

U.S. Department of Labor

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Issue Date: 08 March 2010

CASE NO.: 2009-LCA-00045

In the Matter of:

BISHNU S. BAIJU,
Prosecuting Party,

v.

FIFTH AVENUE COMMITTEE,
Respondent.

Appearances: Bishnu Baiju,
Prosecuting Party, Pro se

Jason Burritt, Esquire
On behalf of Respondent

Before: Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act H-1B visa program (“the Act” or “INA”), 8 U.S.C. § 1101 (a)(15)(H)(I)(b) and § 1182(n), and the implementing regulations found at 20 C.F.R. Part 655, Subparts H and I, 20 C.F.R. § 655.700 et seq.

This Decision and Order¹ is based upon a thorough review of the record, the parties’ arguments and the law.

I. INTRODUCTION

A. Statutory and Regulatory Background

The Immigration and Nationality Act’s (“INA”) H-1B visa program permits American employers to temporarily employ non-immigrant aliens to perform specialized² jobs in the

¹ In this Decision and Order, references to the Prosecuting Party’s evidence shall be referred to as “CX-#”; references to the Respondent’s evidence shall be referred to as “RX-#”; and references to the transcript of the hearing before me shall be referred to as “Tr. #”.

² “Specialized occupation” is defined within the Act 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).

United States. 8 U.S.C. §1101(a)(15)(H)(i)(b). In order to protect U.S. workers and their wages from an influx of foreign workers, an employer must file a Labor Condition Application (“LCA”) with the Department of Labor (“DOL”) before an alien will be admitted to the United States as an H-1B non-immigrant worker. 8 U.S.C. §1182(n)(1). As part of that LCA, the employer must attest that it:

- (i) Is offering and will offer during the period of authorized employment to [H-1B employees] wages that are at least –
 - (I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or
 - (II) the prevailing wage level for the occupational classification in the area of employment,whichever is greater, based on the best information available as of the time of filing the application...

Id. at §§1182(n)(1)(A)(i)(I)&(II). This wage requirement restricts American employers from paying foreign workers less than their American counterparts. The requirement thus acts as a disincentive to hiring non-immigrant workers over American workers.

B. Procedural History

Fifth Avenue Committee (“Respondent”, hereinafter) sought approval to hire Bishnu Baiju (“Prosecuting Party”, hereinafter) pursuant to H-1B visa regulations by filing a petition with the United States Citizenship and Immigration Services (“USCIS”) on October 11, 2006. The petition was approved on November 20, 2006, effective for the period from November 18, 2006 to September 24, 2009. The Prosecuting Party worked for Respondent until he was discharged on February 7, 2008.

In January, 2009, the Wage Hour Division of the United States Department of Labor (“Wage Hour”) initiated an investigation to determine Respondent’s compliance with the Act. At the conclusion of the six month long investigation, Wage Hour concluded that Respondent had failed to comply with prevailing regulations regarding the documentation of the prevailing wage stated on the LCA. Wage Hour requested DOL’s Employment Training Administration to issue an appropriate prevailing wage determination. Wage Hour calculated back wages due to the Prosecuting Party, and DOL issued its determination in the matter on September 16, 2009.

On September 18, 2009, the Prosecuting Party appealed DOL’s determination and asked for a hearing before the Office of Administrative Law Judges (“OALJ”). The case was thereafter assigned to me, and by notice and Order issued October 1, 2009, I scheduled a hearing to commence on Tuesday, November 17, 2009, in New York, New York. By correspondence dated November 3, 2009, filed November 9, 2009, a representative for Respondent requested a continuance of the hearing in order to attempt to secure pro bono counsel. I denied the request pursuant to the expedited nature of hearings concerning LCAs. See, 20 C.F.R. §655.835(c). On the day before the hearing, counsel Jason Burritt, Esq., entered his appearance, pro bono, on behalf of Respondent.

On the date of the scheduled hearing, I made inquiry into whether the Prosecuting Party was competent to represent himself. I noted the complexity of the law, and the fact that some of the Prosecuting Party's pleadings referred to issues and claims over which OALJ does not have jurisdiction, and which were beyond the scope of Wage Hour's investigation. Specifically, the Prosecuting Party raised claims of discrimination under tile VI of the Civil Rights Act, in addition to his claims relating to immigration statutes and regulations. To the extent possible, I have excluded from this D&O discussion regarding such irrelevant and immaterial evidence and argument. Nevertheless, as the Prosecuting Party appeared eager to proceed with the hearing and professed his inability to engage counsel, I commenced the hearing, with the Prosecuting Party proceeding pro se.

At the hearing, I heard testimony presented by the parties, and entered the parties' documentary evidence into the record. I asked the Prosecuting Party to elaborate on his accounting of what he perceived as his damages, and that document was submitted on December 4, 2009, and is hereby admitted to the record as CX-18. Additional documents were submitted to the record by the Prosecuting Party, and have been identified as CX-19 through CX-23. Those exhibits are hereby admitted to the record.

At the hearing, Respondent moved for the dismissal of named Respondent Michelle de la Uz as a party to the matter. I deferred ruling on the motion pending the parties' written argument on that issue. Respondent renewed its motion in formal pleadings filed December 17, 2009, together with the supporting argument and documents. On December 17, 2009, the Prosecuting Party submitted a letter in which he argued that Ms. de la Uz should be held personally liable for using an incorrect wage determination and for her role in his discharge from employment with Respondent. By Order issued December 23, 2009, I dismissed individually named Respondent Michele de la Uz as a party to the case. I concluded that the circumstances of her employment with Respondent were insufficient to pierce the corporate veil, and found therefore, that she could not be held liable for actions of her corporate employer. That Order is incorporated by reference in this D&O.

On January 15, 2010, Respondent filed written closing argument. By facsimile filed January 18, 2010, and regular mail received on January 21, 2010³, the Prosecuting Party submitted correspondence in which he raised assertions that I find appropriate to address specifically.

1. Motion to exclude Respondent's brief

The Prosecuting Party asserts that the brief filed by Respondent was untimely, noting that he expected to receive my decision by 60 days after the hearing commenced on November 17, 2009. I acknowledge that 20 C.F.R. §655.840(a) anticipates that an administrative law judge shall issue a D&O within 60 days after the hearing. However, additional time was allowed for Respondent to address the issue of individual liability. In addition, I note that counsel for Respondent had little time to prepare for the hearing, as I had denied a motion for continuance in consideration of the Prosecuting Party's objection. I overrule Mr. Baiju's objection and find

³ THE PROSECUTING PARTY sent a copy of this document to the National Office of OALJ, which forwarded the copy to me. It was filed with my record on January 28, 2010.

good cause to allow Respondent's evidence and briefs to be admitted to the record. This motion was addressed in part at the hearing, at which time I overruled the Prosecuting Party's objection.

The Prosecuting Party further objected that Respondent "has submitted post hearing brief after two months without any mention about it at the hearing and beyond the thirty days' time allowed for motion to submit brief". See, letter of January 18, 2001 at ¶ 2. This is patently not true. At the hearing, the parties were provided 30 days to file a brief on the limited issue of Ms. de la Uz' personal liability (Tr. 25) and were additionally allowed 60 days to file a brief on the substantive issues underlying the case (Tr. 139). This objection is overruled.

