

U.S. Department of Labor

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Issue Date: 21 January 2015

Case No.: 2014-LCA-00008

In the matter of

ARVIND GUPTA

Complainant

v.

HEADSTRONG, INC.

Respondent

APPEARANCES: ARVIND GUPTA, pro se
The Prosecuting Party

DANA WEISBROD, Esq.
FORREST REID, Esq.
For the Respondent

BEFORE: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER

Background

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.*¹ The Prosecuting Party is not represented by counsel.²

¹ Unless otherwise specified, citations to federal regulations are to Title 20, Code of Federal Regulations.

² As this decision reflects, in 2008 the Prosecuting Party was represented by an attorney, who negotiated a settlement agreement on behalf of the Prosecuting Party. This attorney did not enter an appearance in this matter and does not represent the Prosecuting Party at this time.

Procedural History

The case involves a complaint the Prosecuting Party initially filed against a former employer, the Respondent, with the Wage-Hour Division (“WHD”) of the Department of Labor, in 2008. The complete procedural history of this litigation is long and complex. The most salient facts are as follows:

1. In about June 2008 the Prosecuting Party filed a complaint with WHD, alleging that the Respondent committed various infractions relating to the Prosecuting Party’s employment as an H-1B nonimmigrant employee; WHD determined that the complaint did not warrant an investigation and denied the complaint, based on WHD’s conclusion that the complaint was untimely (filed more than 12 months after the Respondent’s alleged infractions).
2. The Prosecuting Party claims that he provided additional information to WHD between 2008 and 2010; in June 2010 WHD again denied his complaint, stating that the complaint was untimely and did not warrant an investigation.
3. The Prosecuting Party then submitted a request for a hearing to the Office of Administrative Law Judges (“OALJ”), and the matter was assigned to me for adjudication.
4. In October 2010 I dismissed the Prosecuting Party’s complaint, finding no jurisdiction to hold a hearing in cases where WHD determined that an investigation was not warranted. Case No. 2010-LCA-00032 (ALJ Oct. 12, 2010).
5. The Prosecuting Party appealed, and on June 29, 2012 the Administrative Review Board (“ARB” or “Board”) affirmed my dismissal of his complaint.³ ARB Case Nos. 11-008, 11-065 (ARB June 29, 2012).
6. The Prosecuting Party then filed an action appealing the ARB’s decision in the United States District Court, Southern District of New York. Case No.12:cv-06652. On December 6, 2012, the Prosecuting Party entered into a Stipulation and Order of Remand and Dismissal with the Department of Labor. Based on this agreement, WHD’s determination that the Prosecuting Party’s complaints were untimely was vacated, and the matter was remanded to WHD for a new decision on the timeliness of the Prosecuting Party’s 2008 complaint against the Respondent.⁴
7. On March 13, 2014, WHD issued a Determination Letter informing the Prosecuting Party that, after an investigation, it had determined that the Respondent owed back wages in the amount of \$5,736.96 to the Prosecuting Party and had failed to provide him with a copy of the Labor Condition Application (“LCA”) pertaining to him. Further, WHD stated in the Determination Letter, the Respondent had already paid the back wages. No civil money penalties were assessed.

³ Additionally, in 2011 the Prosecuting Party filed yet another complaint with WHD, which WHD refused to investigate and rejected as untimely. He appealed to OALJ, and in July 2011, I dismissed the matter on the same basis I dismissed his earlier complaint (lack of a WHD investigation). Case No. 2011-LCA-00038 (ALJ July 19, 2011). The Prosecuting Party appealed to the ARB, which assigned a case number (11-065) and consolidated that appeal with the Prosecuting Party’s appeal of my October 2010 dismissal.

⁴ The Respondent was not a party to the Stipulation and Order of Remand and Dismissal.

8. On March 14, 2014 the Prosecuting Party submitted his “Hearing Request and Complaint” (hereinafter, “Hearing Request”) to the Chief Administrative Law Judge; it was received in the Washington, DC office of OALJ on March 24, 2014.⁵
9. The case was assigned to me and on April 4, 2014 I issued a “Notice of Hearing and Pre-Hearing Order” setting the hearing for May 6, 2014, in New York City.
10. The hearing was held as scheduled. The Prosecuting Party traveled from India and attended the hearing in person.
11. By Order dated June 11, 2014, I granted the Prosecuting Party’s unopposed Motion to Admit Facts; by Order dated August 18, 2014, I admitted the Prosecuting Party’s post-hearing evidentiary submissions.
12. The parties submitted post-hearing briefs by the deadline of September 10, 2014.
13. By fax on September 11, 2014, the Prosecuting Party submitted a “(Renewed) Motion for Relief.” By Order dated September 16, 2014, I informed the parties that I considered the Prosecuting Party’s Motion to be a motion for an expedited decision; I advised the parties that, notwithstanding the practice to issue decisions in the order in which hearings were held, and that I had approximately 50 cases that were “older” than the Prosecuting Party’s, I would endeavor to issue a decision in this matter by January 15, 2015.

The Prosecuting Party’s Motions

Prior to, during, and after the hearing, the Prosecuting Party submitted multiple motions to me. I have reviewed the Prosecuting Party’s motions and my adjudications of the motions. I reaffirm my prior determinations. I find it appropriate to discuss, briefly, some of the Prosecuting Party’s motions, and the rationale for my determinations.⁶

Motions Regarding Status of Genpact Limited

In his Hearing Request, the Prosecuting Party listed both the Respondent (Headstrong, Inc.) and another entity (Genpact Limited) (hereinafter, “Genpact”) as Respondents. He asserted that Genpact Limited is the “publically held parent of Headstrong, Inc.,” but did not otherwise articulate why Genpact should be listed as a party. Hearing Request at 30.

In my April 4, 2014 “Notice of Hearing and Pre-Hearing Order,” I directed the Respondent to inform me whether it objected to Genpact being designated as a party. Order of April 4, 2014, at 2. Respondent objected. By Order dated April 21, 2014, I found that Headstrong, Inc. should be the sole respondent, because it was the entity that employed the Prosecuting Party and submitted the relevant LCAs to the Department of Labor and U.S. Customs and Immigration Service (“USCIS”).⁷

⁵ The Prosecuting Party mailed his Hearing Request from his current home in India.

⁶ More complete discussions are found in the orders adjudicating the motions.

⁷ I also noted there is no evidence in the WHD Determination Letter that it had ever investigated Genpact, and reiterated that, under the regulation, only matters that WHD has investigated are proper subjects for a hearing.

On May 12, 2014, the Prosecuting Party filed a “Motion for Certification of the Issue of Genpact’s Party Status for Interlocutory Review by ARB.” I denied the Motion by Order dated May 28, 2014.

On review of the entire record in this matter, including the record of the hearing and the parties’ post-hearing submissions, I find there is no evidence to justify adding Genpact as a party. Specifically, I find that Genpact was not in any way involved in the employment of the Prosecuting Party by the Respondent; its only involvement to date has been in defending the Prosecuting Party’s attempt to have it included in the litigation.

Motion for “Default” Decision

Prior to the hearing, on April 16, 2014, the Prosecuting Party submitted a motion for a default decision against the Respondent (“Complainant’s (sic) Motion for an Order Declaring Respondent in Default for Failure to Defend and Default Decision”), in which he averred that because the Respondent did not file an answer to his March 14, 2014 Hearing Request within 30 days, he was entitled to a default decision. The Respondent filed an answer in opposition to the motion and also filed “Respondent’s Special Exception Answer, General Denial, and Affirmative Defenses.”

By Order dated April 21, 2014, I denied the motion, finding the Respondent’s submissions timely. On April 30, 2014, the Prosecuting Party filed a motion for reconsideration of my Order denying his motion for a default decision. On May 21, 2014, I denied the motion for reconsideration and noted, in addition to the other rationales for denying a default decision set out in my Order of April 21, 2014, that the Respondent had appeared at the hearing and had put forth a defense. Therefore, I stated, issuing a default judgment was both unnecessary and inappropriate. On May 27, 2014, the Prosecuting Party submitted a second motion for reconsideration, which I denied by Order dated June 11, 2014.

On review, I adhere to my earlier determination that it is inappropriate to issue a default judgment against the Respondent. Notwithstanding the Prosecuting Party’s contentions, the record reflects that the Respondent timely entered an appearance; timely submitted its required pre-hearing statement; participated in pre-hearing conferences; appeared at the hearing and put on its case; and filed post-hearing submissions. Accordingly, I find there is absolutely no basis, in law or fact, to issue a default judgment against the Respondent.

Discussions of Issues Prior to the Hearing

In the same Order in which I denied the Prosecuting Party’s default motion, and in advance of the pre-hearing conference (held on April 28, 2014, per my Order of April 4, 2014; see Order of Apr. 4, 2014 at 4-5), I provided information to the parties about what issues I would address at the hearing. Order of Apr. 21, 2014, at 3. Specifically, I informed the parties that, in accordance with § 655.820(c)(3), a request for hearing was limited to “the issue or issues stated in the notice of determination giving rise to such request.” Id. Therefore, I stated, the hearing was limited to matters relating to the Prosecuting Party’s employment under two specific LCAs (EAC-07-010-52367, EAC-06-122-50383), for the periods validated by the Department of

Labor. Id. I also informed the parties that I would not consider any aspect of the Prosecuting Party's request for hearing that alleged other "adverse actions by the Respondent or that sought damages (compensatory or punitive)." Id.

At the pre-hearing conference on April 28, 2014, I reiterated that I would limit my adjudication of the Prosecuting Party's claim for back wages to the time periods covered in the LCAs. Transcript of Apr. 28, 2014 conference at 11, 29-30. I also informed the parties that, because the Prosecuting Party alleged that the Respondent retaliated against him and this allegation was investigated, I would adjudicate the Prosecuting Party's allegation of retaliation. Id. at 11-12, 30-31, 32-33. In addition, I told the parties, I would entertain testimony on the issue of whether the Respondent should have paid living expenses for the Prosecuting Party. Id. at 31. I informed the parties that I saw no provision in the regulation for compensatory or punitive damages, or for litigation costs and attorney's fees.⁸ Id.

An additional pre-hearing conference was held on April 30, 2014. At that time I listed the issues to be adjudicated in this matter as follows:

- What is the Prosecuting Party's entitlement to back pay, if any?
- What is the date his employment with the Respondent ended?
- What entitlement to benefits does he have?
- Has the Respondent engaged in any acts of retaliation or discrimination against the Prosecuting Party?
- What has been the effect of the failure to provide the Prosecuting Party with a copy of his LCA?
- Was there any misrepresentation of a material fact (as to the relevant work location)?
- Did the Respondent fail to provide reasonable cost for return transportation, apart from an airline ticket?⁹
- Does the 2008 settlement extinguish any claim for back wages or benefits?¹⁰

Transcript of Apr. 30, 2014 conference at 22-23.

The Respondent also stated that it wished me to address the issue of whether the Prosecuting Party's complaints were timely. Id. at 26-28. And I informed the Prosecuting Party that, if he prevailed, I would issue an order covering the issue of recoupment of litigation costs. Id. at 30-31. As to the issue of compensatory or punitive damages, I informed the parties that I would allow the Prosecuting Party to submit evidence, but because I was unaware of any authority that would permit me to award damages, I would not make any finding regarding damages. Id. at 34-35.

