



Issue Date: 17 May 2016

Case No.: 2013-LCA-00009

In the Matter of:

VICENTE D. DeDIOS
Prosecuting Party

v.

MEDICAL DYNAMIC SYSTEMS, INC.
Respondent

DECISION AND ORDER AWARDING BACK WAGES

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(n) (2005) (“INA” or “the Act”), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I, C.F.R. § 655.700 *et seq.* The Act’s H-1B visa program permits American employers to temporarily employ nonimmigrant aliens to perform specialized occupations in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). 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 hire an H-1B nonimmigrant alien, an employer must first receive permission from the U.S. Department of Labor. To receive permission from the Department of Labor, the Act requires an employer to submit a Labor Condition Application (“LCA”) to the Department. 8 U.S.C § 1182(n)(1). The Department has promulgated detailed regulations setting forth requirements implementing the statutory provisions. These requirements include provisions covering the determination, payment, and documentation of required wages. 20 C.F.R. Part 655, subpart H.

I. PROCEDURAL HISTORY

This matter involves a complaint Complainant, Vicente D. De Dios, filed with the Wage and Hour Division (“WHD”), U.S. Department of Labor, against Respondent, his former employer. Complainant, who was Respondent’s employee under a LCA with a term beginning October 2009 until October 2012, asserted that Respondent failed to pay “bench pay” (time the employee was not working) and unlawfully collected H-1B filing fees. (Complainant’s Pre-Hearing Statement at 7.)

After an investigation, by letter dated February 15, 2013, the District Director, WHD, acting on behalf of the Administrator, issued its determination that Respondent had failed to pay Complainant wages in the amount of \$26,956.80 for the period beginning on February 6, 2010 until May 29, 2010. On March 1, 2013, through counsel, Complainant requested a hearing before the Office of Administrative Law Judges (“OALJ”). Under § 655.840(b), an Administrative Law Judge (“ALJ” or “Judge”) has the authority to affirm, deny, reverse, or modify, in whole or in part, the determinations of the Administrator.

A Notice of Hearing issued March 13, 2013 scheduling the hearing for July 22, 2013 in New York, New York. At the July 22, 2013 hearing, the undersigned admitted ALJ Exhibit 1 (“ALJX”), Joint Exhibits 1-3 (“JX”), and Complainant’s Exhibits 1-6 (“CX”). (July Transcript “Jul. Tr.” 9, 23-25.) Respondent and Complainant asked to reserve the opportunity to submit more evidence, which the undersigned granted. (Id. at 25, 26.)

Complainant did not appear at the hearing. Complainant’s counsel explained that Complainant tried to obtain a B-1 visa but the United States Embassy denied the application because “the U.S. Embassy was on the belief that he might be able to work, he might find job here, because [Complainant] has the license—has a license to practice.” (Id. at 6.) Accordingly, Complainant’s counsel then asked to present Complainant’s testimony through Skype. (Id.) However, the internet connection in the hearing room was not sufficient or reliable enough for testimony. (Id.) Complainant’s counsel stated that Complainant would be willing to travel to Manila, Philippines for a better internet connection. (Id. at 7.) The undersigned rescheduled the hearing for September 16, 2013, in order for Complainant to testify via Skype. (Id. at 28.)

The undersigned held a second hearing on September 16, 2013 in New York, New York. Again, Complainant did not appear, either in person or via Skype. Complainant’s counsel explained that Complainant was unable to testify because he had suffered a stroke. (September Transcript “Sept. Tr.” at 5.) Thus, Complainant’s counsel requested a continuance. (Id. at 6.) The undersigned granted the continuance request and scheduled another hearing for December 10, 2013. (Id. at 9, 16.) The undersigned admitted CX 7 into the record. (Id. at 7.)

On November 25, 2013, Complainant’s counsel, via facsimile, informed this office that Complainant was in poor health and would be unable to testify at the December 2013 hearing. On November 27, 2013, Complainant’s counsel filed a Motion for a decision on the record. On November 29, 2013, Complainant’s counsel submitted a clinical abstract documenting Complainant’s condition. On December 2, 2013, the undersigned issued an Order cancelling the hearing and directing Respondent to show cause why the undersigned should not grant Complainant’s request for a decision on the record. On December 13, 2013, Respondent responded to the Order to Show Cause, objecting to Complainant’s request for a Decision on the Record. On December 18, 2013, the undersigned scheduled a telephonic conference for December 20, 2013.

Representatives for both parties attended the December 20, 2013 conference call. At the conference, the undersigned discussed with the parties Complainant’s inability to testify and whether to issue a decision on the record. The undersigned granted Respondent an opportunity to submit witnesses’ deposition testimony in lieu of trial testimony. (December Telephonic

Conference Transcript “Dec. Tr.” at 13.) Complainant had the opportunity to submit rebuttal evidence to Respondent’s deposition evidence. (Id.)

On December 23, 2013, the undersigned issued an Order granting Complainant’s request for a decision on the record. Pursuant to this Order, the record closed on February 28, 2014 and briefs were due on March 28, 2014. On February 18, 2014, Complainant submitted CX 8 and CX 9. On March 3, 2014, Respondent submitted Marissa Beck’s deposition testimony and Frank Ianucci’s affidavit.¹ On March 31, 2014, this office received Complainant’s and Respondent’s briefs.

II. ISSUES

Based on the assertions the parties made at the hearing and the parties’ filings, including their post-hearing briefs, the issues to be determined are as follows:

1. Did Complainant timely file his complaint?
2. Did Respondent violate the Act by requiring Complainant to pay H-1B filing fees?
3. What is Complainant’s applicable employment period for back wage recovery?
4. Did Respondent fail to effectuate a termination of employment?

III. STIPULATIONS

The parties stipulated to the following facts:

- 1) In or about October 2009, Medical Dynamic Systems, Inc. filed a labor condition application (LCA) with Case Number I-200-09291-328019 with the U.S. Department of Labor for a full-time Nurse Manager position.
- 2) On October 22, 2009, the Department of Labor certified LCA No. I-200-09291-328019 for the period of employment between 10/19/ 2009 through 10/18/ 2012, inclusive, and the approved prevailing wage was thirty seven dollars and six cents (\$37.06) per hour.
- 3) Medical Dynamic Systems, Inc. filed a petition for nonimmigrant worker (Form I-129) on behalf of Vincente De Dios on or about November 3, 2009 for the full-time position of Nurse Manager, using LCA case number I-200-09292-328019.
- 4) The U.S. Citizenship and Immigration Services (“USCIS”) approved Medical Dynamic System Inc.’s H-1B petition with case number EAC-10-023-51789 on behalf of Vincente De Dios for the position of Nurse Manager.
- 5) Medical Dynamic Systems, Inc.’s Vice President, Henry Beck, provided Vincente De Dios with a copy of the certified labor condition application on or about January 29, 2010 pursuant to immigration rules and regulations.
- 6) Medical Dynamic Systems Inc. communicated to Vincente De Dios that it was willing to shoulder his transportation back to the Philippines.

¹ Frank Ianucci’s affidavit has been designated as Respondent’s Exhibit (“RX”) 1 and Marissa Beck’s deposition will be designated as RX 2.