2. Relationship with one of Respondent's counsel

The Prosecuting Party suggests some prejudice against him because Respondent engaged counsel directly before the hearing, one of whom, "were the friend of Mr. Janice K. Bullard". See, letter of January 18, 2001 at ¶ 2 and 3. At the hearing, the following exchange occurred:

JUDGE BULLARD: B-A-I-J-U versus Fifth Avenue Committee. This is case number 2009-LCA-00045. We are in New York, New York. It is November 17, 2009 at about 1:30 in the afternoon. This case involves a complaint and request for review from the Secretary, Department of Labor's determination and complaint regarding an H-1B visa wage determination. I believe Mr. Baiju has some other complaints. I'm not sure to what extent I have the jurisdiction to entertain some of them, but I believe that the prevailing wage rate is what we're going to talk about today. Can you hear me? All right and the parties are present. Mr. Baiju is representing himself. I'll ask you, Mr. Baiju, please state for the record your name and your address.

MR. BAIJU: My name is Bishnu S. Baiju. My address is 9309 43rd Avenue, Elmhurst, New York 11373.

JUDGE BULLARD: All right and the Respondent in this matter is representing by counsel. Who would that be?

MR. BURRITT: Jason Burritt.

JUDGE BULLARD: All right. Could you please [place] your appearance on the record, please?

MR. BURRITT: Sure. I'm appearing on behalf of Fifth Avenue Committee, Jason Burritt.

JUDGE BULLARD: All right. Address please, sir.

MR. BURRITT: 75 West End Avenue, Apartment R-39A, New York, New York 10023.

JUDGE BULLARD: All right, thank you. All right.

MR. WALKER: Your Honor?

JUDGE BULLARD: Yes.

MR. WALKER: You may recall me. My name is Peter Walker.

JUDGE BULLARD: Oh, I do. I'm sorry.

MR. WALKER: And I'm a partner at Snifner (ph) Shaw which Mr. Byrd (ph) is with. I just wanted to put on the record that you and I have met and that you're married to my college roommate, Christopher King Bullard.

JUDGE BULLARD: That's right. Mr. Baiju, have you heard that?

MR. BAIJU: Yes.

JUDGE BULLARD: Do you have any concerns that my past association or my husband's association with Mr. Walker would in any way influence my decision in this matter?

MR. BAIJU: No.

JUDGE BULLARD: All right. I don't feel that I need to recuse myself in this matter. My association is through my husband and it is with counsel, not with the actual party. . .

Tr. 4-5.

This dialogue clearly demonstrates that I did not recognize Mr. Walker by sight, and that my relationship with him is remote in time and character. Moreover, the Prosecuting Party stated that he did not object to my hearing the case despite my acquaintance with counsel. In addition, Mr. Walker was of record but did not directly represent Respondent. Regardless, Mr. Walker is not party to this claim. I overrule any objections the Prosecuting Party now raises to my participation in this adjudication.

I further find no grounds to find that the Prosecuting Party was prejudiced because "the hearing recording person knew Mr. Burritt and gave him visiting card. Whereas when I asked his visiting card he did not pay attention to me". See, letter of January 18, 2001 at ¶ 2. Although I did not observe this interaction, or lack thereof, I take official notice that court reporters typically request the business card of an attorney for purposes of recordkeeping.

3. Late submission of documents

The Prosecuting Party objected to Respondent's late submissions of evidence and pre-hearing statement. Since counsel for Respondent entered his appearance the day before the hearing, I find good cause to waive the time frames for submission of evidence imposed by my pre-hearing Order. The objection is therefore overruled. I decline to find that the Prosecuting

Party was prejudiced because Respondent was represented by different counsel than had been of record in other litigation.

4. Request for Reconsideration of Order Dismissing Individual

The Prosecuting Party again addressed the issue of Ms de la Uz' personal liability in a manner that I construe to be a request for reconsideration of my Order of December 23, 2009, in which I dismissed her as a Respondent in this action. There is no specific rule in the "Rules for Practice and Procedure Before OALJ" set forth at 29 C.F.R. §18 et seq. ("the Rules"), or in regulations pertaining to litigation under the Act, that specifically allows for motions for reconsideration of an Order. Accordingly, the Federal Rules of Civil Procedure (FRCP) apply. See, 29 C.F.R. §18.1(a). Rule 59(e) of the FRCP states: "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." The FRCP also exclude intermediate Saturdays, Sundays and holidays from the computation of the ten day time period.

The Prosecuting Party's filing of January 18, 2010 is more than ten days after my Order of December 23, 2009, even allowing for holidays and weekends. As it is untimely, I need not address it. I nevertheless note that none of the arguments⁴ raised by the Prosecuting Party affect the determinations and findings that I reached in my Order of December 23, 2009. Although Ms. de la Uz held a managerial position with Respondent and had authority to hire, fire, and set wage rates, she did not exercise dominion over the company so as to make her personally liable for decisions she made in her capacity as Respondent's employee. The fact that her decisions are insured for liability has little bearing on whether she should be held liable under the Act. I disagree with the Prosecuting Party's assessment that I have not thoroughly reviewed all the facts in this matter and "hurriedly" reached a decision regarding Ms. de la Uz' personal liability. The Prosecuting Party misunderstands the law on this issue. See, letter of January 18, 2001 at pages 4-5.

5. Suggestion of bias of a potential witness

At the hearing, the Prosecuting Party asked Respondent's witness, Michelle de la Uz, whether she was biased by a comment made by the finance director on February 7, 2008. I excluded that evidence. I reaffirm my ruling, as the suggestion involved hearsay. The finance director was not offered as a witness, and whether Ms. de la Uz may have been biased by his statements would require me to improperly assess her credibility on the basis of hearsay evidence. See, 29 C.F.R. §29.18.802.

II. ISSUES

The issues presented in this case for resolution are:

1. Whether Respondent was required to pay a wage commensurate with the wage determination issued by the State of New York;

⁴ The gravamen of the Prosecuting Party's arguments relates to charges of discrimination and retaliation, which are not issues for consideration in this adjudication.

2. Whether DOL appropriately requested a wage determination from ETA;
3. What amount of back wages, if any, is Respondent liable to pay the Prosecuting Party; and
4. Whether Respondent discriminated or retaliated against the Prosecuting Party in violation of 20 C.F.R. § 655.805(a); and if so
5. What remedies are due to the Prosecuting Party.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

Testimony

Bishnu Baiju (Tr. at 30-89)

Mr. Baiju testified that he believed that he should have been paid at the prevailing wage of \$63,500.00 during his employment with Respondent, based upon an hourly rate of \$34.89 times the number of hours he typically worked, 1,820 per year. Baiju contended that he is due the difference between that rate and \$45,000.00, which was what he maintained he was paid during the 27 months of the period from November 8, 2005 to February 7, 2008. He explained that the wage rate was issued in conjunction with Respondent's petition for his permanent residency. He noted that Respondent did not request a State wage determination in conjunction with the petition they filed for his H-1B visa, but instead alleged that the \$45,000.00 figure was based on a survey that Respondent conducted. The Prosecuting Party did not believe that a survey was conducted, and he believed that once the State issued a wage determination for his permanent visa, Respondent should have paid him accordingly, even though he was a temporary worker under an H-1B visa.

