was company policy for employees to have to work at the Respondent's offices when not working on a project at a client site.

The Respondent had requested that Complainant read training material and participate in recruiting activities from the Respondent's offices in Delaware. The Complainant testified that

at all times during his employment with the Respondent he was ready, willing, able to work on client projects should they materialize; proof that he was in nonproductive status or “benched” status because of employment related lack of work. However, the Complainant has not submitted evidence to demonstrate that he was available for work during this period. The evidentiary record does not verify the list of activities that the Complainant testified he performed. Moreover, the Complainant’s unavailability and nonproductive status were due to conditions unrelated to employment. Living and working from Maryland in his sister’s house was more convenient for the Complainant. Circumstantial evidence shows that the Complainant wanted to be close to his sister.

He moved in with his sister on January 1, 2006. The Complainant’s decision to return to Maryland was voluntary and not based on any factors other than the Complainant’s desire for convenience and possibly to care for his sister who had been in an accident in October 2005. The Respondent’s business consists of placing employees at client sites and billing clients for their services. It is evident that working at the client’s offices in Delaware would not amount to an income producing work. However, it is within the discretion of the Respondent to determine where and how employees perform their work. It was not unreasonable to require the Complainant to report to the Respondent’s office in Delaware when not actively engaged on a project at a client site. The Complainant’s absence from work at the Respondent’s office in Delaware was due to the voluntary choice of the Complainant. The Complainant decided not to conduct recruiting activities at the Respondent’s office or to participate in training sessions at the Delaware office. Absent evidence to the contrary, I find that the Complainant has failed to establish his availability for work during the time period from January 5, 2005 to March 22, 2005 and from April 30, 2005 to July 10, 2005, and pursuant to regulations at 20 C.F.R. § 655.731(c)(7)(ii), I find that the Respondent is not required to pay for these nonproductive periods when the nonimmigrant has made decisions unrelated to conditions of employment which take the Complainant away from his/her duties at the Complainant’s convenience. 20 C.F.R. § 655.731 (c)(7)(ii).⁷

The only remaining issue is the amount of back pay the Complainant is owed for the work he performed at client sites. The hearing consisted of many references to an hourly rate and the discrepancy between the actual wages paid and the amount offered in the first employment letter. During the hearing both the Respondent and the Complainant agreed that H1-B employees are not paid on an hourly basis. Both the testimony of Mr. Koya and Mr. Arramreddy indicate an annual salary of \$48,000. The LCA also showed an annual salary of

⁷ The Regulations at § 655.731(c)(7)(ii) provide that:

If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the non-immigrant 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, provided that such period is not subject to payment under the employer’s benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. 12101 et seq.). 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 cancelled (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)). § 655.731(c)(7)(ii).

\$48,000. Therefore, the Administrator's calculation of the amount of back pay owed to the Complainant based on an hourly rate of \$25 was in error.

The Complainant was employed on a project at a client site while an employee of the Respondent for two full months (April 2005 and August 2005) and three partial months (March 2005, July 2005, and September 2005). The Complainant was in nonproductive status and voluntarily unavailable for work immediately preceding the periods in which he worked a partial month (March 2005 and July 2005). In addition, his employment with IK Solutions ended as of September 21, 2005. 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 terminated so that the petition is cancelled. 8 C.F.R. § 214.2 (h)(11) The Respondent in this case did notify the INS as soon as the Complainant had obtained a new position. However, a *bona fide* termination does not require strict compliance with statutory formalities. The Board held that whether a termination is *bona fide* does not turn solely on whether the employer notified INS. The employer should be permitted to present other evidence concerning whether it terminated the H-1B employee. Filing such notification with INS constitutes additional, not conclusive, evidence of termination. *Administrator, Wage and Hour Division v. Ken Technologies, Inc.*, ARB CASE NO. 03-140 (Sep. 2004) The Complainant became a permanent employee of PG&E and the company ceased billing IK Solutions.

CONCLUSION

Calculation for the backpay owed by the Respondent will be pro-rated based on an annual salary of \$48,000 for the months of March, July, and September 2005 and full pay calculated for the months of April 2005 and August 2005.

20 C.F.R. § 655.810; § 655.855. 20 C.F.R. § 655.810(a) provides that upon determining that an employer has failed to pay required wages, back wages shall be assessed, and shall be equal to the difference between the amount that was paid and the amount that should have been paid.

Based on a bi-monthly pay period and an annual salary of \$48,000, the Complainant earned \$1846.15 every pay period, which consisted of two weeks. In order to determine the appropriate backpay I pro-rate the amount of pay for all of the partial pay periods worked and award the Complainant \$1846.15 for any pay period worked in full regardless of the hours worked. In March 2005, the Complainant worked from March 23, 2005 until April 29, 2005. The Complainant worked two full pay periods, for a sum of \$3692.30, and one partial pay period, for a sum of \$1476.92. The Complainant was again employed on a project at PG&E from July 11, 2005 to September 21, 2005. The Complainant worked for five full pay periods, for a sum \$9230.75, and one partial pay period for a sum \$553.84. The total amount of back pay owed to Complainant, not including assessed interest, is \$14,953.81.

The Complainant is also entitled to reimbursement of \$17.00 for being charged a stop payment fee. (Complainant had attempted to cash checks which had a stop order issued on it by the Respondent.)

The Respondent has submitted several paychecks to the Complainant in the amounts of \$5775.00 (RX 7), \$2625.00 (8/18/2005, \$4000.00 (9/16/2005), and \$3200.00 (3/30/2006) for a total of \$15,600. The total amount paid by the Respondent is in excess of the amount of back pay owed to the Complainant. The Complainant's claim is hereby dismissed.

ORDER

It is hereby **ORDERED** that the claim of Raghu Shankar Arramreddy is **DENIED**.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within thirty (30) calendar days of the date of issuance of the administrative law judge’s decision. *See* 20 C.F.R. § 655.845(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a). If no Petition is timely filed, then the administrative law judge’s decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).