⁸ As previously stated, the Prosecuting Party is not represented by counsel.

⁹ I informed the parties that I would address this issue in the context of whether there was a bona fide termination of the Prosecuting Party's employment. Transcript of Apr. 30, 2014 conference at 25-26.

¹⁰ The conference transcript contains a transcription error. The transcript states: "Does the 2008 settlement extend any claim for back wages or benefits?" Transcript of Apr. 30, 2014 conference at 23. Based on my notes, I believe the word should be "extinguish," not "extend."

Issues Disposed of at the Hearing, and Post-Hearing

At the hearing, the Respondent moved for a directed verdict as to all aspects of the Prosecuting Party's case. Hearing Transcript (T.) at 299. I denied the Respondent's Motion regarding most of the Prosecuting Party's case, but granted the motion as to two issues: compensatory and punitive damages, and the Respondent's alleged retaliation against the Prosecuting Party. T. at 301. Later in the hearing, I realized that I had granted the Respondent's motion for directed verdict without having asked the Prosecuting Party for his position. T. at 326. I invited the Prosecuting Party to make a written motion for me to reconsider my action, which he did on May 12, 2014.¹¹ By Order dated August 18, 2014, I informed the parties that, on reconsideration, I adhered to my prior determinations that the Prosecuting Party had not established a prima facie case that the Respondent had engaged in acts of discrimination or retaliation against him; therefore, a directed verdict in favor of the Respondent on the issue of retaliation was appropriate. Order of Aug. 18, 2014, at 4-6. I also informed the parties that compensatory damages were not appropriate in this matter, and there was no statutory authority for me to award punitive damages. Order of Aug. 18, 2014, at 6. By Order dated August 28, 2014, I denied the Prosecuting Party's request for reconsideration of my order.

On review, I adhere to my prior determinations. Specifically, I find that the record before me does not indicate that the Respondent engaged in any acts of retaliation against the Prosecuting Party motivated by the Prosecuting Party's filing of a complaint against the Respondent to enforce the Department of Labor's H-1B regulations. See § 655.801(a). Rather, as I noted in my Order of August 18, 2014, the Prosecuting Party's allegations of retaliation appear to be complaints about the actions and positions the Respondent has taken in defending against the Prosecuting Party's complaints to WHD and the Prosecuting Party's actions in litigating the instant matter. Order of Aug. 18, 2014 at 5-6. For example, the Prosecuting Party asserts that the Respondent retaliated against him when it "took [the] following adverse actions," by "Making [Prosecuting Party] go through a full litigation to recover his wages and benefits guaranteed by [the] INA," and by "Not participating in any DOL offered Settlement Judge program that could have resulted [in a] 'fair and reasonable' settlement." Prosecuting Party's Hearing Request at 18 (emphasis in original).

On review of the entire record, I find that the Respondent's actions appear to have been motivated by its decision to mount a defense against the Prosecuting Party's actions in filing complaints against the Respondent. I find that such acts are not retaliatory in that they are not among the actions listed as retaliatory under § 655.801(a). Rather, they involve the Respondent's lawful responses to the Prosecuting Party's actions, after the Prosecuting Party initiated complaints or legal actions against the Respondent. As a party in an investigative complaint or in litigation, the Prosecuting Party does not have the luxury of dictating or controlling his opponent's strategy or response. Rather, so long as the Respondent's actions are

¹¹ By Order dated May 21, 2014, I informed the parties that, in order for the parties to address fully the issues the Prosecuting Party raised in his Reconsideration Motion, it would be necessary for the parties to have access to the transcript of the hearing. I therefore set deadlines for the Respondent's answer and the Prosecuting Party's reply that took into consideration the time necessary to obtain a transcript. The parties timely filed submissions.

within the panoply of lawful options, the Prosecuting Party must accede to the Respondent's decision.

I have reviewed the entire record, and I note that the overwhelming number of submissions from the parties in this matter have come from the Prosecuting Party. In general, it appears that in the administrative processing of this matter at WHD, and in litigating this matter before me, the Respondent has done little more than respond to the issues that the Prosecuting Party has raised, and, in general, has filed matters with me only in response to the Prosecuting Party's filings.

The issue of whether the Prosecuting Party can receive compensatory damages requires further discussion. The current rule states that under certain circumstances (violation of specified parts of § 655.810), the Administrator may impose "such other administrative remedies as the Administrator determines to be appropriate," including "appropriate equitable or legal remedies." § 655.810(e)(2). The specified parts of § 655.810 for which such remedies are authorized include discrimination or retaliation. See § 655.810(b)(iii). In addition, as also discussed in my August 18, 2014 Order, I noted that at least one administrative law judge has commented that compensatory damages are included among the "appropriate legal or equitable remedies" that can be awarded under 20 C.F.R. § 655.810(e)(2) ("other administrative remedies").¹² Kersten v. LaGard, Inc. 2005-LCA-00017 (ALJ, May 11, 2006, slip op. at 6). I conclude, therefore, that if I were to find that the Prosecuting Party has established that the Respondent retaliated against him unlawfully, I have the discretion to fashion appropriate remedies, which could include compensatory damages. Nonetheless, as discussed above, I have found no instance of retaliation or discrimination in this matter, and so compensatory damages are not appropriate.

Issues to be Addressed in this Decision

Based on the discussions at the pre-hearing conference(s), the assertions the parties made at the hearing and the parties' filings, including their pre-hearing statements and post-hearing briefs, I find the issues to be determined in this Decision are as follows:

- Whether the Prosecuting Party's various complaints to WHD were timely;
- Whether the Respondent completed a bona fide termination of the Prosecuting Party's employment so as to extinguish Respondent's responsibilities to pay the Prosecuting Party wages and, if so, the effective date of the Respondent's termination of the Prosecuting Party's employment;
- If the Respondent completed a bona fide termination of the Prosecuting Party's employment, whether Respondent's proffer of funds for return travel was sufficient;

¹² Awards of back wages and fringe benefits, civil money penalties, and disqualification from the H-1B program are not included in § 655.801(e); they are covered in §655.810(a)-(d).

- Whether the Respondent owes the Prosecuting Party any back wages and, if so, the amount of back wages owed,¹³ and the time period for which the Respondent's wage liability applies;¹⁴
- Whether the Respondent failed to pay the Prosecuting Party applicable fringe benefits (including per diem payments while employed), in violation of the Act and the applicable regulations; and, if so, the monetary value of the fringe benefits;
- Whether the Prosecuting Party's acceptance of a payment from the Respondent in 2008 to settle his informal complaint against the Respondent extinguishes any liability on the part of the Respondent to pay back wages and/or the monetary value of benefits to the Prosecuting Party;
- In the event that the Respondent has any current liability to the Prosecuting Party for back wages and/or fringe benefits, whether the Respondent also owes the Prosecuting Party interest and, if so, the rate and amount of interest owed;
- Whether the Respondent failed to provide the Prosecuting Party with a copy of the LCAs pertaining to his employment; and
- Whether the Administrative Review Board's determination that another employer, Compunnel, owes the Prosecuting Party back wages, affects the Respondent's potential liability to the Prosecuting Party in this matter.

In this Decision, I have considered all the evidence of record, including the documentary evidence, whether or not I have specifically discussed the item of documentary evidence at issue. I also have considered the testimonial evidence, and the post-hearing arguments of the parties.

Evidence

At the hearing, I admitted into evidence the Prosecuting Party's Exhibits (CX) 1-32. T. at 8. I also admitted into evidence the Respondent's Exhibits (RX) 1-24, and 26-32.¹⁵ T. at 18. Post-hearing, I admitted the Prosecuting Party's unopposed motion to "admit facts," thereby including two admissions in the hearing record. See Order of June 11, 2014. I also admitted the Prosecuting Party's Exhibits CX 33-38.¹⁶

¹³ At the hearing, I remarked that the record did not indicate how the Department of Labor arrived at the back wage liability of \$5,736.96 (see CX 1, CX 34), and I would re-examine the issue of the amount of any back wage liability. T. at 325.

¹⁴ At the hearing, I granted the Respondent's Motion for directed verdict for back wage liability for any period prior to November 27, 2006, because there is no evidence of record that the Respondent failed to pay the Prosecuting Party's wages prior to that date. T. at 330. I also reiterated that I believed that my jurisdiction was limited, as to back wages, to the period of the approved LCA, which expired on November 8, 2007. Id.

¹⁵ I did not admit Respondent's Exhibit 25 (RX 25). T. at 130-31.

¹⁶ See Order of August 18, 2014. The Respondent did not object to the Prosecuting Party's

Prosecuting Party's Evidence¹⁷

The Prosecuting Party's most salient exhibits are summarized as follows:

- CX1: WHD Administrator's Determination Letter, dated March 13, 2014.
- CX 2: Respondent's offer letter to the Prosecuting Party, dated March 13, 2006, with copy (unsigned) of employment contract. The employment contract, between the "Company" [Headstrong, Inc.] and the Prosecuting Party, reflects the employment is "at-will" and that the Prosecuting Party is to be employed beginning March 27, 2006 at a salary of \$8,750.00 per month (\$105,000.00 per year), with a "standard benefits package" and location of employment in New York. The employment contract defines the term "companies" as the Company, its Parent and any "Related Company" and their respective successors and assigns.
- CX 3: LCA filed by Respondent on March 16, 2006, covering time period from March 16, 2006 to March 16, 2009, location Fairfax, Virginia, salary \$105,000.00 per year.¹⁸
- CX 5: H-1B approval notice, receipt No. EAC-060122-50383, dated March 23, 2006, reflecting approval of a visa to cover Respondent's employment of Prosecuting Party from April 4, 2006 ("04/24/2006") to November 8, 2007 ("11/08/2007").
- CX 6: Respondent's "Summary of Employee Benefit Plans 2005/2006."
- CX 8: LCA filed by Respondent on October 10, 2006, covering time period from October 10, 2006 to November 8, 2007, location New York, salary \$105,000.00 per year.
- CX 9: H-1B approval notice, receipt No. EAC-07-010-52367, dated October 16, 2006, reflecting approval of a visa to cover Respondent's employment of Prosecuting Party from October 12, 2006 ("10/12/2006") to November 11, 2007 ("11/08/2007").
- CX 10: Respondent's letter, dated November 14, 2006, signed by Human Resources Director Patricia Somerville, terminating Prosecuting Party's employment, effective November 27, 2006.
- CX 12: Prosecuting Party's earnings statement from Respondent for November 2006.
- CX 13: Prosecuting Party's signed separation agreement, dated December 6, 2006.
- CX 15: Copy of Respondent's check to Prosecuting Party, dated December 6, 2006, in the amount of \$8,055.94. Per Prosecuting Party, the payment represents severance pay and vacation balance.¹⁹
- CX 16: Copy of letter from Respondent ("Headstrong Services, LLC") to USCIS, dated January 15, 2007, referring to EAC-07-010-52367 and stating that Prosecuting Party was

Motion to admit the exhibits, so I presumed that the Respondent had no objection to their admission.

¹⁷ Prosecuting Party's exhibits are sequentially paginated (Index is pages 1-12, exhibit CX 1 is pages 13-18, etc.).

¹⁸ This exhibit reflects that the Prosecuting Party received the copy of the LCA in July 2011, pursuant to a Freedom of Information Act request.