Mr. Baiju contended that Respondent paid him at a level 2 salary for an accountant instead of the level 3 salary that New York State issued. He asserted that Respondent challenged the prevailing wage issued by New York, but eventually accepted the wage rate. He believed that because the State had determined a prevailing wage, Respondent was required to pay him that rate. Baiju learned about the State determination in November 2006, from the lawyer who had worked with Respondent to prepare his permanent visa petition. Mr. Baiju had found the attorney, Satish Bahtia, after Respondent agreed to sponsor his petitions for H-1B and permanent visas. Tr. at 85.

Mr. Baiju testified that he was familiar with correspondence from Mr. Bhatia to Ms. de la Uz dated November 8, 2007, which confirmed that Respondent would be obliged to pay the State wage determination rate only after the petition for permanent alien worker was approved. See, CX-10. He was provided a copy of the letter, which was attached to the offer of employment, which he signed. In the offer of employment, the job duties include performing the accounting for Respondent and its affiliate BWI. CX-10. Mr. Baiju did not discuss the terms of the employment offer with Mr. Bhatia.

Mr. Baiju admitted that he accepted the job with Fifth Avenue and signed an offer of employment without reviewing a job description. He knew he would be the only accountant, and expected to do everything that was required of that position, and so he accepted the job without seeing a description of the duties. Tr. at 83-85. However, he believed that Respondent improperly assigned him to work for other companies that did not petition for a H-1B visa for him. He worked for Leap, Inc., which is also known as Brooklyn Workforce Innovations (“BWI”). However, Mr. Baiju admitted that in March, 2006, he wrote to Respondent and expressed his interest in working for growing agencies like FAC and BWI. Tr. at 89.

Mr. Baiju worked full time, and often worked more than the standard work day of seven hours. He maintained that he had earned compensatory time which he had not been able to use. He asserted that he often worked more than that, and maintained that he was due money for compensatory time. He had hoped to take time off from work, but had not been allowed to do so, nor was he paid for his compensable time. Mr. Baiju contended that Respondent had records of his work, and that earning compensatory time was permitted by company policy. He earned compensatory time because he did the work that an administrative person had performed until she left the job. Respondent didn’t hire a replacement, and he performed the administrative duties for nine months. Mr. Baiju estimated that he was due 200 hours in compensatory time, because he worked at least 8 hours a day, which is one more than the company expects. He calculated compensatory time at five hours per week during those nine months. In addition, he had accumulated 70 to 80 hours of vacation pay that was not given to him. Upon cross examination, he admitted that he was paid for 105 hours of accumulated leave. Tr. at 88.

Respondent paid Mr. Baiju a \$2,500.00 cost of living increase in pay in September, 2006. He received another increase of \$2,500.00 in 2007. He testified that he had asked Respondent “time and again” about increasing his salary. Tr. at 59. Baiju observed that Respondent initially hired him on a temporary basis without an H-1B visa. After a year, Respondent filed the petition for his temporary employment. He testified that “time and again” he had talked to Respondent’s executive director, finance director and other staff about being paid the proper wage. Tr. at 76. Mr. Baiju had told company officials that he believed he was working for two entities, and should have been paid more for the extra work. He explained that the two entities had different tax identification numbers and different accounting systems.

Mr. Baiju maintained that he is due payment for unproductive time after his termination. He explained that he employed Respondent’s appeal process after he was terminated, and then brought a claim against Respondent in the New York Department of Human Rights. He believed his termination was not effective while those actions were pending.

The Prosecuting Party presented a claim for interest on outstanding payments due to him. He also asked for compensation for wrongful discharge. He maintained that because Respondent had charged him with misconduct, he could not get another job. He asked to be reinstated to his former position, maintaining that he had been fired for asking to be paid the prevailing wage. Mr. Baiju testified that the judge who heard his appeal for unemployment benefits found that he had been fired for asking for the prevailing wage. He believed that an email exchange with Respondent’s Executive Director demonstrates that he was threatened because he asked for the prevailing wage.

Michelle de la Uz (Tr. at 90-)

Ms. de la Uz testified that she became the Executive Director for Respondent in January 2004. She holds two graduate degrees from Columbia University and is studying executive education at Harvard University. Ms. de la Uz described Respondent as a non-profit “social justice organization” that is affiliated with another non-profit, Leap Inc., which trains lower income people for work. Tr. at 92. Respondent and Leap, which does business as Brooklyn Workforce Innovations (“BWI”) signed a memorandum of understanding whereby Respondent provides BWI with office services, including financial, administrative, accounting and fundraising services. BWI is a wholly controlled affiliate of Respondent.

Ms. de la Uz explained that Respondent hired Mr. Baiju on a temporary basis to replace the company’s accountant when she was called to active military duty. Ms. de la Uz understood that Respondent was required to keep the position open until the reservist returned from duty, or advised that she would not return. Ms. de la Uz could not recall how much Mr. Baiju’s predecessor earned, but she believed it was less than what Respondent paid him. She observed that the person who replaced him earned less than the \$50,500.00 he was earning when he left Respondent. Mr. Baiju’s starting salary was \$45,000.00, and he received cost of living adjustments and an “equity adjustment” during his employment with Respondent. Tr. at 94.

Ms. de la Uz recalled that Respondent had sponsored a petition for Mr. Baiju’s permanent alien employment, and she understood that Respondent would be required to pay a wage consistent with a prevailing wage determination when that petition was approved. Respondent used its own surveys to determine the wage due to Mr. Baiju for work performed as a non-immigrant under an H-1B visa. In deciding that wage, Respondent also considered the salary paid to Baiju’s predecessor. Ms. de la Uz believed that the SWA wage determination from New York was specific to permanent employment and did not apply to the H-1B visa employment. She confirmed that understanding with Mr. Bhatia. Ms. de la Uz testified that she did not expect the permanent visa petition to be approved for several years.

Ms. de la Uz explained that Respondent filed the H-1B and permanent visa petitions at the same time, and she estimated that the applications were completed in September, 2006. The company could not hire Mr. Baiju on anything other than a temporary basis until his predecessor advised that she would not be returning to her job. Respondent had never been involved in the visa process before, and it took time for them to complete it. The request for a wage determination from the State of New York was one part of the permanent visa petition process that the attorney undertook on behalf of Respondent.

Ms. de la Uz was surprised that the wage determination identified a level 3 staff accountant, because she believed that level was beyond the duties that Mr. Baiju performed. She asked Mr. Bhatia to review the information, but she did not appeal the determination to the U.S. Department of Labor. Mr. Baiju continued to work for Respondent after the wage determination was issued, and Respondent continued with the process of sponsoring his permanent visa. No decision was made at that time regarding paying the prevailing wage, because Ms. de la Uz had been assured by the attorney that the wage rate applied to work performed under a permanent visa. She testified, “. . . it seemed reasonable to me that the position would grow in that two to

five year period in which the immigration process would happen; it seemed like because even in the two year period he was there, his salary increased more than ten percent. It seemed possible that the salary and position could grow in the subsequent two to five year period while it was being processed". Tr. at 103.