- 7) Vincente De Dios replied that he would consider the employer's offer of return transportation back to the Philippines if Medical Dynamic Systems Inc. would likewise compensate him for his bench period under immigration rules.
- 8) On or about June 8, 2010, Medical Dynamic Systems, Inc. communicated to the USCIS and requested that its H-1B petition on behalf of Vincente De Dios be withdrawn.
- 9) During the validity period of the LCA Case No. 1-200-09291-328019, Medical Dynamic Systems, Inc. issued two checks to Vincente De Dios, and there are check nos. 2766691 and 2766695 in the amounts of \$248.00 and \$496.00 gross pay or \$208.34 and \$376.18 net pay.²
- 10) Complainant timely filed a request for a hearing on the Administrator's February 15, 2013 determination.

(See ALJX 1; Jul. Tr. 9-12.)

IV. EVIDENCE

A. Joint Exhibits

JX 1: Emails between Respondent and Complainant

April 8, 2010: Complainant sent an email to Sandra Miranda, Assistant Marketing Director, Henry R. Beck, President and Marissa Beck, Marketing Director, of Respondent Company, writing:

While I have been calling Sandra (many times) to check the available work for me, I am concerned with my immigration status. It's been almost 2 ½ months now since the approval of my H1B visa but MEDSI has only given me 8 and 16 hours of work. I am severely running out of budget right now. Please remedy the situation, as I feel that you are in breach of our agreement.

April 14- 22, 2010: Ms. Miranda sent an email to Complainant asking him to complete an attached leave form so that Ms. Beck can advance him five days' vacation leave. Complainant responded eight days later, asking Ms. Miranda whether going on advance vacation leave without ever having a job will have a bad effect on him.

April 23, 2010: Mrs. Beck sent an email to Complainant writing: "[w]e hope you're not working or else we'll not give you the advance." Complainant responded the same day, stating: "where am I going to work? It is almost three months, I've been begging you to give me a job since I have a contract with you."

² At the July 22, 2013 hearing, the parties agreed that Respondent issued Complainant two checks. (Jul. Tr. 12.) Respondent's counsel stated that the issue in dispute is whether Respondent issued any additional checks. (*Id.*) Respondent has not addressed this issue in its brief or presented any evidence that Respondent issued additional checks.

April 26, 2010: Ms. Miranda sent an email to Complainant asking him to report to the office as soon as possible because the company is trying to place him at one of its nursing homes in Long Island.

May 4, 2010: Ms. Miranda sent an email to Complainant stating “I have been calling you on your 2 telephone numbers but to no avail. I left you a voice message too. If you can come in for an interview today at 1:00 pm at our Bronx facility. Details are below.”

May 4, 2010: Joan Murphy from Split Rock Rehabilitation sent an email to Ms. Miranda informing her that she reviewed all of her resume submissions (which included Complainant’s resume) and only wants to interview one candidate, “Fernando,” because the others do not have experience.

May 21, 2010: Ms. Miranda sent an email to Complainant stating: “[w]e would like to request that we give you time to look for another sponsor for the next two weeks since we’re unable to provide you job placement due to lack of openings... We are willing to give you one way ticket to the Philippines as you make the decision about the H1B.”

May 21, 2010: Complainant sent an email to Ms. Miranda writing:

[t]hank you for your offer to give me a one-way ticket to the Philippines. I will strongly consider your offer if you also pay me for the time that you did not provide me a job, as required by H1B regulations. I believe bench time is compensable under the law.

May 21, 2010: Complainant sent an email to Ms. Miranda addressing Ms. Beck: “[t]hank you for agreeing to pay for my bench pay.” Complainant calculated his total bench pay to be \$22,244.22. He wrote that “if the pay check is ready, I can pick it up in one week. Please schedule my plane ticket back to the Philippines three weeks from now.”

May 22, 2010: Ms. Miranda sent an email to Complainant stating: “[a]t your convenience, give us your schedule and we will buy the ticket and pay you accordingly through our agency.”

June 8, 2010: Ms. Miranda wrote to Complainant:

sorry but we cannot afford to pay the amount. We tried to set you up for an interview but you never showed up. We are arranging an interview at Mt. Vernon and Staten Island, tell us when you can come for an interview? Tell us the time and date when you want to go back to the Philippines if you’ve already decided. The ticket is just here.

June 8, 2010: Complainant wrote an email to Ms. Miranda stating: “I expect interview for position that I was sponsored for and you need also to pay for all my bench time as required by DOL’s regulation.”

July 22, 2010: Ms. Miranda sent an email to Complainant stating that he has an interview the following day at Split Rock Rehabilitation and Healthcare. The subsequent email exchange is summarized below:

Complainant: “What about the issue on my bench time pay Sandra? Can we settle that first?”

Ms. Miranda: “For now, I just want to know if you can come for the interview tomorrow as the HR Director is waiting for the confirmation.”

Complainant: “Right now, I’m really running out of budget Sandra. Imagine yourself not working for 7 months. How can I mobilize, even the cheapest train or bus is so expensive if you are not working? How can you buy presentable clothes to report to the interview that you are saying? So first thing first, can we talk about the bench time pay?”

Ms. Miranda: “Are you coming or not? I need an answer, as they will be waiting for you.”

October 20, 2010: Complainant sent email to Ms. Miranda asking for a release document, writing “May I request for a release document with letterhead of MEDSI so I can find a new employer?”

October 27, 2010: Ms. Miranda responded to Complainant’s email request, attaching a release document, writing “as per your request please see attached release letter. For your conforme (sic)” (the actual document is not part of the email).

JX 2: Respondent’s Motion to Revoke H-1B Petition: By letter dated June 1, 2010, Respondent sent a letter to USCIS asking to revoke its H-1B petition on behalf of Complainant. The document has a handwritten note stating: “approved by M. Beck date: 06/04/2010.”

JX 3: USCIS Approval Notice Revoking H-1B Petition: On July 19, 2010, USCIS notified Respondent that it received Respondent’s Motion to Revoke on June 8, 2010 and that Respondent’s petition is automatically revoked in accordance with 8 CFR 214.2(h)(11)(ii).

B. Complainant’s Exhibits

CX 1: Employment Agreement: This exhibit shows that Marissa Beck and Complainant signed Respondent’s Employment Agreement on October 5, 2009 for a “Nurse Manager” position. Complainant’s compensation was listed as \$37.06 per hour. The contract states that Complainant’s employment “shall begin on the date the Employee first renders actual services to the Company as a duly Licensed Nurse Manager.”

CX 2: USCIS H-1B Approval Notice: The USCIS sent an H-1B approval notice to Respondent on January 28, 2010. The approval notice shows that USCIS received Respondent's H-1B petition on November 3, 2009 and approved Respondent's H-1B petition for the period from January 28, 2010 to October 18, 2012.

CX 3: Respondent's Letter to Complainant: This is a letter that Henry R. Beck sent to Complainant on January 29, 2010 which states "Enclosed please find a copy of the Certified Labor Condition Application for your reference relative to our H-1B nonimmigrant visa petition filed on your behalf."