¹⁹ The check is drawn on the account of Headstrong Services LLC. In his Index to Exhibits, the Prosecuting Party stated that Headstrong, Inc., did not pay the severance but rather the severance was paid by "Headstrong Services LLC."

no longer employed by Respondent. Letter has stamp (rather illegible) in lower right corner.²⁰

- CX 17: Copy of receipt for airline ticket for Prosecuting Party, from Newark NJ to Bangalore, India. Ticket issued January 26, 2007, date of travel February 24, 2007.²¹
- CX 19: “Confidential Settlement and Release Agreement,” signed by Prosecuting Party on May 8, 2008, in which the Prosecuting Party agreed to release the Respondent from any claim relating to Prosecuting Party’s employment with Respondent that arose on or before the date of the agreement, in consideration of payment of \$7,000.00.²²
- CX 20: Copies of checks: From Respondent to Prosecuting Party’s attorney’s law firm, dated May 9, 2008, in the amount of \$7,000.00; and from Prosecuting Party’s attorney’s law firm to Prosecuting Party, dated May 16, 2008, in the amount of \$4,666.67.
- CX 23: Copy of e-mail from Prosecuting Party to Patricia Somerville (Respondent’s Human Resources Director),²³ dated February 11, 2010.
- CX 28: Letter from WHD to Prosecuting Party, dated January 25, 2013, informing him that WHD found “reasonable cause to conduct an investigation based on the information [he] provided.” Letter from WHD to Prosecuting Party dated September 27, 2013, informing him that complaint is under investigation and investigation is in progress.
- CX 32: E-mail from Respondent’s counsel to Prosecuting Party, dated April 19, 2014, forwarding copies of letters from the Respondent to USCIS relating to Respondent’s LCA petition for the Prosecuting Party.²⁴
- CX 34: WHD investigator’s calculation of Respondent’s back wage liability.
- CX 36: Respondent’s policy document regarding “at-will” employment.
- CX 37: Respondent’s policy document regarding extension of H visas.
- CX 38: Respondent’s I-129 (LCA Petition) for Prosecuting Party, dated October 10, 2006, reflecting the purpose of the application is to change previously approved employment (EAC-06-122-50383), with new places of employment listed as New York City and Chicago, for a time period up to November 8, 2007, at salary of \$105,000.00 per year with standard benefits.

Respondent’s Evidence

The most salient of the Respondent’s exhibits that I admitted into evidence are summarized as follows:²⁵

²⁰ In his Index to Exhibits, Prosecuting Party asserts that the date letter was mailed is not known; Prosecuting Party also asserts that the Letter was sent by Headstrong Services, LLC and allegedly refers to employment by the entity.

²¹ Per Prosecuting Party, ticket was “not under H-1B program.” (See Cover sheet to exhibit).

²² An official of the Respondent also signed the document, on May 9, 2008.

²³ This is the same individual who signed the letter terminating the Prosecuting Party’s employment (CX 10).

²⁴ The date on these items is April 18, 2014. It is clear from the context of the letters that the date is in error (it appears that when the Respondent encountered electronic copies of the letters, the act of retrieving them caused a new date to be inserted). Respondent raised this issue at the hearing, and I informed the parties I would not consider the dates. T. at 6-8.

²⁵ Some of the Respondent’s exhibits duplicate the Prosecuting Party’s exhibits. These are as

- RX 4, 5, 6: E-mails reflecting that the Prosecuting Party was informed of his termination from employment in November 2006, prior to its effective date of November 27, 2006.
- RX 7: E-mail from Prosecuting Party to Respondent's officials, dated December 4, 2006, transmitting signed separation agreement and inquiring if Respondent will consider paying reasonable costs of transportation to home country, which Prosecuting Party estimated to be \$2,000; letter to Prosecuting Party, notifying him of the termination of his employment, dated November 14, 2006, and acknowledged by Prosecuting Party on December 4, 2006.²⁶ Also termination agreement, signed by Prosecuting Party on December 6, 2006, which duplicates CX 13.
- RX 8: Letter from Respondent's controller to WHD Investigator, dated March 21, 2013, listing wages paid to Prosecuting Party from April 2006 to December 31, 2006.
- RX 9: E-mail string regarding return travel arrangements for Prosecuting Party, dated December 5, 2006 to January 23, 2007.
- RX 13: E-mails dated January 23, 2007 through January 25, 2007, relating to purchasing the airline ticket for the Prosecuting Party's travel to India.
- RX 14: Letter from USCIS to Respondent, dated March 30, 2007, confirming that petition EAC-07-010-52367, submitted on October 12, 2006 and approved on October 24, 2006, was revoked because the Respondent no longer employed the Prosecuting Party.
- RX 15: "Demand Letter" dated April 1, 2008, from Prosecuting Party's attorney to Respondent's then-President, asserting the Respondent owes Prosecuting Party back wages, up through November 8, 2007 (expiration date of LCA) or, alternatively up to February 24, 2007 (date of air ticket to home country).
- RX 18: Transaction document indicating RX 17 (settlement check to Prosecuting Party's attorney) was cashed.
- RX 20. Excerpt of Prosecuting Party's 2008 complaint to WHD.
- RX 22: Excerpt (first page) of Prosecuting Party's complaint to WHD.²⁷
- RX 23: E-mail from WHD employee to Prosecuting Party, dated June 8, 2010, informing Prosecuting Party that his complaint was "not timely:" also a copy of letter from WHD to Prosecuting Party, dated June 10, 2010, informing him that there was no reasonable cause to conduct an investigation because Prosecuting Party failed to provide evidence complaint was timely.
- RX 29: Prosecuting Party's January 2011 complaint to WHD.

follows: RX 2 (duplicates CX 5); RX 10 (duplicates CX 15); RX 12 (duplicates CX 16); RX 16 (duplicates CX 19); RX 24 (duplicates CX 23). Additionally, RX 17 and 19, together, duplicate CX 20. As well, RX 1 duplicates a portion of CX 3, RX 3 duplicates a portion of CX 8, and RX 26 and 27 duplicate a portion of CX 14. In this Decision, for the sake of consistency, when referring to documents that both parties have submitted, I will refer to the Prosecuting Party's exhibit, unless a witness cited the Respondent's exhibit in testimony.

²⁶ Another copy of this document, signed by the Respondent's Human Resources Director, but not reflecting the Prosecuting Party's acknowledgment, is at CX 10.

²⁷ In the Index to Exhibits, Respondent asserts that Prosecuting Party filed this document in June 2010. I note, however, that this document appears to duplicate the first page of RX 29 (Prosecuting Party's 2011 complaint to WHD).

- RX 30: Copy of WHD letter to Prosecuting Party, dated May 18, 2011, rejecting portions of Prosecuting Party’s January 2011 complaint based on untimeliness.
- RX 31: Copy of “screenshots.”²⁸
- RX 32: Payroll records. Prosecuting Party’s monthly earnings statements for April through November 2006.

Stipulated Facts

At the hearing, the parties agreed to the following stipulated facts:

1. On or about March 23, 2006, the Respondent filed an H-1B petition and LCA application, for the time period through March 26, 2009, with USCIS, intending to employ the Prosecuting Party in an H-1B visa status.
2. USCIS approved the petition through November 8, 2007, petition receipt number EAC-06-122-250383.
3. The Prosecuting Party and Mr. Sahai, on behalf of the Respondent, executed CX 19 (Confidential Settlement and Release Agreement) on May 8 and 9, 2008, respectively.
4. Headstrong, Inc., the Respondent, is a company incorporated in Virginia, with its principal place of business in Virginia.
5. The Respondent maintains offices in several locations, including New York City.
6. The Prosecuting Party is a citizen of India.
7. On or about March 16, 2006, the Respondent filed an LCA with the DOL as part of the process of the government’s approval for the Prosecuting Party’s H-1B employment.
8. The Respondent sent the Prosecuting Party an airline ticket on February 2, 2007, for travel to Bangalore on February 24, 2007.
9. On March 13, 2006, the Respondent sent the Prosecuting Party an employment agreement in the same form as CX 2.
10. Per the parties’ employment agreement, the Prosecuting Party’s job location was in New York City and his job title was “Senior Consultant.”
11. In the LCA the Respondent submitted in March 2006, the work location is listed as Fairfax, Virginia.
12. The LCA’s job title is listed as “Project Manager.”
13. This LCA “was certified” for a period of 03/16/2006 to 03/16/2009.
14. The LCA’s wage rate was listed at \$105,000.00 per year.
15. The Respondent did not submit a copy of the employment agreement (CX 2) to the Department of Labor.
16. USCIS approved the Respondent’s LCA petition for an H-1B validity period of 04/24/2006 to 11/08/2007.
17. On November 14, 2006, the Respondent sent the Prosecuting Party the termination letter at CX 10.

²⁸ Respondent asserts that this exhibit establishes that documents at CX 32 were not created in 2014, but rather were created in 2006. (Respondent states the error was due to a programming feature that re-populates the field with a current date when the document is opened).

18. In November 2006, the Respondent offered the Prosecuting Party separation pay in exchange for signing a general release of all claims and covenant not to sue in the form of CX 13.
19. According to CX 10, all company benefits for the Prosecuting Party were to be terminated effective November 27, 2006, unless otherwise stated in the separation agreement.
20. In April 2008, the Prosecuting Party's representative, Goldberg & Fliegel LLP, sent the Respondent a letter intended to revoke the Prosecuting Party's consent to the separation agreement, and to request payment of additional wages and benefits.²⁹

T. at 24-27.

Testimonial Evidence

As noted above, the hearing in this matter was held on May 6, 2014. The hearing took a full day, commencing at 9:49 a.m. and concluding at 8:06 p.m. I summarize the testimonial evidence as follows:³⁰

Alphonse Valbrune.

Mr. Valbrune was called as a witness by both the Prosecuting Party and the Respondent, and testified under oath, with his initial testimony on behalf of the Prosecuting Party. He stated that he has been employed by the Respondent for 14 years and that his direct employer is "Headstrong, Inc." Mr. Valbrune stated that he has heard of the company called "Headstrong Services," and testified that it is a "sister company" of Headstrong, Inc., because both companies are subsidiaries of a holding company called "Headstrong Corporation." Mr. Valbrune remarked that in 2006 the ultimate parent of Headstrong, Inc. was Headstrong Corporation, a private company, and that presently the parent company of Headstrong, Inc. is Genpact, Limited. T. at 43-45.

Mr. Valbrune stated that he had no involvement with the Prosecuting Party's case until 2008, when the Respondent received a demand letter from the Prosecuting Party's attorney, and he identified RX 15 as that item. He stated that after he received the demand letter, he gathered documents relating to the Prosecuting Party's employment termination, consulted with counsel, and ultimately obtained a settlement and release. Mr. Valbrune stated that the settlement was for \$7,000.00, involved all of the Prosecuting Party's claims that he had or may have had outstanding against the Respondent, and included a general release; he identified RX 17 as the check that the Respondent paid. The witness acknowledged that the check was drawn on "Headstrong Services," but remarked that "Headstrong Services" would have paid the check on

²⁹ Based on my review of RX 15 (Goldberg & Fliegel, LLP's demand letter, dated April 1, 2008), I conclude that the hearing transcript does not accurately reflect the stipulation (there is likely a transcription error in which several words are omitted).