Ms. de la Uz denied that Mr. Baiju worked for two different businesses. She reiterated that BWI is a program administered by Respondent. Mr. Baiju handled the day to day accounting for both Fifth Avenue Committee and BWI. Ms. de la Uz explained that the position described in classified advertisements and online, and described in the visa petitions, noted that the staff accountant would be performing duties for two organizations. She testified that the organizations do not co-mingle finances, and answer to separate Boards of Directors. Ms. de la Uz had made it clear to Mr. Bhatia that the visa petitions should specify that the position required performing work for two separate organizations. Mr. Bhatia prepared that documentation, and did not advise Respondent that both organizations would have to file individual visa petitions. She did not believe that Mr. Bhatia was suggesting that Mr. Baiju could not do the accounting for both Fifth Avenue Committee and BWI in his correspondence of November 8, 2007. CX-10.

Ms. de la Uz testified that Mr. Bhatia also prepared the H-1B visa petition for Respondent to employ Mr. Baiju, and used the prevailing wage that the company had proposed. He had recommended that the company use a survey to determine an appropriate wage rate for the H-1B visa. Ms de la Uz believed that Mr. Baiju had been compensated fairly for his duties. She could not recall whether his education, experience and expertise were comparable to other individuals who had held the position.

Ms. de la Uz confirmed that Respondent had a policy that allowed employees to earn compensatory time for working extra hours. The policy allows employees to work out the details of earning and using the time with their supervisors. She believed that Mr. Baiju's supervisor, Roy Neilson, directed him to request approval in advance before claiming compensatory time.

Ms. de la Uz testified that on February 6th or 7th [2008], Mr. Baiju sent her an email demanding that he be compensated at a higher rate. In addition, Mr. Baiju interrupted other employees with a raised voice to complain about his pay, and detained a Board member who had come to the office to sign checks. Several staff members came to Ms de la Uz with concerns that Mr. Baiju was disrupting their work by raising his voice and behaving aggressively. She discussed the circumstances with his direct supervisor, and expressed her dismay at what she perceived as Mr. Baiju's refusal to do work that he had performed up until that time. She testified that she met with Mr. Baiju on February 7th at about 4:15 p.m., and "clearly reviewed" the circumstances with him: She explained:

I pulled out the job description. I said, This is the job description you've agreed to perform. This is the job you agreed to perform and now you're telling me you're unwilling to perform a portion of those duties' and he said 'Yes'. I said, 'Do you realize what you're saying? Do you realize that if you're telling me you're not willing to perform those duties, that's a breach of what you said you were willing to do?' He said, 'Yes'. I said, thanks 'Okay, well, then we're going

to need to terminate you’ and his response was ‘you don’t’ terminate me. I terminate you’.

Tr. at 119-120. Ms. de la Uz accepted full responsibility for her decision to discharge Mr. Baiju from employment with Respondent.

Ms. de la Uz recalled that Baiju had attempted to negotiate his salary before he was hired. She was aware that he had discussions with a member of the Board of Directors regarding grieving his termination in accordance with company grievance policy. The personnel committee acts as the grievance committee. She was not aware of whether she would be bound by a decision by the committee to overturn her decision. The situation had never occurred, and she had not consulted the company handbook, which would address those circumstances. In this instance, both the committee and the full Board agreed with her decision to discharge Mr. Baiju. Ms. de la Uz explained that she is not a voting member on the committee, which reviewed Mr. Baiju’s grievance and discussed it before affirming her decision.

Ms. de la Uz testified that she is an employee of Fifth Avenue Committee, and is not in any way a principal of the non-profit corporation. She is not involved with the company’s assets except to direct how they are used for the purposes of the company’s business.

Ms. de la Uz denied that she threatened Mr. Baiju on February 7th. She agreed that he had performed some of his duties on that date, but was concerned about his threat to stop performing all of his duties. She observed that he had in fact neglected to enter data into the accounts of BWI.

Documentary Evidence

The Prosecuting Party submitted twenty-three (23) separate exhibits, which I have identified as CX-1 through CX-23. Those are admitted to the record. Respondent submitted five (5) exhibits, which are identified as RX-1 through RX-5, and those are admitted to the record. In addition, the attachments to Respondent’s motion to dismiss Ms. de la Uz as an individually named Respondent are admitted, and are referred to as Attachments A through D to Respondent’s Motion to Dismiss Individual Respondent.

B. Legal Analysis

1. Was Respondent required to pay THE PROSECUTING PARTY in compliance with the wage determination issued by the New York State Department of Labor on November 9, 2006?

An employer seeking to employ H-1B non-immigrants in a specialty occupation must attest in a labor condition application (“LCA”) that they will pay the H-1B non-immigrants a required wage rate, which is the greater of the “actual wage” or the “prevailing wage”. 8 U.S.C. §1182(n)(1)(A)(I) and (II). The prevailing wage is determined for the occupational classification in the area of intended employment and must be determined as of the time of the filing of the

LCA. 20 C.F.R. § 655.731(a)(2). The regulations require that the prevailing wage be based on the best information available. Id.

DOL considers a determination from the relevant State Workforce Agency (SWA) to be the most accurate and reliable source for determining the prevailing wage. Id. Prior to 2006, State Workforce Agencies (SWA) were called “State Employment Security Agencies” (SESA). 71 Fed Reg. 35521. Employers may request a prevailing wage from SWA, or may use an independent authoritative source or other legitimate source of wage data to determine the prevailing wage. 20 C.F.R. § 655.731(a)(2).

In the instant matter, Respondent determined the prevailing wage it reported on the LCA in support of the Prosecuting Party’s H-1B visa petition by conducting a survey as recommended by their immigrant attorney. The LCA was filed on September 25, 2006, and the H-1B petition was filed on October 11, 2006. Respondent also had agreed to file a permanent labor certification for the Prosecuting Party, and accordingly requested a prevailing wage determination from the State of New York’s Department of Labor. CX-8. On November 9, 2006, the State issued its wage determination in conjunction with the PERM application. CX-4.

Wage Hour initiated an investigation to determine Respondent’s compliance with the H-1B visa process. Wage Hour rejected Respondent’s source for its reported wage determination, and requested ETA to issue a determination. In a determination letter issued September 16, 2009, Wage Hour advised Respondent that it had failed to pay wages as required. Wage Hour calculated back wages due to the Prosecuting Party in the amount of \$377.28. RX-1.

The Prosecuting Party argues that he should have been paid in accordance with the State of New York’s wage determination, and quotes part of the regulation set forth at 20 C.F.R. § 731(a)(2)(ii)(a)(2). The Prosecuting Party cites the regulatory mandate that allows an employer to avoid violating the Act by paying the difference between a reported prevailing wage and a later discovered greater SWA determined wage. However, the Prosecuting Party failed to note that this regulation applies where an employer has requested a SWA wage determination but is unable to wait for its production, and instead uses another legitimate source for its wages.