CX 4: Complainant's Certified LCA: This is Form ETA 9053E, LCA for H-1B & H-1B1 Nonimmigrants. Henry Beck, who lists his title as Vice President, signed the form on Respondent's behalf on October 28, 2009. The job title is Nurse Manager. The employment period is from October 19, 2009 to October 18, 2012. The rate of pay is \$37.06 per hour, which equals the prevailing wage for the locality. The Office of Foreign Labor Certification approved the LCA on October 22, 2009.

CX 5: Two Checks from Respondent to Complainant

Check No. 2766691: This is a copy of a check dated March 15, 2010 in the amount of \$208.34 net pay made out to Complainant and signed by Marissa Beck. The description is listed as "S.T. Hours." The date is from March 2, 2010 to March 7, 2010. The rate is listed as thirty-one.

Check No. 2766695: This is a copy of a check dated March 18, 2010 in the amount of \$376.18 net pay. The contents are the same to the previous check except this is for the period from March 9, 2010 to March 14, 2010.

CX 6: Three Payment Receipts showing checks from Complainant to Respondent: The first check, dated October 13, 2009 with check no. 9990, is in the amount of \$2,500 and the service is "LF." The second check, dated October 13, 2009 with check no. 9991 is in the amount of \$1,000 and the service is "premium processing." The third check, dated December 17, 2009, with check no. 101, is in the amount of \$100 and the service is "trustforfe evaluation."

CX 7: Copy of USCIS Approval Notice: This exhibit is another copy of USCIS's approval notice for Respondent's H-1B petition. USCIS sent this copy to Jesus Martin L. Reyes, Complainant's H-1B attorney.

CX 8: NYS Department of State Entity Information on Respondent Company: printed from website on January 25, 2014. The website lists Henry R. Beck as the Chief Executive Officer. The business address is 359 2nd Ave Lower Level, New York, New York, 10010.

CX 9: NYS Department of State Entity information on Advanced Professional Marketing, Inc.: printed from website on January 25, 2014. The website lists Marissa T. Beck as the Chief Executive Officer. The business address is 229 E 21st St., Suite 1, New York, New York, 10010.

C. Respondent's Exhibits

RX 1: Frank Ianucci's Affidavit

Respondent submitted the affidavit of Frank Ianucci, Sunharbor Manor's Director of Nursing, dated February 24, 2014. In his affidavit, Mr. Ianucci explained that Sunharbor Manor sources healthcare professionals from Respondent's company and that Complainant came from Respondent. He interviewed Complainant the second week in February 2010 for a Nurse Manager position. Mr. Ianucci decided not to hire Complainant because based on the interview, he concluded that Complainant did not have the necessary experience for the position.

RX 2: Marissa Beck's Deposition Testimony

Marissa Beck, Respondent's Marketing Director, testified at a deposition on January 28, 2014. She testified that her job entails looking for prospective candidates in the medical field, conducting interviews, and placing candidates into jobs. (RX 2 at 4.) She said that Complainant was Respondent's employee. (Id. at 4-5.) After Complainant submitted his resume for a position, Ms. Beck spoke with him by phone a few times during the application process. (Id. at 6.) According to Ms. Beck, when Complainant was first applying for Respondent, he was a student in California and was also working as a caregiver. (Id. at 24.) Ms. Beck stated that Complainant started working for Respondent in March; stating that "I started to give him a job in March, because it took time for him to get his Social Security in February, but I was already marketing him for several nursing homes." (Id. at 7.)

Complainant initially had an interview at Sunharbor Manor Nursing Home which did not accept him because he did not have enough experience. (Id. at 8-10.) Complainant started working for Green Key in March and worked there on March 4, 5, 14 and 15, 2010. (Id. at 11-12.) Ms. Beck testified that he stopped working at Green Key because the patients did not like him and because Complainant "had an attitude problem." (Id. at 11.) From February 15, 2010 to March 4, 2010, Complainant did not work at all. (Id.)

Ms. Beck reviewed an email from Sandra Miranda, Respondent's Assistant Marketing Director, to Michelle Kufka (sp), Sunharbor's human resources employee, dated February 15, 2010. (Id. at 9-11.)³ The deposition does not address the substance of this email. After reviewing this email, Ms. Beck explained that Complainant interviewed with Pat, Sunharbor's Assistant Director of Nursing, and Frank Ianucci, Sunharbor's Director of Nursing. (Id. at 10.) Both Pat and Frank were copied on the February 15, 2010 email.⁴ (Id.)

Respondent asked Complainant to report to the office for interviews, but Complainant never showed up. (Id.) In order to set up these interviews, Respondent would reach out to Complainant by email or phone and Complainant would sometimes respond. (Id. at 13.) Ms.

³ This email is not included in the exhibits.

⁴ The deposition testimony suggests that by the time that Ms. Miranda sent the email, Frank and Pat both met Complainant: "in the e-mail, there is Pat and Frank who already met Mr. De Dios." (RX 2 at 10.)

Beck said that Respondent set up an interview for Complainant with Garden Care Center but Complainant never showed up for the interview. (Id.) Garden Care Center offered Complainant a nurse manager position. (Id. at 36.) Ms. Beck also set up interviews at East Haven Nursing Home and Split Rock Rehabilitation and Nursing Home and Complainant did not show up for these interviews. (Id. at 15.) Every time that Complainant would not show up at an interview, Respondent would ask whether he was available and Complainant would never respond. (Id. at 15.) Ms. Beck said that she called Complainant twice regarding a position at Split Rock and left a voicemail but Complainant never showed up. (Id. at 20.)

Ms. Beck reviewed an email between Ms. Miranda and Complainant in which Complainant asked about finding a job and his concerns about his immigration status. (Id. at 17.) Ms. Beck explained that she offered Complainant money “to file his vacation time so I can give him some five days of vacation to help him with his financial problems.” (Id. at 18.) Complainant asked for bench pay in June but Respondent refused to pay him because Complainant did not show up for interviews. (Id. at 21.) Subsequently, Ms. Beck wrote Complainant a letter informing him that Respondent was terminating his employment as of June. (Id. at 22.) Ms. Beck offered Complainant a ticket to the Philippines but he never came to the office to pick it up. (Id. at 23.) Ms. Beck explained that she offered a check in the amount of \$2,615.04 for a plane ticket to the Philippines. (Id. at 40.) Ms. Beck stated that this money was not for bench time. (Id. at 41.)

Ms. Beck stated that Respondent usually pays for a lawyer to complete the H-1B paperwork, however, when a person uses an outside lawyer, the H-1B applicant pays for the application. (Id. at 30.) Ms. Beck said that Complainant paid for his lawyer because he picked an outside lawyer rather than their in-house attorney. (Id. at 31.) Ms. Beck looked at a check payable to Respondent in the amount of \$2,500 for service “L-F”. (Id. at 35.) She explained that Complainant gave this check to Respondent for the lawyer’s fee. (Id. at 35.)

V. THE PARTIES’ ARGUMENTS

Complainant’s Position

Complainant asserts that Respondent’s actions and decisions put him into non-productive status. (Complainant’s Brief at 4.) Complainant explained that his H-1B status began on January 28, 2010 but he only worked for twenty-four hours in March 2010. (Id.) Complainant wrote that he was ready, willing and able to perform the professional services as listed in his LCA. (Id. at 5.) According to Complainant, Respondent attempted to employ Complainant in positions inconsistent with the Nurse Manager position, which “would be a violation of the LCA and the H-1B petition.” (Id. at 6.)