³⁰ Because of constraints on witness availability (some witnesses were available only at certain times, other witnesses were available only by telephone), the witness testimony was not in order. I summarize the testimony in the order that the witnesses testified at the hearing.

behalf of “Headstrong, Inc.,” because it was sent to the Prosecuting Party’s attorney pursuant to the settlement and release agreement. T. at 45-49.

The Prosecuting Party directed the witness’ attention to CX 19 (the settlement and release agreement), and acknowledged that paragraph 12 of the document reflects that the agreement supersedes any prior agreements between the Respondent and the Prosecuting Party. The witness stated that the settlement amount of \$7,000.00 was arrived at by negotiation between the Prosecuting Party’s attorney and the Respondent’s officials. The witness identified CX 23 as an e-mail from the Prosecuting Party, dated February 2010, in which the Prosecuting Party attempted to rescind his settlement agreement and “threatened [the Respondent] with some action if we didn’t agree to the recission.”³¹ The threatened actions included complaints to be filed with the Department of Labor, USCIS, and the U.S. District Court for the Southern District of New York. Additionally, the witness testified, the Prosecuting Party stated he would inform the “ministry of overseas Indians” about the Respondent’s harassment of Indian workers. The witness commented that the Prosecuting Party had no right to rescind the agreement. T. at 49-56.

The witness identified CX 24 and 25, e-mails from the Prosecuting Party dated November 2010 and August 2011, respectively. He acknowledged that the Respondent chose not to participate in a settlement judge proceeding with the Prosecuting Party, commenting that the Respondent had no reason to believe the Prosecuting Party would honor any additional settlement, because he was attempting to rescind a settlement he had already entered into. Mr. Valbrune reiterated that he became involved with the Prosecuting Party’s case in 2008 so whatever he knows about the facts pertaining to the Prosecuting Party’s employment, he learned by reviewing documents. He identified CX 10 (termination letter dated November 14, 2006) and CX 2 (letter dated March 13, 2006, offering the Prosecuting Party employment and enclosing employment agreement), and acknowledged that the termination letter referred to the employment offer letter. T. at 56-63.

On cross-examination, Mr. Valbrune confirmed that the Respondent had never agreed that the 2008 settlement agreement with the Prosecuting Party had been rescinded, and also acknowledged that the Prosecuting Party never repaid any of the money paid to him under that settlement. He also stated that he negotiated the 2008 settlement agreement via telephone with the Prosecuting Party’s attorney. The witness stated he did not negotiate directly with the Prosecuting Party and did not discuss with the Prosecuting Party the demand letter that his attorney sent to the Respondent. See RX 15. Aside from being copied on e-mails the Prosecuting Party sent on the issue of the recission of the 2008 settlement agreement, Mr. Valbrune stated, he did not have any direct communication with the Prosecuting Party and had never spoken with the Prosecuting Party until the date of the hearing. On re-direct examination, the witness reiterated it was the Respondent’s position that the 2008 settlement agreement, and its accompanying release, are valid and binding. T. at 64-67.

³¹ At this point the witness clarified that he is an attorney who represents the Respondent. T. at 54.

On direct examination by the Respondent, Mr. Valbrune stated that Genpact is the parent of Headstrong and acquired Headstrong in 2011.³² And on cross-examination by the Prosecuting Party, the witness stated that the Respondent is a subsidiary of Genpact and that the companies share some functions, but that employees of Headstrong at the time of the acquisition have remained employees of Headstrong. T. at 67-71.

Valerie Spratling

Ms. Spratling was called as a witness by both the Prosecuting Party and the Respondent, and testified under oath, with her initial testimony on behalf of the Prosecuting Party. She stated that she has been employed by Headstrong since September 2006; the witness testified that from when she joined the company up until March of 2011, she was assigned to “Headstrong, Inc.” but that she then had a break in service until November 2011; since she resumed employment, her paycheck comes from “Headstrong Services, LLC.” Ms. Spratling stated that in 2006-07 she managed human resources (“HR”) for Headstrong North America, reporting to Patricia Somerville, who was the Director of Human Resources for North America. She stated that Ms. Somerville contacted her and requested that she prepare the termination agreement and severance agreement for the Prosecuting Party, and identified RX 4 as the e-mail documenting that request. T. at 73-77.

The witness identified the Prosecuting Party’s termination letter (CX 10) and stated she prepared that document. She stated that the first paragraph of the termination letter referred to the Prosecuting Party’s March 13, 2006 offer of employment and noted that the Prosecuting Party’s employment was “at will.” Additionally, Ms. Spratling stated, the reason for the termination, lack of work (“layoff”), was given in the second paragraph of the letter. Ms. Spratling acknowledged that in the fourth paragraph of the termination letter the Prosecuting Party was informed that he would be paid his vacation balance as of November 27, 2006. She stated that she was the person who was identified to the Prosecuting Party as his point of contact in processing his employment termination. T. at 77-83.

Ms. Spratling identified the severance agreement the Prosecuting Party was tendered (CX 13).³³ She stated that per the agreement, the consideration for the Prosecuting Party’s release was as follows: four weeks of base pay in the amount of \$8,076.92, less withholdings; continuation of medical and dental benefits through November 30, 2006; and payment of vacation balance as of November 27, 2006. She stated that she notified the payroll office to release the payment to the Prosecuting Party, after the expiration of the period specified in the agreement in which the Prosecuting Party could revoke the release. T. at 83-86.

The witness identified CX 12 as e-mails relating to the Prosecuting Party’s request for transportation costs; she confirmed that initially the Respondent refused to make such payment,

³² As noted above, this witness testified on behalf of both the Prosecuting Party and the Respondent. After he testified on behalf of the Prosecuting Party, I permitted the Respondent to ask questions on direct examination.

³³ The hearing transcript stated that this document was at tab 30. I find that the reference in the hearing transcript is a transcription error.

but stated that within a day and after consultation with other officials, it was learned that the company was obligated to make such payment, and an official contacted the Prosecuting Party directly to arrange travel. She stated that the last time she had any involvement with the Prosecuting Party's termination action was when the issue of his return transportation was addressed and resolved. T. at 86-92.

On cross-examination, Ms. Spratling agreed that she was never advised that the Prosecuting Party was being benched for lack of work. She also agreed that the Prosecuting Party was notified on November 14, 2006 that his employment with the Respondent was to be terminated effective November 27, 2006. She also agreed that the Prosecuting Party signed the separation agreement in December 2006 and that, when travel arrangements were being discussed, the Prosecuting Party requested that his return travel date be February 24, 2007. T. at 93-96.

On re-direct examination, the witness stated that, though she had no direct involvement with the Prosecuting Party after December 2006, she was aware that an airline ticket with a return date of February 24, 2007 had been purchased, that the Prosecuting Party had approved the itinerary on January 23, 2007, and that the ticket was issued on that same date. The witness was shown CX 17 (airline e-ticket receipt);³⁴ she stated that the document reflects the ticket was issued to Headstrong on January 26, 2007 for the Prosecuting Party's travel on February 24, 2007, but she did not know when the Prosecuting Party actually received the airline ticket.³⁵ The Prosecuting Party requested that the witness review CX 15 (a check reflecting payment to the Prosecuting Party of \$8,055.94, dated December 6, 2006, drawn on "Headstrong Services LLC Disbursement Account"). In response to a question regarding which entity owed the Prosecuting Party severance pay, the witness responded that, according to the separation agreement, "Headstrong, Inc." was the proper entity. T. at 96-104.

On direct examination by the Respondent, Ms. Spratling testified that Headstrong intended the Prosecuting Party's last day of employment to be November 27, 2006, and stated that the Prosecuting Party did not perform any work for the Respondent after that day and did not receive regular wages after that date either.³⁶ Regarding effectuating the Respondent's termination of the Prosecuting Party's employment, Ms. Spratling stated that the company must notify USCIS of an employee's termination, and that the Respondent does so by letter. The witness identified RX 12 as a letter that the Respondent sent to USCIS, dated January 15, 2007, to revoke the Prosecuting Party's H-1B status because of the termination of his employment. As to why the Respondent waited so long to notify USCIS, Ms. Spratling stated that sometimes employees request some delay so that they can try to find different sponsoring employers and thus remain in the United States. She stated that in this case the Respondent accommodated the Prosecuting Party's request. T. at 104-11.

³⁴ The transcript reflects CX 7; this appears to be a transcription error.

³⁵ At this point the Prosecuting Party stated that he did not receive the airline ticket until February 2, 2007.

³⁶ As noted, this witness testified for both the Prosecuting Party and the Respondent. After completing testimony on behalf of the Prosecuting Party, the witness testified as the Respondent's witness.

On further direct examination, Ms. Spratling testified that the position that the Prosecuting Party was offered in his employment agreement (CX 2), “Senior Consultant,” is an internal designation, which would not be the same position as listed on an LCA. As to the job location on an LCA, Ms. Spratling stated that the location typically is accurately listed, but on occasion if the Respondent is unaware of where the employee is to be working, the location of the corporate office was used to initiate the H-1B process, and later an amended LCA was filed to reflect the new location. Ms. Spratling admitted that there could be a time lag in filing an amended LCA. T. at 111-15.

On cross-examination, Ms. Spratling stated she was not sure which “Headstrong” entity (e.g., Headstrong Services, Headstrong, Inc.) produced the e-mail at RX 25 (initiating the termination of the Prosecuting Party’s employment).³⁷ She stated that she had some familiarity with LCA requirements because at one point in her employment, in 2009, she managed immigration for the Respondent. As for the Prosecuting Party’s LCA (CX 3), she testified that the dates in the application, March 16, 2006 and March 16, 2009, reflected the period that the employment could cover. She agreed that these were the dates for which the application was certified by the Department of Labor. As to the LCA at CX 8, the witness stated she did not have any direct knowledge of it.³⁸ As to the letter to USCIS at CX 17, Ms. Spratling stated she had seen it before many times, and she acknowledged that the letter was written on behalf of “Headstrong Services, LLC,” even though the entity reflected on the Prosecuting Party’s termination letter and separation agreement was “Headstrong, Inc.” She also acknowledged that USCIS’ approval of the Prosecuting Party’s LCA application (CX 5), receipt number EAC-06-122-50383, was made to “Headstrong, Inc.” and that the letter to USCIS at CX 17 related to receipt number EAC-07-010-52367.³⁹ The witness reiterated, though, that “Headstrong is all one company.” T. at 135-43.

On re-direct examination, Ms. Spratling confirmed that the receipt number referred to in the Respondent’s letter to USCIS [EAC-07-010-52367] is the same receipt number that appears at CX 9 (USCIS’s October 2006 approval of Prosecuting Party’s LCA petition).⁴⁰ The witness identified RX 14 as the USCIS’ notification to the Respondent of the revocation of the approval of the Prosecuting Party’s LCA petition, with the receipt number matching that on the USCIS approval notice and the January 15, 2007 letter to USCIS. In response to my question, Ms. Spratling clarified that her work in human resources involved all of the “Headstrong” companies.

³⁷ At this point, after a colloquy on how RX 25 was obtained, I disallowed the admission of RX 25. See T. at 118-31. I authorized further re-direct examination: Ms. Spratling stated she had no role in the preparation of the Prosecuting Party’s LCA (RX 1), and she explained that the job title in the LCA, “Project Manager,” may not be the same as the Respondent’s internal designation of a job title. T. at 131-34.