I find that the record establishes that Respondent relied upon its own survey for the wage determination it reported on the LCA supporting petition for the Prosecuting Party’s H-1B visa. Respondent’s request for a SWA determination by New York State was made in conjunction with its petition for the Prosecuting Party’s permanent visa status, and was not related to his H-1B employment status. Respondent did not request a SWA for the H-1B petition, but conducted a survey upon the advice of its immigration counsel. Accordingly, I find that Respondent was not required to pay the SWA wage determination for work performed by the Prosecuting Party under his H-1B visa. 20 C.F.R. § 656.10(c)(4) provides that an employer is not required to pay the wage determination reported on a PERM labor certification until permanent residence is granted. The evidence is undisputed that the Respondent’s petition for permanent worker status for the Prosecuting Party was not approved during the pendency of his employment with Respondent.

This conclusion is further supported by the fact that Wage Hour requested a wage determination from ETA. DOL considers a determination from the relevant State Workforce Agency (SWA) to be the most accurate and reliable source for determining the prevailing wage. 20 C.F.R. § 655.731(a)(2). If Respondent had been required to pay the wage rate determined by New York State, there would have been no reason for Wage Hour to request another wage determination from ETA.

The Prosecuting Party argues that the wage he was paid was not commensurate with the work he was performing, and therefore, asserts that the State wage determination would more accurately compensate him for his duties. 20 C.F.R. § 655.731(c)(8) states: “If the employee works in an occupation other than that identified on the employer's LCA, *the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.*” (emphasis added); see Amtel v. Yongmahapakorn, ARB Case No. 04-087, ALJ Case No. 2004 LCA-006, at 6-7 (2006). In these circumstances, regardless of what work level the Prosecuting Party contends applied to his duties, the required wage obligation was based on the employer's LCA. Although Wage Hour found defects in that LCA and requested a wage determination from ETA, the wage determination must have been similar to the rate that the Prosecuting Party was paid. I make this inference because of the minimal amount of back wages calculated.

I also find it significant that the Prosecuting Party was not paid at the wage identified on the LCA, which was derived from a survey, but rather was paid an actual rate of thousands of dollars more. The regulations require employers to pay H-1B non-immigrants a required wage rate, which is the greater of the “actual wage” or the “prevailing wage”. 8 U.S.C. §1182(n)(1)(A)(I) and (II). Since the amount paid to the Prosecuting Party was more than the prevailing wage reported on the LCA, he would have been required to be paid that actual wage.

2. Was Wage Hour's request for a wage determination from ETA warranted?

The regulations allow employers to use an independent authoritative source or other legitimate source to determine the prevailing wage. 20 C.F.R. § 655.731(a)(2). The term, “independent authoritative source” means a professional, business, trade, educational or governmental association, organization, or other similar entity, not owned or controlled by the employer, which has a recognized expertise in the occupational field. 20 CFR § 655.920. Employers may use the job classifications recorded in the DOL Online Wage Library (“OWL”) as an “independent authoritative source” for the prevailing wage it enters on the LCA. In addition, DOL's Bureau of Labor Statistics (BLS) collects wage data for its Occupational Employment Statistics (OES) program, which it compiles in the Occupational Information Network (O*NET) database that is made available to the public at <http://online.onetcenter.org>. SWAs have access to the data, which they can use to determine prevailing wage rates for each state. See also, http://www.bls.gov/oes/oes_ques.htm.

Wage Hour may request a wage determination from the ETA when DOL determines through an investigation into compliance with the Act and regulations that an employer has insufficient documentation to support the wage it reported on an LCA. 20 C.F.R. § 655.731(d)(1). If the employer does not challenge ETA's prevailing wage determination

obtained by Wage Hour, then that determination shall be deemed to have been accepted as accurate and shall not be subject to challenge. 20 C.F.R. § 655.731(d)(2)(ii). 20 C.F.R. § 655.840 sets the standards for the content of a Decision and Order by an administrative law judge, and specifically addresses circumstances where Wage Hour has requested a wage determination during an investigation pursuant to 20 C.F.R. § 655.731(d). 20 C.F.R. § 655.840(c). In that event, an administrative law judge's inquiry is limited to determining whether the Administrator's request was warranted. Id.

Respondent relied upon its own survey to establish the wage it reported on the LCA filed in support of the Prosecuting Party's H-1B petition. During its investigation, Wage Hour rejected the survey as non-compliant with the regulations. Wage Hour concluded that the documentation supporting the survey did not meet the criteria of 20 C.F.R. § 655.731. RX-2. I find that this investigative finding supports Wage Hour's July 22, 2009 request to ETA for a wage determination. There was no timely complaint filed through the Employment Service complaint system that challenged ETA's wage determination, and accordingly, that wage determination is deemed to be final. See, 20 C.F.R. § 655,840(c). The prevailing regulations clearly do not require Respondent to use a wage rate issued by a SWA in conjunction with an application for a permanent residency visa.

I note parenthetically, that neither party has entered into evidence the amount of the wage determination that ETA issued. As my inquiry on this issue is limited, this omission is immaterial. The regulations provide that "[u]nder no circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the prevailing wage determination." 20 C.F.R. § 655.840(c). However, since back wages of \$377.28 were computed for a period of almost fifteen months, it can be inferred that the ETA wage determination rate was not too different from what the Prosecuting Party had been paid, which, as I have noted, was an amount in excess of the prevailing wage reported on the LCA.

As the regulations preclude me from determining the validity of the wage determination, I am constrained from giving much weight to the Prosecuting Party's argument that since he was working for two companies, the wage determination issued by ETA was improper. I do note, however, that the documentary evidence reflects that he was put on notice that his duties would require him to work on tasks relating to both Respondent and its affiliate BWI. The Prosecuting Party himself authored a document in which he expressed his eagerness to work for Respondent and its affiliate.

The Prosecuting Party has argued that since the State of New York issued a wage determination, there was no need for Wage Hour to request one from ETA. This argument fails because the State wage determination was issued in conjunction with Respondent's petition for a permanent visa, and bore no relationship to the Prosecuting Party's wages under the H-1B visa.

3. Back Wage Calculations

The Prosecuting Party has asserted that he is entitled to \$41,625.00 in salary for the period from November 8, 2005 to February 7, 2008, based upon his stated salary of \$45,000.00 and the New York State wage determination of \$63,500.00. CX-18. He further alleges that he is entitled to payment of \$6,978.00 for 200 hours of “compensatory time” and \$105,833.33 representing salary for “unproductive time” during the period from February 8, 2008 to September 24, 2009. CX-18.

The Prosecuting Party argues that Respondent did not effect a bona fide termination of his employment. Employers are required to pay non-immigrant workers the required wage unless their employment is severed by a bona fide termination. 20 C.F.R. § 655.731(b)(7)(ii). A termination is considered bona fide if the employer notifies the Department of Homeland Security that the employment relationship has been terminated and if employer provides the employee with payment for transportation home under certain circumstances. 20 C.F.R. § 655.731(c)(7)(ii); 8 C.F.R. § 214.2(h)(11); 8 C.F.R. § 214.2(h)(4)(iii)(E).