Complainant also asserts that Respondent failed to effect a bona fide termination of employment. (Id. at 6.) On May 21, 2010, Respondent sent an email to Complainant informing him that Respondent was unable to place Complainant in a job and asking Complainant to look for another sponsor. (Id.) Despite sending this email, Complainant wrote that Respondent continued to email Complainant job opportunities on June 8, 2010 and July 22, 2010, and thus

never terminated Complainant. (Id.) Consequently, Complainant requests back wages with interest for the period from October 19, 2009 through October 18, 2012. (Id. at 7.)

Finally, Complainant asserts that he paid H-1B filing fees to Respondent in violation of 20 C.F.R. §655.731(c)(10)(ii). (Id. 7-8.) Complainant wrote that he gave three checks to Respondent for legal fees, premium processing, and for Trustforte evaluation.⁵ (Id. at 8.)

Respondent's Position

Respondent asserts that it complied with the regulations in effecting a bona fide termination. (Respondent's Brief at 4.) Respondent wrote that it notified Complainant of his termination sometime in June 2010 according to Marissa Beck's testimony. (Id. at 4.) Respondent also offered Complainant a plane ticket home in June 2010. (Id.) Finally, Respondent sent notice to USCIS asking to revoke its H-1B petition and USCIS responded on July 19, 2010, revoking the petition. (Id.) Thus, Respondent argued that its obligation to pay ended on July 19, 2010 and Respondent's potential liability period began on February 15, 2010 (when Sunharbor Manor interviewed Complainant for the LCA position). (Id.)

Respondent alleges that during that potential liability period, it is only liable to Complainant for the period that Complainant was "available to work" for Respondent. (Respondent's Brief at 8.) Thus, Respondent asserts that it is liable to Complainant for February 15, 2010 (date that Complainant went on an interview) and for March 4, 5, 14, and 15 (dates Complainant actually worked). Respondent states that Complainant was not under the control of the employer on any other dates because Complainant did not show up to interviews, answer phone calls, or respond to emails. (Id.)

Respondent also asserts that Complainant untimely filed his complaint and therefore the claim is time-barred. (Id. at 6.) Respondent wrote that pursuant to the INA and the Administrative Review Board ("ARB"), a complaint must be filed within twelve months after the latest date of an alleged violation. (Id.) Although the record does not show when Complainant filed his complaint, the Administrator issued its decision on February 15, 2013. (Id.) Respondent noted that the Administrator must issue a decision within thirty days of conducting an investigation. Accordingly, Respondent estimated that Complainant filed his complaint no later than January 16, 2013, which is more than twelve months after the date of the last violation (which according to Respondent is July 19, 2010, when it revoked its H-1B petition). (Id.) Thus, Respondent wrote that Complainant's claim is time-barred and that the Administrator did not have the authority to issue its determination. (Id. at 7.)

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Did Complainant timely file his Complaint with the WHD?

⁵ According to its corporate website, Trustforte Corporation "is a leading provider of equivalency evaluation services for use in connection with educational, licensing, and immigration purposes." See <http://trustfortecorp.com/profile.html>.

The provisions at 8 U.S.C.A. § 1182(n)(2)(A), state that "[n]o investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively." The regulations, at 20 C.F.R. § 655.806(a)(5), state that "[a] complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA." See, e.g., Adm'r, Wage and Hour Div. v. Greater Missouri Medical Pro-Care Providers, Inc., ARB No. 12-015, ALJ No. 2008-LCA-26 (ARB Jan. 29, 2014); see also Adm'r v. Avenue Dental Care, ARB. No. 07-101, ALJ No. 2006-LCA-029, slip. op. at 11 (Arb. Jan. 7, 2010). After receiving a complaint, the Administrator of the Wage and Hour Division must investigate and issue a determination within thirty calendar days of the filing date. 20 CFR §655.806(a)(3). However, "[t]he time for the investigation may be increased with the consent of the employer and the complainant, or if, for reasons outside of the control of the Administrator, the Administrator needs additional time to obtain information needed from the employer or other sources." Id.

Respondent, for the first time in its brief, alleged that Complainant's complaint to WHD was untimely. (Respondent's brief at 5.) Respondent estimated that Complainant filed his complaint on January 16, 2013, thirty days before the Administrator's determination. (Id.) As summarized above, Respondent argues that the last date of the alleged violation occurred on July 19, 2010, the date that USCIS notified Respondent that it is revoking Complainant's H-1B visa. Thus, according to Respondent, the violation occurred more than twelve months before Complainant filed his complaint. Complainant, on the other hand, asserts that Respondent failed to effect a bona fide termination and so the date of the alleged violation extends the full term of the LCA period.

The record includes a copy of Complainant's complaint to the WHD. In the complaint, Complainant noted that he is Respondent's "current employee" and that he is entitled to back wages from January 28, 2010 until October 18, 2012, the end of the LCA period. The complaint is not dated. The Administrator conducted an investigation and issued a final determination on February 15, 2013. The record includes a Form WH-56 "Summary of Unpaid Wages" from a WHD investigator dated September 28, 2010. The form lists Complainant's name, the dates of the violation period, and the total amount due. Marissa Beck, on behalf of Respondent, signed the document on November 13, 2012 stating that it will pay Complainant \$26,956.80.

Respondent's argument fails on several grounds. First, Complainant filed his complaint well within the LCA employment authorization period. Complainant was authorized to work until October 18, 2012, the end of the LCA period. Based on this date, Complainant must have filed his complaint by October 18, 2013. As Complainant and Respondent dispute whether Respondent effected a bona fide termination, one must consider the entire LCA period. Thus, as a preliminary matter, Complainant established that he filed his complaint within twelve months of his employment period under the LCA. See Gupta v. Jain Software Consulting, Inc., ARB No. 05-008, ALJ No. 2004-LCA-39, slip. op. at 5 (ARB Mar. 30, 2007) ("The express terms of the regulation make a benching violation a 'continuing violation' that remains actionable for the duration of the employment relationship as stipulated in the LCA.").

Second, Respondent failed to raise the timeliness argument before the investigative agency and did not raise the issue before the undersigned until its brief. The Administrative Review Board (“ARB”) has held that an employer waives its right to argue that a complainant’s complaint is untimely if it did not raise this issue before an ALJ. Limanseto v. Ganze & Co., ARB No. 11-068, ALJ No. 2011-LCA-5, slip. op. at 4 fn. 14 (ARB Jun. 6, 2013).⁶ Respondent did not note the timeliness argument in its pre-hearing submissions or discuss it during any of the hearings. Accordingly, Complainant did not address the timeliness issue in any of his written submissions to the ALJ. Because Respondent raised the timeliness issue only in its brief, Complainant did not have the opportunity to respond to Respondent’s argument. Thus, Respondent has waived the timeliness defense by failing to raise the issue at the hearing and effectively precluding Complainant from providing evidence on this issue. The ARB has previously refused to consider an employer’s argument which the employer failed to raise at the hearing before the ALJ. See Adm’r v. Am Truss, ARB No. 05-032, ALJ No. 2004-LCA-12, slip op. at 4-5 (ARB Feb. 28, 2007).