³⁸ The Prosecuting Party referred to the document not by its exhibit number but by its sequential page number, 48, in his exhibits.

³⁹ In response to the Prosecuting Party’s intimation that there was no evidence USCIS received this letter, I informed him that CX 17 appears to bear a faint and barely legible receipt stamp, dated either January 26 or January 23, 2007. T. at 142-43.

⁴⁰ Respondent’s counsel referred to this exhibit by its sequential page number in the Prosecuting Party’s exhibits, which is 53.

On the issue of vacation pay, Ms. Spratling stated that it was accrued on a monthly basis, at the rate of 6.67 hours per month. T. at 144-47.

Acky Kandar

Mr. Kandar was called as a witness by both the Prosecuting Party and the Respondent, and testified under oath, with his initial testimony on behalf of the Prosecuting Party. His testimony was taken by telephone, by concurrence of the parties. He stated that he joined Headstrong in 1999 and left in 2014. In 2006, he testified, he was responsible for a business unit that addressed large clients in New York, and he said he worked for “Headstrong Services.” As to any distinction between Headstrong Services and Headstrong, Inc., Mr. Kandar stated he was aware there was some sort of structure, but was unsure what that specifically meant. He stated he did not recall any circumstances surrounding the Prosecuting Party’s termination from employment, and does not recall ever meeting the Prosecuting Party. T. at 150-52.

On cross-examination, Mr. Kandar stated that the Prosecuting Party was not under his direction and did not report directly to him. On further examination from the Prosecuting Party, the witness stated that he knew Ricky Pool, but was unsure whether Mr. Pool worked for Headstrong Services or Headstrong, Inc., and stated that when preparing for his testimony he concluded that the Prosecuting Party had worked under Mr. Pool’s supervision. T. at 152-54.

Patricia Somerville

Ms. Somerville was called as a witness by both the Prosecuting Party and the Respondent, and testified under oath, with her initial testimony on behalf of the Prosecuting Party. Her testimony was taken by telephone, by concurrence of the parties.⁴¹

Ms. Somerville stated that she began working at Headstrong in July 2006 and worked there until August 2008, and that she was the human resources (“HR”) director. She stated that documents were retained at the corporate office, which at that time was in Fairfax. She identified CX 3, noted that the applicable employer was Headstrong, Inc., and stated that the employment period specified in that document was March 2006 through March 16, 2009, with a location of Fairfax, Virginia. She stated that this was the period for which authorization was given to work in the United States, and noted that she is not an immigration specialist. Ms. Somerville stated she did not sign this LCA but has signed other ones. Ms. Somerville examined CX 5, the USCIS receipt, indicated that employment was valid from April 24, 2006 to November 8, 2007, and it related to the Prosecuting Party. Ms. Somerville identified CX 8 as an LCA that she signed in October 2006, with the employer listed as Headstrong, Inc. with dates of employment from October 10, 2006 (“10/10/2006”) to November 8, 2007 (“11/08/2007”), pertaining to the Prosecuting Party. She stated she did not recall any specific details about this action, nor did she recall any specific documents that may have been filed with the LCA. She stated she did not recall why the second LCA was filed, but did note that the location in the

⁴¹ Prior to her testimony, the Prosecuting Party provided copies of some exhibits to Respondent’s counsel, and requested that counsel forward the documents to the witness. The witness confirmed receipt of the documents. T. at 156-59.

second LCA was specified as New York. She stated that if any employee switched locations, a new LCA may have been needed. Alternatively, she also remarked, if the company did not initially know where an employee would be working, but later found out, a new LCA may have been filed. As to these particular LCAs, however, Ms. Somerville testified, she did not recall. She stated she did not know if any additional LCAs were filed pertaining to the Prosecuting Party. T. at 156-67.

The witness identified CX 10, the November 14, 2006 letter terminating the Prosecuting Party's employment, and verified that she signed the letter. She said she was unable to explain why there was no work (the reason given in the termination letter) when she also had signed, under penalty of perjury, an LCA indicating that the Prosecuting Party was to be employed through November 2007. She acknowledged that the termination letter referred to the Prosecuting Party's initial offer of employment. She stated that the offer of a severance payment was the Respondent's usual practice. Ms. Somerville identified CX 12 as the Prosecuting Party's earnings statement covering November 2006, and she stated that the amount paid was less than the regular gross pay rate, because the termination date was prior to the end of the month. She identified CX 14 as e-mails relating to the cost of air transportation, and stated that Headstrong did not provide funds to employees but rather purchased airline tickets directly. She acknowledged that the Prosecuting Party's termination letter did not indicate that air transportation back to his home country would be provided. She identified CX 17 as an e-mail containing an airline ticket e-receipt, and noted the date the e-mail was sent was February 2, 2007. T. at 167-75.

Regarding RX 4, Ms. Somerville identified it as an e-mail she sent to Ms. Spratling regarding the Prosecuting Party's termination from employment, and she stated that Rick Pool had asked her to do that. Though the date of the e-mail was November 14, 2006, she stated, she had a conversation with Mr. Pool prior to that date. She stated that according to Mr. Pool, there was no more work and so the Prosecuting Party's employment was to be terminated. Ms. Somerville commented that she could not recall any details of the decision to terminate the Prosecuting Party's employment. Regarding RX 6, Ms. Somerville stated that it contained e-mails regarding the Prosecuting Party's last day of employment, and that Headstrong determined it would remain November 27, 2006, despite the Prosecuting Party's request for leave without pay. She stated she did not know whether the termination agreement was submitted to the Department of Labor or other authority, and also did not know whether the LCA was ever withdrawn. T. at 175-80.

On cross-examination by Respondent's counsel, Ms. Somerville noted that some of the e-mail communications with the Prosecuting Party in RX 6 were sent to his work account and others were sent to a personal ("Yahoo") account. She stated that she wanted to confirm that the Prosecuting Party was aware that it was decided that his last day was to be November 27, 2006. She stated she had authority to approve air travel for the Prosecuting Party, even though the immigration specialist was making the travel arrangements. Ms. Somerville stated that it was her understanding that an LCA does not guarantee employment for any period of time, and she confirmed that the Prosecuting Party was an "at-will" employee for the Respondent. She confirmed that the Respondent would purchase an airline ticket for a terminated H-1B employee and also confirmed that if an employee requested a specific travel date that the Respondent

would attempt to accommodate that request. Ms. Somerville clarified that, though she signed LCAs on behalf of the Respondent, the content of the LCAs was prepared by the Respondent's immigration specialist. She acknowledged that, at times, the work location on an LCA was not accurate, despite the Respondent's best intentions (and if the location was uncertain the Respondent's headquarters would be designated as the work location); she also stated that, if possible, the Respondent would endeavor to submit an updated LCA reflecting an accurate location. When comparing CX8 with CX 3 (the two LCAs pertaining to the Prosecuting Party), she indicated it was probable that the second LCA was submitted because it reflected a changed work location – that is, New York. Ms. Somerville acknowledged that it was the Respondent's practice to provide a copy of the LCA to the affected employee, and this task would have been done by the immigration specialist. T. at 180-87.

On further examination by the Prosecuting Party, Ms. Somerville reiterated that it was her understanding that submitting an LCA does not guarantee that an employee will be employed for the LCA period. She stated she could not cite a regulation or other source for this conclusion, and acknowledged this was only her opinion. In response to my question, Ms. Somerville stated that an employee who refused to sign a severance agreement would not receive a severance payment, but would receive payment of wages up to the date of termination, as well as accrued vacation pay. She stated she could not recall whether there was any specific notice period that the Respondent used when informing employees that their employment was to be terminated. T. at 187-91.

Arvind Gupta (Prosecuting Party)

The Prosecuting Party, Arvind Gupta, testified on his own behalf. He stated that he first came into contact with Headstrong in March 2006, when he was working in Atlanta. He interviewed and Rick Pool offered him long term employment. The Prosecuting Party also commented that the recruiter told him it was Headstrong's policy to sponsor green card applications for employees after six months. The Prosecuting Party stated that he accepted Headstrong's employment offer in part because the job was for a project manager in the financial services sector, and he had an interest in that area. To join Headstrong, the Prosecuting Party stated, he resigned from his employment, which was based in India. The Prosecuting Party stated that, after some delay, his work with Headstrong started about May 1, and he moved from Atlanta to New York. But it was not a project manager position but instead was an analyst position in the "PMO Group." In August, the Prosecuting Party stated, Headstrong told him that the client had obtained someone internally for the project manager position, so that job was not available. Accordingly, he said, he worked on other projects for Headstrong for a while. Then, as of September 19, he was asked to go to Chicago to work on a short-term project, which he did. Then on November 3, the Prosecuting Party stated, that project ended, and he returned to New York, and took leave for a few days of vacation. T. at 194-97.

While he was on vacation, the Prosecuting Party stated, he got an e-mail from Mr. Pool asking him to call. He called and told Mr. Pool he was on vacation, and said he would contact him when he returned on November 13. The Prosecuting Party stated that he called Mr. Pool on November 13 but was not able to speak with him. On the morning of November 14, he stated, Mr. Pool called him back and started yelling at him about why he did not call him immediately

upon his return from Chicago. The Prosecuting Party stated that he surmised that Mr. Pool did not know about his approved leave. Then, the Prosecuting Party stated, Mr. Pool told him he was laid off – that is, he was fired. The Prosecuting Party stated he could not believe it and figured that Mr. Pool would change his mind once he cooled off. The Prosecuting Party stated he called Mr. Pool back the next day and Mr. Pool confirmed that he was to be laid off. Shortly thereafter, the Prosecuting Party said, he got a letter telling him that due to lack of work his employment was terminated. The Prosecuting Party stated he contacted several officials at Headstrong but the decision had already been made. However, the Prosecuting Party stated, Acky Kandar took his curriculum vitae (“CV”) and, he believed, circulated it within the New York area. The Prosecuting Party testified that Mr. Kandar told him that no work was available at the time but in several months an alternative position may come up, and that they would not cancel his H-1B visa but rather would continue his H-1B status. T. at 197-200.

The Prosecuting Party testified that when he got his pay stub for November it did not show his full pay, and Ms. Somerville told him that his employment was terminated. At that time, he said, Mr. Kandar advised him to go ahead with the separation agreement, because if he did not, he would not receive any payment. The Prosecuting Party stated that he signed the separation agreement and received four weeks’ pay. He said he did not hear anything from Headstrong and so in January 2008 he contacted them to ask about the status of his H-1B visa, which was supposed to last until November 8, 2007. At that time, he said, he got an e-mail informing him that Headstrong had told USCIS on January 15, 2007 that his job had been terminated. The Prosecuting Party stated that he disputes that, because he contacted USCIS and they told him they did not have any request from Headstrong, Inc. to cancel his visa. He remarked, though, that USCIS, “by mistake,” issued a letter to Headstrong Services relating to the petition approved in October 2006. However, the Prosecuting Party stated, he did not understand this issue in January 2008, so he contacted an attorney, who contacted Headstrong and made a demand based on the information that was available at that time. The Prosecuting Party said that after a while the attorney told him that Headstrong had offered \$7,000.00 on a take-it-or-leave it basis, which he took, and the attorney received a check for \$7,000.00 from Headstrong Services, LLC. T. at 200-202.