On February 7, 2008, Respondent’s Executive Director terminated the Prosecuting Party’s employment. By letter dated February 12, 2008, Respondent advised the Prosecuting Party that his employment was terminated effective February 7, 2008. CX-13. On February 22, 2008, the Chairperson of Respondent’s Personnel Committee of the Board of Directors wrote to the Prosecuting Party to advise him of the proper manner in which to file a grievance of his termination with the Board of Directors. CX-20. The Chairperson sent a second letter dated March 3, 2008, acknowledging receipt of his appeal. CX-21. By letter dated March 11, 2008, the Chairperson affirmed the Prosecuting Party’s discharge of February 7, 2008. CX-22. In separate correspondence dated March 11, 2008, Respondent offered to reimburse him for the cost of his transportation to his country of origin. RX-5. On that same date, Respondent wrote to USCIS to advise that his employment had been terminated. RX-4.

The Prosecuting Party contends that Respondent did not promptly inform the USCIS that his employment had been terminated, and argues that therefore he was never actually terminated within the understanding of the Act and prevailing regulations. He suggests that the copy of Respondent’s letter to USCIS (RX-4) is not reliable, and does not prove that USCIS was notified of his termination. He notes that he was not served a copy of the correspondence.

I decline to accord weight to the Prosecuting Party’s allegations regarding the validity of Respondent’s letter to USCIS. There is no evidence of record casting doubt on the validity of the letter, and there is no regulatory or statutory authority that requires an Employer to provide a discharged employee with a copy of its notice to USCIS of the severance of an employment relationship. I find that Respondent has fulfilled the regulatory requirements of effecting a bona fide termination of the Prosecuting Party’s employment. Therefore, I find no evidence supporting the contention that Respondent is responsible to pay him the required wage for unproductive time due to ineffective severance of the employment relationship.

I accord weight to the Prosecuting Party's argument that the termination of his employment was not effective on February 7, 2008. The record establishes that the Prosecuting Party was offered the opportunity to grieve his termination to the Personnel Committee of Respondent's Board of Directors. Accordingly, it is reasonable to conclude that his termination could not be deemed effective until that body considered his appeal. The Board advised the Prosecuting Party of its decision upholding Respondent's termination on March 11, 2008. It was on that date that Respondent advised USCIS of the termination, and offered the Prosecuting Party transportation home. I note further that Wage Hour used the period from November 18, 2006 to March 15, 2008 to compute back wages. Moreover, in its closing written argument, Respondent agrees that its obligation to pay the Prosecuting Party the required rate ended "on or about March 11, 2008." See, Respondent's brief at page 5.

I am unable to fully credit the Prosecuting Party's argument that Respondent did not send him the correspondence regarding his termination until March 21, 2008. See CX-22. I note that two documents dated March 11, 2008, on Respondent's letterhead (RX-5 and CX-22) were addressed to him, and he has not distinguished which correspondence was in the copy of the envelope he tendered as evidence. Because one of the letters came from Respondent's Executive Director, and the other from Respondent's Board, I conclude that they were sent by separate cover. Accordingly, I find that Respondent was responsible to pay the required wage from February 8, 2008 until March 11, 2008.

I am unable to determine from the evidence of record whether Respondent paid the Prosecuting Party the required wage for the period from February 7, 2008 until March 11, 2008. The Prosecuting Party has presented no evidence of payroll documentation, and no bank statements showing deposits, or lack thereof for payment during this period. Also, I note that his calculations of back wages are based upon assertions that I discredit as less than accurate. He has asserted that he is entitled to back wages based upon the difference of \$45,000.00 and the State wage determination. I accord weight to Ms. de la Uz' testimony that Respondent had increased his pay, which the Prosecuting Party did not dispute. That testimony is supported by documentary evidence. See, CX-15 (References to wages in pleadings submitted to the New York State Division of Human Rights). Because Wage Hour's back wage computation covers the period to March 15, 2008 (RX-1), and Respondent acknowledges that the date of termination is March 11, 2008, I conclude that the back wage computations that Wage Hour made accurately reflect all wages due to the Prosecuting Party.

The Prosecuting Party claims \$11,577.36 are due for benefits, based upon a monthly cost of \$964 x 12 months. Health insurance plans must be offered "on the same basis and in accordance with the same criteria" that the employer offers to American workers. 8 U.S.C. § 1182(n)(2)(C)(viii); 20 C.F.R. § 655.731(c)(3)(i). As I have found that Respondent has demonstrated a bona fide termination of his employment, I find that the Prosecuting Party is not entitled to benefits. The record includes a letter from Respondent advising him of his right to continue health care benefits under COBRA (CX-23). The Prosecuting Party has presented no evidence demonstrating that he bought insurance for which he should be reimbursed. I again accord substantial weight to Wage Hour's calculation of back wages due, as the calculations cover the duration of the Prosecuting Party's employment with Respondent.

The Prosecuting Party also asks for interest to be computed on back wages due. It is uncertain whether Respondent paid the back wages calculated by Wage Hour. Respondent submitted a copy of a check in the amount of the back wages calculated by Wage Hour in support of its contention that back wages were paid. See, Exhibit C of Respondent's motion to dismiss individually named Respondent, dated December 16, 2009. The Prosecuting Party observed that the check does not accurately represent back wages, as it does not reflect deductions for appropriate tax and other withholdings. Because the Prosecuting Party was Respondent's accountant, I accord substantial weight to his testimony on this issue. I also note that the copy of the check in evidence is drawn on Respondent's "general fund", which I infer is separate from a payroll account. Accordingly, I find that Respondent is liable to pay the back wages computed by Wage Hour, minus lawful deductions. Prejudgment compound interest should be calculated at the applicable rate of interest in accordance with 26 U.S.C. § 6621 and added to the net amount of back wages, together with any post-judgment interest that may accrue, pursuant to 26 U.S.C. § 6621.

4. Whether Respondent discriminated or retaliated against the Prosecuting Party in violation of 20 C.F.R. § 655.805(a).

At the hearing, I mistakenly advised the parties that I believed that the instant adjudication was confined to issues regarding the prevailing wage, although I also advised that I would expand the scope of the inquiry upon consideration of all of the evidence. Tr. at 10-11. I relied upon the omission of any reference to a complaint of discrimination in the Wage Hour determination letter of September 16, 2009. I also had difficulties comprehending the Prosecuting Party's initial submissions to OALJ, filed with his request for a hearing. Therein, he referred to discriminatory motives for his termination, but the causes appeared to fall outside of the jurisdiction of the Act. However, upon full examination of the parties' positions and arguments, I find that this issue was raised by the Prosecuting Party and that the Act and implementing regulations provide authority to order reinstatement in circumstances where an individual is subjected to adverse action for engaging in protected activity. I believe my initial misapprehensions about my authority amount to harmless error, because the record is sufficient to address the issue. The Prosecuting Party testified about the circumstances underlying his termination, and has submitted copious argument and documentary evidence regarding the issue. Respondent offered testimony on the issue regarding the termination, and addressed the issue in written closing argument.