Finally, there is insufficient evidence in the record to establish the date that Complainant filed his complaint. Respondent asserted in its brief that Complainant must have filed his complaint by January 16, 2013, based on the regulations which state that the Administrator must issue a determination in thirty days. However, Respondent’s calculation is misplaced; there is no evidence that the Administrator conducted the investigation in thirty days. The regulations explicitly provide that the Administrator can extend the investigation’s duration if the Administrator needs more time.⁷ Furthermore, the “Summary of Unpaid Wages” document, which contains Complainant’s name and violation dates, establishes that the WHD began its investigation at least before September 28, 2012. As the record does not contain any definitive evidence as to when Complainant filed his complaint, Respondent cannot establish that Complainant’s complaint was untimely. Consequently, without evidence to the contrary, Complainant’s complaint with the WHD was timely filed.

B. Did Respondent violate the Act by requiring Complainant to pay for his H-1B filing fees?

The H-1B regulations prohibit an employer from receiving, or the employee from paying, the filing fee for the visa. 20 C.F.R. §655.731(c)(10)(ii). The employer may make certain “authorized deductions,” which do not count against the employer’s obligation to pay the required wage. 20 C.F.R. §655.731(c)(9). Authorized deductions include tax withholdings and other deductions that are “reasonable and customary in the occupation and/or area of

⁶ In Limanseto, an employer argued on appeal that the Complainant’s complaint should be dismissed as untimely. Id. The ARB refused to address the issue because the employer admitted that it had not raised it with the ALJ. Id. citing Adm’r v. Am Truss, ARB No. 05-032, ALJ No. 2004-LCA-12, slip op. at 4-5 (ARB Feb. 28, 2007).

⁷ “Government agencies do not lose jurisdiction for failure to comply with statutory time limits unless the statute ‘both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision.’” See Brock v. Pierce County, 476 U.S. 253, 259 (1986) (citations omitted).

employment (*e.g.*, union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution...). 20 C.F.R. §655.731(c)(9)(i-ii). Certain deductions are not permitted, including “business expenses,” or costs connected to the performance of the H-1B program. 20 C.F.R. §655.731(c)(9-10). “Business expenses” include “attorney fees and other costs connected to the performance of the H-1B program functions which are required to be performed by the employer, *e.g.*, preparation and filing of LCA and H-1B petition.” 655.731(c)(9)(ii). “Where a worker is required to pay an expense, it is in effect a deduction in wages which is prohibited if it has the effect of reducing an employee’s pay (after subtracting the amount of the expense) below the required wage.” Administrator v. Kutty, ARB No. 03-022, ALJ No. 01-LCA-010 (May 31, 2005) (citing 65 Fed. Reg. at 80199 (2000)).

In its brief, Complainant alleged that he paid H-1B filing fees to Respondent in the form of three checks; one for legal fees, one for premium processing, and one for the Trustforte evaluation. (Complainant’s Brief at 8.) The record includes three receipts showing that Complainant gave Respondent two checks dated October 13, 2009; one check in the amount of \$2,500 for “LF” and the other in the amount of \$1,000 for “premium processing.”⁸ In her deposition testimony, Ms. Beck testified that Complainant paid for his own lawyer to process his H-1B application and acknowledged that the \$2,500 check for “LF” was for legal fees. (RX 2 at 35.) Complainant gave Respondent another check for \$100 dated December 17, 2009 for “trustforte evaluation.”

Accordingly, Complainant paid a total of \$3,600 in relation to his H-1B application processing and H-1B program functions. Respondent has not presented any evidence that the aforementioned payments were not in connection with Complainant’s H-1B application. Respondent paid \$584.52 in wages to Complainant. Thus, Complainant’s \$3,600 payment decreased his pay below the required wage and was therefore an unauthorized deduction. Consequently, Respondent violated the Act by requiring Complainant to pay for his H-1B filing fee and making an unauthorized deduction. Respondent must remit the payment back to Complainant.

C. What is the applicable employment period for Respondent’s back wage liability?

The parties do not dispute that Complainant was Respondent’s employee and that Respondent is liable to Complainant for back wages. The disputed issues are the applicable employment period for Respondent’s back wage liability and whether Respondent is liable for the entire employment period. The Administrator determined that Respondent’s back wage liability was from February 6, 2010 to May 29, 2010.^{9, 10} Complainant asserts that he is entitled

⁸ Premium processing is a service that “provides expedited processing for certain employment-based petitions and applications.” See <https://www.uscis.gov/forms/how-do-i-use-premium-processing-service>.

⁹ The record does not include the basis for the investigator’s determination.

¹⁰ The record shows that Respondent agreed to pay Complainant back wages for the period from February 6, 2010 to May 29, 2010.

to back wages from October 19, 2009 to October 18, 2012, the full duration of his LCA certification period. (Complainant's Appeal Letter; Complainant's Brief.) Respondent asserts that its liability for back wages began on February 15, 2010 (when Complainant interviewed at Sunharbor Manor) and ended on July 19, 2010 (when USCIS notified Respondent that it revoked Complainant's H-1B petition). (Respondent's Brief at 4.)

i. When did Respondent's back wage liability commence?

An employer's back wage liability extends only over the period of employment covered by an approved LCA petition. § 655.805; see also Vojtisek-Lom v. Clean Air Technologies Int'l, Inc., ARB No. 07-097, ALJ No. 2006-LCA-9 (ARB July 30, 2009). An employer must pay wages on the date that an H-1B employee "enter[s] into employment" with the employer. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I). Regulatory section 655.731(c)(6)(i) specifies that the date the H-1B nonimmigrant is considered to "enter into employment" means the date that the nonimmigrant

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 to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.

The regulations also provide that if a nonimmigrant has not yet "entered into employment" with the employer, then for a nonimmigrant who is present in the United States on the date of the petition's approval, the employer must pay wages beginning sixty days after the nonimmigrant becomes eligible to work. 20 CFR §655.731(c)(6)(ii).¹¹

USCIS received Respondent's H-1B petition on November 3, 2009 and approved Respondent's H-1B petition on behalf of Complainant for the period from January 28, 2010 to October 18, 2012. (CX 2.) After the petition's approval, Respondent scheduled Complainant for an interview with Sunharbor Manor. (RX 2 at 8.) Sunharbor Manor interviewed Complainant for a Nurse Manager position the second week of February 2010 and decided not to hire him. (RX 1.) Subsequently, on March 4, 5, 14, and 15, 2010, Complainant worked at Green Key. (RX 2 at 11.) Complainant did not work between February 15, 2010 and March 4, 2010. (Id. at 12.)

There is no clear date establishing when Complainant first made himself "available for work" or came "under the control of the employer." The record does show that Complainant came under Respondent's control as early as the second week of February 2010, the date that Complainant went on the Sunharbor Manor interview. Ms. Beck's testimony supports a finding that Complainant went on the interview on February 15, 2010. (RX 2.) Ms. Beck reviewed an email dated February 15, 2010 and although she did not discuss the substance of the email, she stated that Complainant interviewed with two Sunharbor Manor employees around that date.