In January 2008, the Prosecuting Party stated, he contacted the Department of Labor and informed them he had not received wages up to November 2007 from Headstrong. At the time, the Prosecuting Party stated, the Department of Labor believed his complaint to be untimely, and asked for more information. He said he provided information as requested by the Department of Labor, but ultimately, in April 2009, he left the United States and returned to India. He said that he continued to press his case with the Department of Labor from India. The Prosecuting Party testified that he filed cases against Headstrong in 2010 and 2011, which were dismissed, but eventually, in 2013, the Department of Labor found reasonable cause to investigate his allegations, and then conducted an investigation. T. at 202-205.

The Prosecuting Party acknowledged that in December 2006, when he was out of work, he contacted Headstrong about payment for his return to India. However, he said, Headstrong’s offer to pay for an airline ticket did not necessarily indicate that Headstrong had terminated his employment. He said he was aware of many instances in which employees traveled between India and the United States, and just because the employer may have paid for the ticket did not

mean an employee had been terminated. He reiterated that Headstrong, Inc. never informed him of the termination of his H-1B visa. He remarked that he contacted USCIS and obtained copies of documents, none of which show that Headstrong, Inc. informed USCIS about the termination of his employment or withdrew any of the two approved petitions. He said that under such circumstances, because there was no termination of employment, Headstrong was not obligated to pay any return transportation; however, he asked about return transportation because he was not working and figured he could leave the United States until work became available and he could return. The Prosecuting Party stated that he was available for work, and remained fully available for work, from November 2006 up to the present. T. at 205-06.

Additionally, the Prosecuting Party remarked, "Headstrong should make me whole for ... whatever actions it has taken. And Headstrong is legally obligated to do it. ... These minimum program requirements have to be met by all employers and Headstrong cannot be the exception to it. It has to comply with law." T. at 206-07.

On cross-examination, the Prosecuting Party conceded that his employment agreement with the Respondent set his first day of work as sometime early in April 2006. He also conceded that a project for him did not become available until May 2006, but he was paid his full salary for April. The Prosecuting Party further conceded he was basically paid the amount due under his employment agreement through November 27, 2006, though he said that the amount he was actually paid for that time period was about \$300 to \$400 less than he was due, on a prorated basis. He stated he was aware that USCIS only approved Headstrong's H-1B visa petition through November 8, 2007, and acknowledged that it was his position that Headstrong owed him wages up to at least that date. He confirmed that after Mr. Pool informed him of his impending termination, he reached out to several officials, but denied that he tried to get them to delay the termination date. The Prosecuting Party also confirmed that he spoke with Mr. Kandar, but denied that he indicated a concern about keeping his H-1B status active; rather, he stated, he informed Mr. Kandar that Headstrong's action [in terminating his employment] was contrary to the law, as he understood the law to be. He confirmed that after circulating his curriculum vitae, Mr. Kandar told him that no position was available, but also said that Mr. Kandar told him that his H-1B visa would not be cancelled and he would be offered a position as soon as one became available. The Prosecuting Party disagreed that Mr. Kandar told him that a termination date of November 27, 2006 stood; rather, he stated, Mr. Kandar told him that the termination letter would stand. The Prosecuting Party acknowledged that the letter reflected that his employment would be terminated as of November 27, 2006. T. at 213-23.

The Prosecuting Party stated that he informed Headstrong officials that it was possibly a violation of H-1B program regulations to have him working in Chicago, because his "appointment letter" specified a New York work location. He acknowledged that he performed no work for Headstrong after November 27, 2006 and that he signed a separation agreement on December 4, 2006. He also acknowledged he received separation pay of \$8,076.92, less withholding, which was equivalent to four weeks' wages. As for accrued vacation pay, the Prosecuting Party acknowledged receiving a payment, but stated he was unsure whether the amount tendered was accurate. T. at 223-26.

On the issue of a return airline ticket, the Prosecuting Party acknowledged requesting an airline ticket back to India; however, he stated, by doing so it was not his intention to “conclude” his termination of employment. He acknowledged, however, that in an e-mail at RX 26 he attempted to get the Respondent to pay the cost of his air travel by citing the regulation that requires an employer to pay the cost of return transportation if an employee is dismissed from employment; he also acknowledged that shortly after this e-mail, the Respondent agreed to pay for an airline ticket. The Prosecuting Party further acknowledged that an employer must notify USCIS in order to effect a bona fide termination of an H-1B worker’s employment. He stated that Headstrong, Inc. never notified USCIS. T. at 227-33.

The Prosecuting Party acknowledged that he entered into a confidential settlement agreement with Headstrong and received \$7,000.00 in exchange for releasing his claims against the company. He also acknowledged that Headstrong Services, LLC issued a check in that amount to his attorney’s law firm. He stated that he later received a check from his attorney for a smaller amount. The Prosecuting Party further acknowledged that in February 2010 he sent an e-mail to Headstrong stating that he wished to rescind the 2008 agreement. The Prosecuting Party acknowledged that the Department of Labor did not investigate his 2008 complaint, but stated he was not sure whether the reason was the alleged untimeliness of his complaint; and he acknowledged that his 2008 complaint did not raise the issue of retaliation. See RX 20. As for the Prosecuting Party’s 2011 complaint (RX 29), the Prosecuting Party acknowledged that initially, the Department of Labor refused to investigate because of concerns as to the timeliness of the complaint. He stated that it was his belief that the Department of Labor investigated his claims, at least in part, in 2010. He also stated that the WHD’s Determination Letter, dated March 2014, addressed all of his complaints, including his complaint of retaliation. See CX 1. The Prosecuting Party conceded that he received the WHD’s letter of May 2011, relating to his 2011 complaint, but stated that this letter was an “incomplete answer” to his complaint. T. at 233-49.

As for his other employers, the Prosecuting Party said that he resigned from his Indian employer, “Wipro Technologies,” in order to take a position with Headstrong, but did not resign from a U.S. employer. He conceded that he had filed a complaint with the Department of Labor asserting that Wipro owed him wages, and said he currently has a lawsuit pending against that company in federal court in California. T. at 249-56.

The Prosecuting Party acknowledged a claim against Compunnel is pending with the ARB [Administrative Review Board]. The Prosecuting Party conceded that he claims to still be employed by both Headstrong and Compunnel, and stated he is not involved in litigation regarding any other claim of employment during the period he was employed by Headstrong. He acknowledged that after receiving the November 14, 2006 termination letter, he engaged in employment discussions with Compunnel, and stated that such discussions occurred approximately November 20 to 22. The Prosecuting Party acknowledged that he subsequently interviewed and was hired for a position at Compunnel. He stated that he was paid wages by Compunnel for the following periods: February to July 2007; and December 2007 to March 2008. He stated that he was also paid wages by an employer in India for the period from May 2010 to December 1, 2010. The Prosecuting Party stated that in 2009 he took steps to establish a consulting company in India, but eventually decided not to do so. T. at 256-70.

Regarding job applications, the Prosecuting Party stated that he may have filled out “hundreds or thousands” of job applications online since November 2006, and when he listed Headstrong as an employer he indicated employment up to November 27, 2006. He stated that the first time he returned to India after April 1, 2006 was in April 2009. He stated that he believed that the receipt date for Compunnel’s H-1B petition was about December 10 or 11, 2006, with employment dates of February 27 or 28, 2007 through April 30, 2009. T. at 271-274.

In response to my questions, the Prosecuting Party clarified that it was his position that in order to effect a bona fide termination of his employment, the Respondent was required to notify USCIS to cancel both LCAs [EAC-06-122-50383 and EAC-07-010-52367].⁴² T. at 275-76.

The Prosecuting Party then testified about his asserted compensatory damages and provided facts that, in his view, justified an imposition of punitive damages against Headstrong. He stated that he was shocked by the way Headstrong treated him because Headstrong’s officials promised him long-term employment. Because Headstrong terminated his employment, the Prosecuting Party stated, he suffered financially. He stated that all of his problems started due to Headstrong’s violations of the H-1B program requirements, and noted that he has spent a lot of time and energy litigating his claims. He stated that he has suffered and that his character has been “totally destroyed” due to Headstrong’s false promises. He stated that he has been unable to find employment and he believes this is due to Headstrong’s harassment. He further stated: “All the problems in my life for the last eight years, they all got started and got compounded by Headstrong’s violations of the INA. All these violations took place in America and all the remedies have to be given by [the] USA system, the make whole relief has to be given by [the] U.S. justice system because all this was done in America, using American laws and by violating American laws and by continuing to violate these American laws.” Additionally, the Prosecuting Party remarked: “I was working reasonably well, and Headstrong made false promises to me. It destroyed my career. It destroyed my personal life. It destroyed my emotional life. It destroyed the happiness of all my near and dear ones.” He also stated: “So all my professional life is destroyed. My personal life is destroyed. My psychological life is destroyed and not from one year, one month, one week, it is now eight years and it is continuing.” T. at 277-85.

On cross-examination, the Prosecuting Party stated that Headstrong was not putting him back into productive status, and was not using a neutral forum to settle the dispute. Rather, he said, Headstrong was making him go through “full litigation” and was doing everything in its power not to follow the law, not to pay him wages, and to keep on harassing him. He confirmed that participating in litigation has taken a big toll on him because of the time involved and the emotional strain of the proceedings. He acknowledged he did not see any mental health professionals or request that any medications be prescribed for him, but also commented that he could not afford to do so. T. at 285-97.

⁴² At the hearing, I referred to these LCAs by their last two digits, “83” and “67.” T. at 275.

David O'Shaughnessy

Mr. O'Shaughnessy testified under oath on behalf of the Respondent. He stated that he is an employee of the Respondent and when he was hired in July 2006 his position was "Comptroller North America." In that capacity, he testified, he was responsible for all of the Respondent's entities in North America, the United Kingdom, and Germany for matters such as statutory compliance, direct taxation, payroll, invoicing clients, collections, and accounts payable. He testified that RX 8 is a document he compiled in response to this litigation, reflecting payments made to the Prosecuting Party during his employment up to December 31, 2006. Mr. O'Shaughnessy stated that the Prosecuting Party's salary was \$8,750.00 per month, but he was paid less than that for November 2006 because his employment was terminated prior to the end of the month, and so he was paid a pro-rata amount. The payments made in December 2006, Mr. O'Shaughnessy stated, were accrued vacation pay and payments made pursuant to the severance agreement. The witness identified RX 10 as the check remitted to the Prosecuting Party in December 2006, number 4723. He stated that Headstrong Services, LLC paid the check because that was the entity that paid non-payroll accounts payable obligations for the Respondent. He identified RX 11 as a listing of uncleared checks in December 2006, and noted that check number 4723, paid to the Prosecuting Party, was not listed. The witness identified RX 17 as another accounts payable check from Headstrong Services, LLC, and noted the check was paid to Goldberg and Fliegel, LLP in the amount of \$7,000.00 in May 2008. He stated that the documentation indicated the check was paid for "settlement." Mr. O'Shaughnessy stated that Headstrong Services, LLC was again acting as the common paymaster for accounts payable. He stated the check was cashed. T. at 305-16.