Title 20 of the Code of Federal Regulations implements the employment protection provision that was added to the H-1B program by the Competitiveness Amendments. 8 U.S.C. § 1182(n)(2)(C)(iv). Those who employ H-1B workers may not discriminate against them in any manner for complaining internally (to the employer) or externally (to the government) about suspected violations of H-1B program requirements. The regulations provide as follows:

No employer . . . shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee . . . because the employee has . . . [d]isclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation . . . of the INA or any regulation relating to sections 212(n) or (t) . . . or . . . [c]ooperated or sought to

cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements . . . of the INA or any regulation relating to sections 212(n) or (t).

20 C.F.R. § 655.801(a). The Competitive Amendments codified regulations governing how DOL addresses complaints of whistleblowers. 144 Cong. Rec. S12752 (Oct. 21, 1998; see also, 65 Fed. Reg. 80,178) (finding that Congress intended that the Department interpret and apply whistleblower protections for H-1B non-immigrants using the principles it had developed in adjudications under its existing nuclear and environmental whistleblower protection programs⁵ implemented with regulations published at 29 C.F.R. part 24).

The pendency of a whistleblower retaliation complaint permits an H-1B worker to remain in the United States during the term of the H-1B visa, and to seek other appropriate employment, even though the worker no longer is employed with the employer who sponsored the non-immigrant's H-1B visa petition. 8 U.S.C. §§1182(n)(2)(C)(v); 1182(t)(3)(C)(v); USCIS Memorandum 08-06 (May 30, 2008)⁶.

H-1B retaliation claims are analyzed in the same manner as other types of whistleblower claims administered by the Department of Labor. See 65 Fed. Reg. 80,178 (Dec. 20, 2000) see also, Toia v. Gardner Family Care Corp., 2007-LCA-00006 at p. 21 (ALJ Apr. 25, 2008). First, a complainant must prove a prima facie case of unlawful discrimination by a preponderance of the evidence. The employee must show "that he engaged in a protected activity, that his employer knew about this activity, and that his employer took adverse action against him because of his protected activity." Kersten v. LaGard, Inc., ARB No. 06-111, ALJ No. 2005-LCA-017, at 9 (ARB Oct. 17, 2008); U.S. DOL, Wage Hour Division v. Kutty, ARB No. 03-022, ALJ Nos. 2001-LCA-010 through 2001-LCA-025, slip op. at 13 (ARB May 31, 2005). Upon a determination that an employee's protected activity contributed to the employer's adverse action, the employer then has the burden to articulate a legitimate, non-discriminatory reason for the adverse action. Brune v. Horizon Air Indus., Inc., ARB No. 04-037, AJL No. 2002-AIR-00008, slip op. at 13-14 (2006); Toia, 2007-LCA-00006 at 22. The non immigrant worker then must prove by a preponderance of the evidence that the stated reason for the adverse action was not true, but rather, was a pretext for discrimination. Kutty, supra. ARB No. 03-022, ALJ Nos. 2001-LCA-10 to 25, slip op. at 14 (ARB May 31, 2005).

The record demonstrates that the Prosecuting Party advised his supervisor and other Fifth Avenue officials that he believed he was not being paid the proper prevailing wage, and was shortly fired thereafter. Therefore, the Prosecuting Party has established a prima facie case of

⁵ "Procedures for the Handling of Discrimination Complaints Under Federal Employee Protection Statutes" address complaints of retaliation made under the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); the Water Pollution Control Act, 33 U.S.C. § 1367; the Toxic Substances Control Act, 15 U.S.C. § 2622; the Solid Waste Disposal Act, 42 U.S.C. § 6971; the Clean Air Act, 42 U.S.C. § 7622; the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610 and Section 211 (formerly Section 210) of the Energy Reorganization Act of 1974, as amended on October 24, 1992 in the Energy Policy Act of 1992, 42 U.S.C. § 5851. See, 63 Fed Reg. 6614; amended regulations set forth at 29 C.F.R. part 24.

⁶ Available at www.uscis.gov/files/nativedocuments/AC21_30May08.pdf.

retaliation for purported protected activity. The temporal relationship between his demand to be paid and the termination of his employment is sufficient to create a nexus of discrimination. See, USPS Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). However, I find that it was not reasonable for the Prosecuting Party to believe that he was entitled to the prevailing wage that he insisted, and continues to insist, was his due. I find the reasoning of the Administrative Review Board (“ARB”) in its decision in Malmanger v. Air Evac EMS, Inc., ALJ No. 2007-AIR-8 (ARB July 2, 2009) extends to the instant circumstances. The ARB upheld the determination by an administrative law judge who found no protected activity had occurred where the concerns of an employee had been addressed and resolved. Although the Prosecuting Party’s concerns about his pay were not resolved to his satisfaction, they were in fact addressed by Respondent well before February 6, 2008.

The Prosecuting Party had no objective reason to believe on February 6, 2008, that Respondent was not paying him the proper wage determination. He testified that he knew about the State’s first wage determination from November 9, 2006⁷ shortly after it was issued, because Mr. Bhatia gave him a copy of the determination. Tr. at 50. On November 9, 2006, the New York DOL issued a wage determination in conjunction with Respondent’s petition to sponsor the Prosecuting Party’s permanent residency. CX-4; CX-5. The documents were prepared on behalf of Respondent by an attorney, Satish Bhatia, who had been recommended to Respondent by the Prosecuting Party. CX-6. Respondent thereafter continued to gather the necessary documents to petition for the Prosecuting Party’s permanent and H-1B visas. On October 30, 2007, Ms. de la Uz sent an email to Mr. Bhatia in which she asked him to clarify certain aspects of the petition process, referring to the fact that Respondent was not paying Mr. Baiju the hourly rate indicated by the wage determination. CX-9. By facsimile dated November 8, 2007, Mr. Bhatia responded to Ms. de la Uz’ email, and advised that Respondent was obligated to pay the prevailing rate of \$34.89 per hour only after the alien worker petition is approved. CX-10. Mr. Baiju testified that he was provided a copy of this correspondence, together with the offer of employment dated June 28, 2007. Tr. at 87.

Therefore, it is undisputed that long before February, 2008, Mr. Baiju was aware that the State wage rate applied only to employment under a permanent visa. He was provided a copy of that correspondence also. In addition, February 6, 2008 was not the first occasion on which Mr. Baiju raised the issue with Respondent. He testified that he had raised the issue about the proper wage determination “time and again” with his supervisor, Respondent’s Executive Director, and other staff. Tr. at 59; 76. An email of February 6, 2008, from Ms de la Uz corroborates that she and Mr. Baiju had discussed the matter. The message says, in pertinent part, “I have consistently said that we do not have a staff accountant position at FAC that pays \$63K on an annual basis, nor do we need one at that rate given the requirements of the position here. Additionally, as you know, I even confirmed with the attorney that the [New York] DOL rate of pay determination represents what the salary should be once the petition is finalized” CX-17, page 3.

⁷ Respondent subsequently requested another determination, and NY State confirmed its wage determination of \$34.89 per hour in correspondence dated January 11, 2007.