¹¹ The H-1B nonimmigrant becomes "eligible to work" for the employer upon the date of need set forth on the approved H-1B petition filed by the employer, or the date of adjustment of the nonimmigrant's status by the Department of Homeland Security ("DHS"), whichever is later. Id.

There is no evidence establishing Complainant's employment relationship prior to this date.¹² Thus, Respondent's back wage liability commenced as of February 15, 2010.

ii. When did Respondent's back wage liability end?

Twenty C.F.R. § 655.731(c)(7)(ii) provides that liability for back wages ends when the employer effects a bona fide termination of the employment relationship. In Amtel Group of Fla., Inc. v. Yongmahapakorn, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 11 (ARB Sept. 29, 2006), the ARB listed three requirements to effect a bona fide termination of H-1B employment. This test requires an employer to demonstrate that it: (1) expressly terminated the employment relationship with the H-1B worker; (2) notified USCIS of the termination so that the petition could be cancelled; and (3) provided the worker with the reasonable cost of return transportation to his or her home country. The ARB has held that a case's particular facts may warrant an exception to the strict application of these requirements. Batyrbekov v. Barclays Capital, ARB No. 13-013, ALJ No. 2011-LCA-025 (ARB July 16, 2014); see also Puri v. University of Alabama Birmingham Huntsville, ARB No. 13-022, ALJ Nos. 2012-LCA-010, 2008-LCA-038, 2008-LCA-043 (ARB Sept. 17, 2014).

1. Notice to USCIS

The applicable date for determining when an employer has provided notice to USCIS is not the date USCIS notifies the employer that it has revoked the H-1B petition but the date that the employer notifies USCIS of its desire to revoke petition. Rajan v. Int'l Bus. Solutions, Ltd., ARB No. 03-104, ALJ No. 03-LCA-12, slip op. at 9 (ARB Aug. 31, 2004); Baiju v. Fifth Ave. Committee, ARB No. 10-094, ALJ NO. 2009-LCA-045 slip. op. at 9 (ARB Apr. 4, 2012) ("notice to USCIS is all that is required to fulfill the notice requirement for effecting a bona fide termination; there is no requirement that USCIS cancel the LCA for a termination to be bona fide.") (citing 20 C.F.R. § 655.731(c)(7)(ii)).¹³

On June 1, 2010, Respondent sent a letter to USCIS asking to revoke its H-1B petition on behalf of Complainant. (JX 2.) On July 19, 2010, USCIS informed Respondent that it received its Motion to Revoke on June 8, 2010 and that Respondent's petition is automatically revoked. (JX 3.) The record establishes that Respondent notified USCIS of its desire to revoke the H-1B petition on June 1, 2010; the date written on the revocation letter. Thus, Respondent fulfilled its requirement of notifying USCIS on June 1, 2010.

¹² Because Complainant was already in the United States on the H-1B approval date, he became eligible to work sixty days after his adjustment of status, January 28, 2010, or March 29, 2010. However, Complainant had already "entered into employment" on February 15, 2010, thus section 655.731(c)(6)(ii) does not apply.

¹³ In Rajan, the ALJ found that an employer's back wage liability ended on the date Immigration and Naturalization Service ("INS") sent a letter notifying the employer that INS had revoked the employee's petition. Id. at 9. The ARB disagreed and found that the employer's liability ended on the date that the employer notified INS of the employee's discharge. Id. INS is now USCIS, which is located within DHS. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2194-96 (Nov. 25, 2002).

2. Notice to Employee

An employer fails to terminate its employment relationship with a nonimmigrant if it continues to market the nonimmigrant to its clients. Innawalli v. American Information Technology Corporation, ARB No. 04-165, ALJ No. 2004-LCA-13 (Sept. 29, 2006) (“we give no effect to AITC’s April 26, 2002 and November 18, 2002 letters to the INS terminating Innawalli’s employment because the company continued to act as if a termination never occurred”); see Adm'r v. SV Technologies, LLC, ARB No. 12-042, ALJ No. 2011-LCA-009 slip. op. at 7 (ARB Dec. 23, 2013) (affirming ALJ’s finding that a nonimmigrant’s employment continued because the employer continued to email the nonimmigrant job opportunities after his alleged termination).

Based on the record, Respondent never sent an official termination notice to Complainant. Ms. Beck testified that she wrote Complainant a letter terminating his employment as of June 2010. (RX 2 at 22.) However, there is no evidence of this letter in the record. On May 21, 2010, Sandra Miranda sent an email to Complainant informing him that Respondent was unable to find Complainant a job due to “lack of openings.” However, on June 8, 2010, Ms. Miranda sent an email to Complainant telling him that Respondent was trying to set him up for an interview at two job locations. On July 22, 2010, Ms. Miranda sent an email to Complainant informing him that he had an interview the following day. On October 20, 2010, Complainant requested a release document from Respondent so that he could look for a new employer and in an email dated October 27, 2010, Ms. Miranda sent Complainant a release document.

Although Respondent notified Complainant on May 21 that Respondent had no job opportunities and that he should look for another sponsor, Respondent continued to market Complainant to its clients. The record shows that as late as July 22, 2010, Respondent continued to market Complainant and arrange job interviews. Because Respondent continued to offer job opportunities, Complainant was not put on notice of his termination. As the burden is on the employer to establish an employee’s termination, Respondent failed to establish that it notified Complainant of his termination before July 22, 2010.

The first clear evidence of Complainant’s termination is Ms. Miranda’s email dated October 27, 2010 in which she attached a “release document.” Although the actual attachment is not included in the record, the email exchange demonstrates that Ms. Miranda informed Complainant that Respondent no longer employed him. A release document allowing Complainant to look for other employers served as a definitive and unequivocal notice to Complainant that he was no longer Respondent’s employee. Thus, the record supports a finding that Respondent notified Complainant of his termination on October 27, 2010.

3. Return Transportation

The regulations provide that in “certain circumstances,” the H-1B petitioner must pay for the H-1B worker’s return trip to his home country. 20 C.F.R. §655.731(c)(7)(ii). An offer of return transportation is sufficient to complete a bona fide termination. Baiju v. Fifth Ave. Committee, ARB No. 10-094, ALJ No. 2009-LCA-045 slip. op. at 10 (ARB Apr. 4, 2012)

(“although Baiju apparently did not accept the offer of the cost of return transportation to his home country, this does not affect the fact that FAC made the offer of payment of the cost of return transportation to complete the bona fide termination”); see also Adm'r v. Gabriele Wirth, M.D., ARB Nos. 10-090, 10-093, ALJ No. 2009-LCA-026 (ARB Dec. 20, 2011).

By email dated May 21, 2010, Ms. Miranda offered Complainant a one way ticket to the Philippines. (JX 1.) Complainant responded to the email, stating that he would accept the return ticket if Respondent would compensate him for the period that he worked for Respondent. (Id.) On May 21, Complainant asked Respondent to schedule his plane ticket to the Philippines three weeks from that date. (Id.) On June 8, 2010, Ms. Miranda wrote “tell us the time and date when you want to go back to the Philippines if you have already decided. The ticket is just here.” (Id.) Ms. Beck testified that she offered Complainant a ticket to the Philippines but he never came to the office to pick it up. (RX 2 at 23.)