On cross-examination, the witness confirmed that neither check was a payroll check, but noted that Internal Revenue Service regulations construe payment of accrued vacation and severance as wages for tax purposes. In response to my questions, he stated that Thanksgiving was treated as a paid holiday for the calculation of the Prosecuting Party's pro-rata compensation for November 2006. On review of CX 1, he stated he was not aware how the Department of Labor had calculated the Prosecuting Party's back wage entitlement, and stated that he compiled the document at RX 8 in response to a request from "Immigration" and had no direct contact with the Department of Labor's investigator. He stated that rate of vacation pay was calculated as follows: divide the annual salary (\$105,000.00) by the number of hours in a work year (2,080) for the hourly rate; vacation was accrued at the rate of 6.67 hours per month for the Prosecuting Party; and he noted the Prosecuting Party was paid for 67 hours of accrued vacation. He confirmed that the figures in RX 8 for the severance and accrued vacation pays were gross and not net figures. T. at 316-23.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statutory and Regulatory Framework

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, the employer must first receive permission from the U.S. Department of Labor. To receive permission from the DOL, the Act requires an employer to submit an LCA to the Department. § 8 U.S.C 1182(n)(1); § 655.730(a).

The Department has promulgated detailed regulations setting forth requirements to implement the statutory provisions. These requirements include provisions covering the determination, payment, and documentation of required wages, as well as requirements for working conditions and computation and payment of benefits. 20 C.F.R. Part 655, subpart H. Under these regulations, an employer's LCA must include, among other things, the occupational classification for the proposed employee; the actual wage rate; the prevailing wage rate and the source of such wage data; and the location (city) and period of employment. §§ 655.730-734. In most circumstances, an LCA is valid only for the period of time for which the Department of Labor has approved the employment. § 655.750(a). This period commences not earlier than the date that the application is certified and may not continue for more than three years.⁴³ Id. Moreover, an H-1B nonimmigrant may enter the United States only with a valid visa; DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached, and is responsible for approving the H-1B visa classification for the H-1B employee. § 655.705(b). Accordingly, an H-1B nonimmigrant is authorized to be employed within the United States only for the term for which the visa has been approved. § 655.700; see also 8 C.F.R. § 214.1(e)

The regulation requires that an employer pay H-1B nonimmigrants at the "required wage rate." 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. § 655.731(a). The employer must also provide an H-1B nonimmigrant employee with the same fringe benefits that are provided to similarly employed U.S. workers. § 655.731(c)(3).

Once the employment period begins, the employer is required to pay an H-1B employee the required wage at the full-time rate for any time that is non-productive due to a decision by the employer.⁴⁴ However, an employer need not pay wages for H-1B workers in nonproductive status due to conditions unrelated to employment which take them away from work at their own

⁴³ The regulation recognizes that under the "increased portability" provisions of § 214(n) of the Act, employment may commence prior to the date of certification; in such instances, the inception date of authorized employment applies back to the first date of employment. § 655.750(a). From the record before me, I conclude that this situation may have pertained to the Prosecuting Party's employment with the Respondent, because the Respondent employed the Prosecuting Party beginning in early April 2006, and the inception date of the approved LCA was April 24, 2006. See T. at 195 (Prosecuting Party testified he was working in Atlanta for a different employer); see also CX 5.

⁴⁴ Employer-determined nonproductive time, or "benching," can result from factors such as lack of available work or lack of the individual's license or permit. 8 U.S.C. § 1182(n)(2)(C)(vii); § 655.731(c)(7)(i).

convenience or request (e.g., touring), or which render them unable to work (e.g., temporary incapacitation due to accidental injury). § 655.731(c)(7)(ii).

The H-1B nonimmigrant's first location of employment must be at the location specified in the approved LCA. § 655.735(e). However, an employer may later place an H-1B nonimmigrant at another location for a maximum of 30 days per year, provided that the employer pays the H-1B nonimmigrant the required wage for the permanent worksite and pays the actual costs of meals and lodging.⁴⁵ § 655.735(b)(3), (c). Once the H-1B nonimmigrant's short-term placement has reached this limit, the employer must either file a new LCA for the new location or terminate the H-1B nonimmigrant's placement in the other location. § 655.735(f). The regulation also requires that an employer provide each H-1B employee with a copy of the LCA (form ETA 9035 or 9035E), certified by the Department of Labor and signed by the employer or its representative. § 655.734(a)(3).

After the employment has begun, an employer need not pay a nonimmigrant worker, if it has effected a "bona fide termination" of the employment relationship. § 655.731(c)(7)(ii). To terminate the obligation to pay an H-1B employee, the regulation states that the employer must notify DHS that it has terminated the employment relationship so that DHS may revoke approval of the H-1B visa.⁴⁶ 8 C.F.R. § 214.2(h)(11); § 655.731(c)(7)(ii). Additionally, in certain circumstances, the employer must provide the H-1B nonimmigrant with payment for transportation to his or her home. Id.; see also 8 C.F.R. § 214.2(h)(4)(iii)(E). Under 8 C.F.R. § 214.2(h)(4)(iii)(E), the employer is responsible for "reasonable costs of return transportation" to the employee's last place of foreign residence, if the alien employee "is dismissed from employment by the employer" before the end of the LCA period.

A complaint must be filed not later than 12 months after the latest date(s) on which the alleged violations were committed, defined as the date(s) on which the employer allegedly failed to perform an act or fulfill a condition specified in the LCA, or the date on which the employer allegedly demonstrated a misrepresentation of material fact in the LCA. § 655.806(a)(5). No particular form of complaint is required, except that it must be in writing or, if oral, be reduced to writing by the WHD official who received the complaint. § 655.806(a)(1). Under the regulation, no hearing or appeal is available if the Administrator determines that investigation of a complaint is not warranted. § 655.806(a)(2).

After investigation, the WHD Administrator issues a determination letter, which is served on the interested parties, including the H-1B nonimmigrant whose LCA was the subject of the investigation. § 655.815(a). The determination letter sets out the Administrator's conclusions; in the event the Administrator finds that an employer committed violation(s), the Administrator's letter will prescribe remedies. § 655.815(b)(1). For back wage obligations, under the regulation, the amount owed is defined as the difference between the amount the employee should have

⁴⁵ If the H-1B nonimmigrant maintains an abode in the United States at the permanent worksite location and spends a substantial amount of time at that location, the employer may station the H-1B nonimmigrant for up to 60 days per year at a location other than the permanent worksite. § 655.735(c).

⁴⁶ I note that USCIS is a component of DHS. See <http://www.dhs.gov/department-components>.

been paid and the amount actually paid. § 655.810(a). The Administrator also may assess civil-money penalties and other remedies, as listed in § 655.810. § 655.815(c)(1).

An interested party requests a hearing under procedures set out in § 655.840. The regulation indicates that a hearing relates to “review of a[n Administrator’s] determination issued under §§ 655 and 655.815.” § 655.840(a). Under § 655.840(b), an administrative law judge has the authority to affirm, deny, reverse, or modify, in whole or in part, the determinations of the Administrator. The administrative law judge is not authorized to render findings on the “legality of a regulatory provision or the constitutionality of a statutory provision.” § 655.840(d).

Timeliness of the Prosecuting Party’s Complaints

The Respondent asserts that this action should be dismissed because the Prosecuting Party’s complaints to the WHD were untimely. Respondent’s brief at 8-11. The Prosecuting Party did not specifically address the timeliness of his complaints. Prosecuting Party’s brief.

The Prosecuting Party testified that he initially made an oral complaint to the WHD in January 2008. T. at 203. The record indicates that the Prosecuting Party made at least two written complaints to the WHD, in June 2008 (RX 20) and January 2011 (RX 29). The June 2008 complaint (form WH-4) alleged that the Respondent committed the following violations of the INA and the H-1B regulations: supplied incorrect or false information on the LCAs; failed to pay the higher of the prevailing or actual wage; failed to pay for time off due to decisions by the employer; failed to provide fringe benefits equivalent to those provided to U.S. workers; failed to provide employee with a copy of the LCA; and failed to provide reasonable costs of return transportation (apart from airline tickets) after terminating the Prosecuting Party’s employment before the end of the period of authorized stay. RX 20.

Initially, the WHD declined to investigate the June 2008 complaint, based on a determination that the Prosecuting Party had failed to provide sufficient information to indicate that the Respondent committed a violation within the 12 months preceding the complaint, as required under the regulation. RX 21; see § 655.806(a)(5). Under the terms of the settlement of the Prosecuting Party’s District Court complaint, WHD’s determination that the Prosecuting Party’s June 2008 complaint was untimely was vacated, and the Prosecuting Party’s complaint was remanded to WHD for a new investigation. Case No. 12:cv-06652 (S.D.N.Y.), “Stipulation and Order of Remand and Dismissal,” Dec. 10, 2012.

The record indicates that, after the remand, WHD then investigated the issues raised in the Prosecuting Party’s June 2008 complaint. CX 28. Eventually, in March 2014, WHD issued a Determination Letter. CX 1. Though the Determination Letter did not specifically address the issue of whether the Prosecuting Party’s June 2008 complaint was timely, it did include findings that the Respondent owed the Prosecuting Party back wages and also that the Respondent failed to provide the Prosecuting Party with a copy of his LCA. Id. I presume, therefore, that the WHD found the Prosecuting Party’s June 2008 complaint to be timely.

On review of the record, I note that the Prosecuting Party’s June 2008 complaint to the WHD stated that the Respondent owed back wages to the Prosecuting Party for nonproductive

periods; the complaint also specifically cited the Respondent's dates of alleged violations as extending from 11/28/2006 to 11/08/2007 (that is, from the date after the Prosecuting Party's termination of employment to the end of the authorized LCA period).⁴⁷ Because there is evidence of record that, at the time the Prosecuting Party made his June 2008 complaint to WHD, he alleged that the Respondent committed violations up to November 8, 2007, I find there is evidence that the Prosecuting Party's allegation was timely, as he alleged violations that occurred within the 12 months preceding his complaint. Therefore, I conclude that the Prosecuting Party's June 2008 complaint, as resurrected by the settlement agreement in his District Court action, was timely. Accordingly, any allegations pertaining to the items the Prosecuting Party checked on the form WH-4, as listed above, are timely.

The record indicates that the Prosecuting Party submitted an additional complaint to the WHD in January 2011. RX 29. This complaint alleges, for the first time, that the Respondent retaliated against the Prosecuting Party. Additionally, the complaint specifies that the Respondent misrepresented a material fact in the LCA when it listed the work location as Fairfax, Virginia. In support of this allegation, the Prosecuting Party cited the LCA the Respondent filed in March 2006, which listed the job location as Fairfax, Virginia. The record also indicates that, by letter dated May 18, 2011, WHD informed the Prosecuting Party that no investigation was warranted as to the Prosecuting Party's allegations of the Respondent's misrepresentation in the LCA because the alleged violation occurred more than 12 months before the complaint was made. RX 30. The evidence is that the Respondent submitted the LCA in which it asserted that the Prosecuting Party's job location was to be Fairfax, Virginia, in March 2006. CX 3. This is almost five years prior to the date of the Prosecuting Party's January 2011 complaint, and is clearly untimely under the regulations. I affirm the Administrator's determination that the Prosecuting Party's allegation that the Respondent misrepresented the facts in the LCA by indicating the job was located in Fairfax, Virginia was untimely.