The insistence of the Prosecuting Party that his perception of the law and facts regarding the applicable wage determination is correct is objectively unreasonable. He was aware of the advice of an immigration attorney that Respondent was not obligated to pay the New York State wage determination until he was granted a permanent visa. The plain meaning of the prevailing regulation set forth at 20 C.F.R. § 656.10(c)(4) specifically provides that an employer is not required to pay the wage determination reported on a PERM labor certification until permanent residence is granted. It is undisputed that the New York State wage determination was issued in conjunction with the petition for the Prosecuting Party's permanent visa, and not the H-1B visa which applied to his employment with Respondent. Despite the content of his complaint on February 6, 2008, I find that the Prosecuting Party's subjective opinions on the applicable wage rate were not objectively reasonable, and that therefore, he did not engage in protected activity.

It is clear that the Prosecuting Party's complaints on February 6, 2008 led to the termination of his employment the next day. If those complaints constituted protected activity, then his discharge on the next day would be deemed to be because of the complaints, and therefore, discriminatory. I have noted that the temporal proximity of the events is sufficient to infer discrimination. However, despite the temporal relationship of the demand of February 6, 2008 and the Prosecuting Party's discharge the next day, the record is undisputed that he had made similar demands repeatedly before that date without suffering any adverse effect. Although his termination occurred in reaction to the Prosecuting Party's demand for a pay increase, Ms. de la Uz has credibly testified that she was concerned about the manner in which he made his request. She credibly testified that she decided to discharge the Prosecuting Party when during her discussion about the situation with him, he told her he would not perform certain of his work duties.

I find support for Ms. de La Uz's version of the events that led to the termination of the Prosecuting Party's employment. Although she suggested that he seek employment elsewhere if he was unhappy with his wages, she did so only after he continued to reject her explanation of how the prevailing wage rate would apply to his employment. Ms. de la Uz testified that she had received complaints from other employees that Mr. Baiju had been disruptive, and the email evidence demonstrates that he approached various individuals about his pay. She knew that he had approached a member of the Board of Directors about the matter, rather than following her instructions. When she met with him on February 8, 2008, the Prosecuting Party remained intractable on the issue. I accord weight to the fact that her decision was upheld by the Board of Directors, and I note that the decision had to impose a burden on Respondent, which would be deprived of the services of an accountant until the Prosecuting Party could be replaced.

Ms. de la Uz' recollection of the events is further supported by the Prosecuting Party's demeanor at the hearing. He appeared reluctant to follow instructions or accept rulings that were opposite his position. Despite the advice from an immigration lawyer, and the plain text of the prevailing regulation, the Prosecuting Party clearly did not accept that he was not entitled to the rate of wages that the State had issued. In addition, he believed that he was entitled to more money because he believed he was working for two different companies, despite explanations from his supervisor, Respondent's Executive Director, and the Executive Director for BWI that the work was related to a contract between the two entities. CX-11. I find that Respondent has articulated a legitimate reason for terminating Mr. Baiju's employment.

I further find that the preponderance of the evidence fails to demonstrate that Respondent's stated reason for termination was a pretext for discrimination. The parties repeatedly discussed the issue of whether the Prosecuting Party was entitled to the higher wage determination, and yet no adverse action was taken against him until February 7, 2008. This gives credence to Ms. de la Uz's rationale that she discharged the Prosecuting Party for failing to follow instructions and for refusing to perform assigned work. The argument in favor of pretext is undermined by Respondent's continued sponsorship of the Prosecuting Party's permanent visa petition in spite of his demands for more money. Ms. de la Uz referred to the expenses involved in the process, which cost Respondents at least the price of Mr. Bhatia's services. There would have been no incentive for Respondent to continue to spend time and money on that venture only to later discriminate against Mr. Baiju for activity that he had engaged in repeatedly in the past, namely, demanding to be paid the SWA wage rate. In addition, attachments to the petition (CX-10) and an audit notification letter (CX-12) reflect that Ms. de la Uz was aware of the need to pay the higher wage rate when the permanent visa was approved. I credit her testimony that she expected an increase in accountant's duties over time, which would merit the higher wage when the petition was approved. Ms de la Uz also credibly observed that Mr. Baiju would likely have continued to receive cost of living adjustments, which he had earned in each full year of his employment with Respondent.

An administrative law judge for the State of New York Unemployment Insurance Appeal Board ("Appeal Board") found that the Prosecuting Party was discharged because he complained about his rate of pay. CX-16. The judge specifically made that finding because "the employer did not produce first hand testimony regarding claimant's separation from employment". *Id.* The judge relied upon precedent holding that hearsay evidence cannot outweigh sworn testimony when no other evidence impeaches that testimony. (citing Matter of Perry, 27 AD2d 367, rev'g A.B. Case No. 160501). CX-16. Although a determination made in another forum may have persuasive value, the circumstances before me are different from those before the Appeal Board. Here, both parties testified about the circumstances leading to termination. In addition, the probative value of the evidence regarding the prevailing wage has weight in the instant controversy that it did not have before the Appeal Board. I find that the determination by that forum has little probative or persuasive value to my adjudication.

I find that the preponderance of the evidence supports a finding that the Prosecuting Party's discharge from employment with Respondent was not in retaliation for protected activity. Accordingly, I find no support for an award of remedies to the Prosecuting Party.

The Prosecuting Party has suggested that he would be entitled to reinstatement (or comparable compensation) during the pendency of his complaint of discrimination under the Act. When such a complaint is filed, the H-1B worker may remain in the United States during the term of the H-1B visa, and seek other appropriate employment, even though the worker no longer is employed with the employer who sponsored the non-immigrant's H-1B visa petition. 8 U.S.C. §§1182(n)(2)(C)(v); 1182(t)(3)(C)(v); USCIS Memorandum 08-06 (May 30, 2008). I find that this regulation does not support reinstating a discharged employee until the discrimination claim is adjudicated, or for paying wages in lieu of reinstatement.

IV. CONCLUSION

For the foregoing reasons, I affirm the Administrator's determination that Respondent failed to properly document the wage rate it reported on the LCA that accompanied its petition for the Prosecuting Party's H-1B visa. Therefore, Wage Hour properly requested a wage rate determination for ETA. I find that Respondent was not obliged to pay the Prosecuting Party the wage rate determined by the State of New York, because that rate applied to employment under the petition for the Prosecuting Party's permanent resident visa, which was not yet approved. I find that Respondent did not discriminate against the Prosecuting Party for protected activity under the Act. Respondent is liable to pay the Prosecuting Party the back wages calculated by Wage Hour, together with accrued interest⁸. I further find that Michelle de la Uz is not personally liable to pay any liabilities of Respondent.

ORDER

1. The notice of determination of the Administrator, Wage Hour, dated September 16, 2009 is **AFFIRMED**.
2. Respondent shall pay the stated back wages in the total amount of \$377.28 to Bishnu S. Baiju, the Prosecuting Party, pursuant to the instructions set forth in the Administrator's Determination letter.⁹
3. Respondents shall calculate pre and post judgment interest until satisfaction of the liability, pursuant to the legal authorities set forth in this Decision.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

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, Suite 5220, 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).

⁸ If Respondent can conclusively demonstrate that the wages have been paid, then they shall be deemed to have satisfied this Order.

⁹ In the letter, Respondent was instructed to make all necessary and lawful deductions for taxes and associated expenses from the back wage payment.

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).