The record establishes that Respondent offered to pay Complainant for his return trip to the Philippines in accordance with 20 C.F.R. §655.731(c)(7)(ii). Complainant’s failure to accept Respondent’s offer does not undermine Respondent’s offer. Accordingly, Respondent established that it complied with 20 C.F.R. §655.731(c)(7)(ii) by offering to pay Complainant for his return ticket.

Conclusion- Bona Fide Termination

In sum, Respondent notified USCIS of its desire to revoke Complainant’s petition on June 8, 2010, offered to pay the cost of Complainant’s return trip to the Philippines on May 21, 2010, and definitively notified Complainant of his termination on October 27, 2010. Even though Respondent offered Complainant a plane ticket home on May 21, 2010 and notified USCIS on June 8, 2010 that it wished to revoke the H-1B petition, Respondent continued its employment relationship with Complainant by offering job opportunities as late as July 22, 2010. Complainant was unequivocally put on notice of his termination on October 27, 2010, when Respondent sent him a release letter allowing Complainant to look for other employers. Consequently, Respondent completed a bona fide termination of Complainant’s employment on October 27, 2010.

Respondent did not appeal the Administrator’s determination that it is liable for back wages from February 6, 2010. The evidence establishes that Respondent is liable for back wages from February 15, 2010 through October 27, 2010. The record includes evidence that Respondent agreed to pay back wages from February 6, 2010 to May 29, 2010. However, there is no actual evidence in the record that Respondent paid Complainant for this period. Accordingly, Respondent is liable for back wages from February 15, 2010 to October 27, 2010.

D. Is Respondent liable for the entire employment period?

Once the H-1B employer’s obligation to pay H-1B wages begins, the employer must continue to pay wages unless the employer can prove by a preponderance of the evidence the presence of any of the circumstances specified at 20 C.F.R. § 655.731(c)(7)(ii). See Administrator v. Ken Techs., Inc., ARB No. 03-140, ALJ No. 2003-LCA-015, slip op. at 4 (ARB

Sept. 30, 2004) (“Therefore, in order to avoid liability, Ken must prove by a preponderance of the evidence the presence of ‘circumstances where wages need not be paid.’”). See also Administrator v. University of Miami, ARB No. 10-090, -093; ALJ No. 2009-LCA-026, slip op. at 8 (ARB Dec. 20, 2011) (“[T]he ALJ properly found that the University was obligated to pay Wirth wages beginning on October 12, 2006, because Wirth made herself available to the University on that date, and the University did not establish that she was unavailable to work after that date.”)

The H-1B employer must pay the required wage even if the H-1B nonimmigrant is in “nonproductive status” (i.e., not performing work) “due to a decision by the employer (e.g., because of the lack of assigned work)” 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i). The INA and 20 C.F.R. §655.731(c)(7) distinguish between different types of non-productive periods. Subsection 655.731(c)(7)(i) provides, in relevant part, that the H-1B employer must pay wages:

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

This sort of non-productive time is often called “benching.” It can occur when a company brings H-1B workers into the United States intending to contract their labor out to other entities, rather than to use the workers’ labor directly in its own business. The regulations do not permit a failure to pay until placement in a job. However, an H-1B employer need not pay wages:

If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions *unrelated to employment* which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant) . . .

20 C.F.R. §655.731(c)(7)(ii) (emphasis added.)

The Board has held that to be relieved from paying wages for nonproductive periods the H-1B employer must prove: (1) the existence of conditions unrelated to the employee’s employment that either; (2) took the employee away from his/her duties at his or her request and convenience, or (3) otherwise render the employee unable to work. Gupta v. Compunnel Software Group, Inc., ARB No. 12-049, ALJ No. 2011-LCA-045, slip. op. at 16 (ARB May 29, 2014). In Gupta, the Board concluded that “a ‘condition unrelated to employment’ cannot take an employee ‘away from his duties’ if the employee has no duties.” Id.

Respondent asserts that it is only liable for the dates that Complainant was “available to work for Respondent,” namely February 15, March 4, 5, 14 and 15. (Respondent’s Brief at 8.) According to Respondent, Complainant was not available to work on other dates because Complainant did not answer phone calls, respond to emails, or show up to interviews. (Id.) As

noted above, the employer has the burden of establishing that an H-1B employee experienced a period of non-productive status due to conditions unrelated to employment. In support of its position, Respondent offered email correspondence and Ms. Beck's deposition testimony.

In a May 4, 2010 email, Ms. Miranda wrote to Complainant stating that she called him several times on his two phone numbers and left him a voicemail. (JX 1.) She asked whether he could come in for an interview that day. (Id.) In a June 8, 2010 email, Ms. Miranda wrote to Complainant stating "we tried to set you up for an interview but you never showed up." (Id.) In that email, she informed Complainant that the company is arranging interviews for him at Mt. Vernon and Staten Island and asked for his availability. (Id.) Complainant responded on that date via email stating "I expect to interview for the position that I was sponsored for." (Id.) In a July 22, 2010 email, Ms. Miranda wrote to Complainant telling him that he has an interview the following day. (Id.) Complainant responded that he wants to settle the bench pay issue first. He explained that he was running out of money and would have trouble "mobilizing" to go on an interview.

During Ms. Beck's deposition, she testified that the company asked Complainant to report to the office for interviews and that Complainant would fail to show up. (RX 2 at 12.) Complainant would also fail to respond to emails asking him why he failed to show up. (Id. at 15.) Respondent set up Complainant for interviews at Garden Care Center, East Haven Nursing Home and Split Rock Rehabilitation and Nursing Home. (Id. at 15-36.) According to Ms. Beck, Garden Care Center offered Complainant a nurse manager position. (Id. at 36.)

Based on this evidence, Respondent has not met its burden in establishing that Complainant was in non-productive status due to conditions unrelated to employment. As summarized above, Complainant entered into employment with Respondent on February 15, 2010. According to the record, Complainant did not have any assigned work from February 2010 to October 2010 except for four days in March. Ms. Beck testified that Complainant did not work from February 15, 2010 to March 4, 2010. Respondent has not offered any evidence that Complainant was unavailable to work from February 15 to March 4, 2010.¹⁴ Consequently, the record shows that Complainant was in non-productive status from February 15, 2010 to March 4, 2010 and Respondent failed to establish that Complainant's non-productive status was due to conditions unrelated to employment.

Respondent also failed to establish that Complainant was unavailable to work from March 15, 2010 to October 27, 2010. To prove that Complainant was unavailable to work, Respondent offered only Ms. Beck's testimony and two emails as evidence that Complainant did not respond to phone calls or show up to interviews.¹⁵ As summarized above, although Ms.

¹⁴ Arguably, before Complainant began working for Green Key on March 4, he presumably attended an interview there.

¹⁵ Ms. Miranda's April 26, 2010 asking Complainant to report to the office does not establish that Complainant was not available, there is no evidence that Complainant did not respond to this email. The July 22, 2010 email, as will be discussed, also does not establish that Complainant was not available because Complainant responded to this email and declined an interview, stating reasons related to employment.

Beck testified that Complainant did not show up to interviews or answer phone calls, she did not specify when she reached out to Complainant, which interviews he skipped or how many interviews he skipped. The emails similarly fail to establish the dates that Complainant skipped interviews. In the first email, dated May 4, 2010, Ms. Miranda wrote that she called Complainant several times. However, the email does not reveal when she called Complainant and how frequently she reached out to him. In the second email, dated June 8, 2010, Ms. Miranda wrote that Complainant did not show up for an interview. Complainant responded to that email stating that he would interview for the position as described in his H-1B petition. The record does not contain information on the interview such as the interview date or the position title. The July 22, 2010 email shows that Respondent attempted to set Complainant up for an interview but Complainant declined because Respondent had not paid him.

The June 8, 2010 and July 22, 2010 emails do not support Respondent's position because Complainant responded to Ms. Miranda's emails and declined the interviews for reasons related to his employment. Complainant declined the interview discussed in the June 8, 2010 email because it was not for the Nurse Manager position. (See JX 1) ("I expect interview for position that I was sponsored for.") Thus, the interview was for a job that was not the same job listed on his H-1B petition. The H-1B regulations require that the employer have actual assignable work within the specialty occupation when the employer files the petition. Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,420 (Proposed June 4, 1998) (codified at 8 C.F.R. § 214). In the event of a material change in the terms or conditions of the nonimmigrant's employment, the petitioning employer must file a new certified LCA together with an amended H-1B petition with USCIS. 8 C.F.R. § 214.2(h)(2)(i)(E). Thus, if Respondent intended to offer Complainant a job that was different from a Nurse Manager position, it should have filed a new H-1B petition with USCIS. Respondent has not offered any evidence that the job interview discussed in the June 8, 2010 email was for a Nurse Manager position.

Similarly, Complainant declined to attend an interview in the July 22, 2010 email for reasons related to his employment. Complainant explained that before he could go on interview, he needed to receive his bench pay; Complainant stated that he was running out of money and it was difficult for him to attend interviews with limited resources. Thus, Complainant declined to attend the interview discussed in the July 22 email not because he was unavailable to work but because of Respondent's failure to pay him.

The only remaining evidence of Complainant's unavailability is Ms. Beck's testimony and the May 4 email. As discussed, this evidence is not sufficient to carry Respondent's burden that Complainant was not available to work. Ms. Beck's testimony does not specify the dates and frequency with which Respondent reached out to Complainant and does not specify the dates that Complainant did not show up for interviews. Likewise, the May 4 email only provides an isolated incidence of Complainant's non-response. The email does not establish that Complainant perpetually failed to respond to emails and phone calls. It is not clear from the record that Complainant refused to work for reasons unrelated to employment. Respondent has not offered any evidence that Complainant was unable to work or declined to work for reasons related to his own convenience. Instead, Complainant's April 8, 2010 email suggests that he wanted to work. (See JX 1) ("I have been calling Sandra (many times) to check the available work for me.")

Under the regulations, Respondent was obliged to pay Complainant while he was waiting for an assignment and attending interviews. Instead, the record suggests that Respondent never intended to pay Complainant until he was placed in a position. Consequently, Respondent has failed to establish, by a preponderance of the evidence, that Complainant was in non-productive status due to conditions unrelated to employment. 20 C.F.R. §655.731(c)(7)(ii). Thus, Respondent is liable for the entire employment period from February 15, 2010 to October 27, 2010.

E. Is Complainant entitled to interest on his back wages award?

The remedies for violations of the statute or regulations include payment of monies due. 20 C.F.R. §655.810(a). The regulation requires that an employer pay H-1B nonimmigrants at the “required wage rate.” 20 C.F.R. §655.731. This rate is defined as the greater of: (1) the “actual wage rate,” defined as the rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the “prevailing wage,” defined as the wage rate for the occupational classification in the area of employment, at the time the LCA is filed. 20 C.F.R. § 655.731(a). For a full-time worker paid on an hourly basis, the employer must pay the rate for a 40-hour workweek. 20 C.F.R. § 655.731(c)(7).

For Complainant’s position under the applicable approved LCA in October 2010, the prevailing wage listed in the LCA was \$37.06 per hour. (CX 4.) This is equal to Complainant’s actual wage. (CX 1.) The back wages, therefore, are calculated based on Complainant’s actual wage of \$37.06 hour. Vojtisek-Lom v. Clean Air Technologies Int’l, Inc., ARB No. 07-097, ALJ No. 2006-LCA-9 (ARB July 30, 2009), slip op at 14 (computation of back wages may be based on wage rate paid to the employee). In sum, Respondent is liable to Complainant for thirty-seven weeks and two days of back wages at a rate of \$37.06 per hour, at 40 hours a week, for a total of \$55,441.76.¹⁶

This amount represents the number of weeks from February 15, 2010 to October 27, 2010 minus twenty-four hours of work that Respondent already paid. The evidence also reveals that Respondent failed to pay Complainant the prevailing wage for the period that Complainant worked for Green Key. Based on the copies of the issued checks, Respondent paid Complainant \$31 per hour, or \$6.06 less than the prevailing wage. Accordingly, Respondent owes an additional \$145.44 to Complainant for the period that Complainant worked.¹⁷ Consequently, Respondent owes a total of \$55,587.20 in back wages.

The Board has held that, notwithstanding that the INA does not specifically authorize an award of interest on back pay, interest shall be paid on awards of back pay, with compound interest to be paid prejudgment. Innawalli v. Am. Info. Tech. Corp., Case No. 05-165 (ARB: Sept. 29, 2006), slip op. at 8-9; Amtel Group of Florida, Inc., v. Yongmahapakorn, Case No. 04-087 (Sept. 29, 2006), slip op. at 12-13. Pre- and post-judgment compound interest is commonly ordered to make a complainant whole. See Doyle v. Hydro Nuclear Servs., ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000). The Board

¹⁶ \$37.06 per hour x 40 hours per week x 37.4 weeks= \$55,441.76.

¹⁷ \$6.06 per hour x 24 hours = \$145.44.

also has set the rate of interest at the rate charged on underpayment of federal income taxes prescribed under 26 U.S.C. § 6621(a)(2). Mao v. Nasser, Case No. 06-121 (ARB: Nov. 26, 2008), slip op. at 11-12.

Based on the foregoing, prejudgment compound interest is due on the back pay determination. Post-judgment interest is due on the back pay award, until paid or otherwise satisfied.

F. Attorneys' Fees

The INA does not have an explicit provision for recovery of attorney's fees. 8 U.S.C. § 1182(n). The ARB has held that absent explicit statutory authority, Complainant is not entitled to recover attorneys' fees. Talukdar v. U.S. Dept. of Veterans Affairs, Medical and Regional Office Center, Fargo, North Dakota, ARB No. 04-100, ALJ No. 2002-LCA-25 (ARB Jan. 31, 2007).

VII. ORDER

For the foregoing reasons, Respondent violated H-1B wage laws. It is hereby ORDERED:

1. Respondent must pay \$3,600.00 to Complainant, which represents the amount Complainant paid in connection with his H-1B processing.
2. Respondent must pay \$55,587.20 in back wages to Complainant.
3. Respondent is responsible for pre-judgment compound interest on the aforementioned back wage assessments and post-judgment interest on all back wages assessments, until satisfied.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing.

Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.