As for the Prosecuting Party's allegation that the Respondent retaliated against him, I find that the record does not specifically indicate whether the WHD ever investigated this allegation. See RX 30. The WHD's letter of May 18, 2011, which informed the Prosecuting Party that it would not investigate the complaint pertaining to the Respondent's alleged misrepresentation of the Prosecuting Party's work location, does not address this allegation. Neither does the WHD Determination Letter dated March 2014. If the WHD opted not to investigate the allegations of retaliation, then the Prosecuting Party's complaint on this issue is not properly before me, because I am limited to adjudicating only those issues that WHD investigated. § 655.806(a)(2). If WHD investigated such allegations, then I have jurisdiction to adjudicate them, provided the Prosecuting Party included them in his hearing request. See § 655.820(a). The Prosecuting Party did include allegations of discrimination in his Hearing Request. Hearing Request at 16-20.

⁴⁷ I note that the notation 11/28/2006 is typewritten and the phrase "to 11/08/2007" is handwritten. I presume that the handwritten addendum was made by the Prosecuting Party. In the absence of evidence to the contrary, I will presume that this notation was made in June 2008, at the time the Prosecuting Party filed his initial complaint.

As discussed above, however, I have found that the Prosecuting Party's allegations about the Respondent's conduct do not constitute allegations of retaliation that are cognizable under the regulation, and I have granted the Respondent's motion for summary decision on such issue. Therefore, even assuming arguendo that WHD conducted an investigation, I find that my action in granting the Respondent's motion for summary decision adequately disposes of the issue.

Lastly, there is some evidence the Prosecuting Party submitted a complaint in 2010 against the Respondent. RX 23. This complaint was rejected, without investigation, as untimely.⁴⁸ Id. Because the WHD did not investigate the complaint, there is no basis for me to adjudicate it. See § 655.806(b)(2).

The Applicable H-1B Employment Period

The record firmly establishes that the applicable H-1B employment period runs from April 24, 2006 to November 8, 2007. These are the dates for which DHS approved a visa for the Prosecuting Party. CX 5, 9. As the record reflects, the Respondent's initial petition was dated March 16, 2006 and was intended to cover the period from March 16, 2006 to March 16, 2009. CX 3; see also CX 4. It listed a job location of Fairfax, Virginia. It was approved on April 24, 2006 (receipt no. EAC-06-122-50383) but only for the period from that date up to November 8, 2007. CX 5. Later, in October 2006, the Respondent submitted a second LCA petition for the Prosecuting Party; this petition was the same as the initial petition regarding the Prosecuting Party's job title and wage, but listed the job locations as New York and Chicago, consistent with the Prosecuting Party's recent worksites. CX 8; see also T. at 195. This petition was approved on October 24, 2006 (receipt no. EAC-07-010-52367), for the period up to November 8, 2007. CX 9.

The Department of Labor has cognizance 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), slip op at 16. Therefore, the employment period for which the Prosecuting Party may seek enforcement remedies extends from April 24, 2006 (the date reflected on receipt no. EAC-06-122-50383) to November 8, 2007 (the date reflected on receipt nos. EAC-06-122-50383 and EAC-07-010-52367). Accordingly, I will consider the Respondent's wage and employment obligations to the Prosecuting Party only for the period up to November 8, 2007. As noted above, I have found that the Respondent paid all wages due the Prosecuting Party for the period up to November 27, 2006.⁴⁹ Therefore, the period for which the Respondent may be responsible for back wages is limited to the timeframe between November 28, 2006 and November 8, 2007.

⁴⁸ It is not clear, from the record, what allegations the Prosecuting Party made against the Respondent in the 2010 complaint.

⁴⁹ I granted judgment in favor of the Respondent as to any wages due up to November 27, 2006. T. at 330. I will address the allegation that the Respondent failed to pay fringe benefits during the period of employment (such as per diem allowances) below.

Period for Which Back Wages Are Owed

Under the regulation, an employer must pay the applicable required wage to an H-1B employee throughout the entire H-1B employment period (less authorized deductions). § 655.731(c)(1). However, an employer is not required to pay an employee for periods when the employee is in a “nonproductive status” for reasons unrelated to the employment, such as travel for the employee’s personal convenience. § 655.731(c)(7)(ii). In addition, an employer’s obligation to pay wages to an employee is extinguished when there has been a bona fide termination of the employment relationship. Id. However, up to the time that there has been a bona fide termination, an employer’s wage obligation to an H-1B continues unabated, up to the end of the authorized period of employment. Id.; see also Mao v. Nasser Eng’g & Computing Svcs., ARB No. 06-121, ALJ No. 2005-LCA-36 (ARB Nov. 26, 2008), slip op. at 10.

In this matter, the Respondent asserts that it properly terminated its employment relationship with the Prosecuting Party, by January 15, 2007. Respondent’s brief at 18-22. The Prosecuting Party, on the other hand, contends that the Respondent never properly terminated the employment relationship. Prosecuting Party’s brief at 17-20.

The Board has held that there are three elements to establish a bona fide termination of employment: first, unequivocal notice to the employee that the employment relationship has been terminated; second, the employer’s notice to immigration officials of the terminated employment; and third, payment for transportation back to the employee’s home country.⁵⁰ Amtel Group of Fla. v. Yongmahapakorn, ARB No. 04-087, ALJ No. 2004-LCA-06 (ARB, Sept. 29, 2006), slip op. at 11-12, aff’d on recon, ARB No. 07-104 (Jan. 29, 2008); see also Gupta v. Jain Software Consulting, Inc. ARB No. 05-008, ALJ No. 2004-LCA-39 (ARB, Mar. 30, 2007), slip op. at 5-6. The Board also has held that the burden is on the employer to establish each element of the bona fide termination. Gupta v. Jain, slip op. at 5 n. 3.

As to the first requirement, the parties agreed that the Respondent sent the Prosecuting Party a letter on November 14, 2006, informing him of the termination of employment. T. at 26; see also CX 10. Additional evidence establishes that the Prosecuting Party was aware in advance that this was the date of his proposed termination of employment because he contacted the Respondent’s officials in an effort to get them to change their decision or, alternatively, delay the termination date. RX 4, 5; see also T. at 179-80.

The Prosecuting Party contends that the Respondent does not have the ability to terminate his employment, because he had a contract with the Respondent. Prosecuting Party’s brief at 17-18; see also CX 2 (employment agreement). I reject this contention, because the employment agreement between the Respondent and the Prosecuting Party explicitly states that the Prosecuting Party’s employment was “at-will.” CX 2 at 2. The Respondent’s employment policies indicate that, “except when defined by a written contract for a specified period of time,

⁵⁰ Section 655.731(c)(7)(ii) states that payment for transportation back to the employee’s home must be tendered under certain circumstances, and cited 8 C.F.R. § 214.2(h)(4)(iii)(E). This provision states that transportation must be provided when the employee has been dismissed prior to the expiration of the approved LCA period.

all employment with Headstrong is on an ‘at-will’ basis, which means that the employee may terminate employment at any time, with or without notice, and Headstrong also may terminate employment at any time.” CX 36.

The Prosecuting Party also contends that the Respondent’s action in terminating his employment was improper, either because the regulation requires that employment continue throughout the entire H-1B period, or because the Respondent’s position that the Prosecuting Party was terminated due to “lack of work” is not consistent with its assertion in the LCA petitions that the Prosecuting Party would be employed through March 2009 (first petition) or November 2007 (second petition). Prosecuting Party’s brief at 21; T. at 168, 282. Contrary to the Prosecuting Party’s position, I find that there is no regulatory bar to terminating an employee’s employment prior to the end of the H-1B period.⁵¹ § 655.731(c)(7)(ii). Even though it is not necessary for an employer to justify its reasons for terminating an H-1B employee’s employment, I note that the record reflects there is some evidence to support the Respondent’s rationale that there was a lack of work for the Prosecuting Party. For example, the Prosecuting Party testified that after he received the termination notice, he contacted Mr. Kandar, who circulated his curriculum vitae and attempted to find him work, without success. T. at 199-200.

Based on the foregoing, I find that the evidence establishes that there was neither a regulatory nor contractual bar to the Respondent’s action in terminating the Prosecuting Party’s employment. I also find that the Respondent notified the Prosecuting Party that his employment was to be terminated, in advance of the November 27, 2006 termination date. Thus, the Respondent satisfied this first requirement for a bona fide termination.

The second requirement for a bona fide termination is that the employer notify USCIS that the employee’s employment has ended. § 655.731(c)(7)(ii). The record reflects that the Respondent notified USCIS, by letter dated January 15, 2007. CX 16; additional copy at RX 12. The notice accurately reflected the Prosecuting Party’s applicable LCA (receipt no. EAC-07-010-52367). A date stamp indicates that USCIS received the Respondent’s letter on January 23, 2007.⁵² The Prosecuting Party contends that the Respondent’s January 15, 2007 letter did not fulfill the requirement to notify USCIS, because the Respondent did not refer to the first approved LCA (receipt no. EAC-06-122-50383) and the entity that informed USCIS was not Headstrong, Inc., but was Headstrong Services, LLC. Prosecuting Party’s brief at 19-20; see also T. at 228-31, 275-76.

I reject both of the Prosecuting Party’s contentions. The regulation indicates that when an employer submits a subsequent LCA petition to cover the same employment period, such a petition is intended to supersede the earlier LCA. § 655.735(g); see also § 655.750(c)(3) (discussing that subsequent approved applications supersede earlier applications). Notably, a purpose of submitting a subsequent LCA petition for the same time period is to reflect a change

⁵¹The regulation makes it clear that, unless and until a bona fide termination of the employment relationship is accomplished, an employer’s wage payment obligation continues. But a bona fide termination extinguishes an employer’s wage payment obligation.

⁵² The date stamp is more legible on RX 12 than on CX 16. See T. at 142-43 (discussion of date stamp on Prosecuting Party’s exhibit).

in the location of an employee's worksite. § 655.735(g); see also § 655.735(c) and (e) (in general, workers are to be located at the areas specified in the approved LCAs). At the hearing, Ms. Spratling testified that a second LCA petition is filed when an employee's worksite is different from the site stated in the initial LCA petition. T. at 113. Based on the foregoing, I find that on January 15, 2007, the only applicable LCA was the petition approved in October 2006, specifically receipt no. 07-010-52367. And because the Respondent's notice to USCIS referenced that approved LCA petition, its notice was adequate.

As to the issue of the entity that informed USCIS, I find that it is immaterial whether the notice referred to Headstrong Services, LLC or Headstrong, Inc. The record reflects that the Prosecuting Party's employment agreement was with Headstrong, Inc. (designated as the "Company" in the agreement). CX 1. Most notably, however, the employment agreement also specified that the term "companies" meant the Company (that is, Headstrong, Inc.), its parent, and any related company. Id. The testimonial evidence established that Headstrong, Inc. and Headstrong Services, LLC were related companies. T. at 311. Accordingly, I find that the Prosecuting Party's employment agreement with Headstrong, Inc. also embraced related companies such as Headstrong Services, LLC, and therefore Headstrong Services, LLC's notice to USCIS was adequate.

Based on the foregoing, I find that the Respondent fulfilled this second requirement for a bona fide termination of employment by January 15, 2007, the date of its notice to USCIS.

The third requirement, under the regulation, is that, where an employer dismisses the employee before the end of the approved LCA period, the employer must "provide the employee with payment for transportation home." § 655.731(c)(7)(ii); 8 C.F.R. § 214.2(h)(4)(iii)(E). The evidence of record on this issue includes various e-mail chains. CX 14, 17, 33; RX 9, 13. These documents indicate that initially the Respondent refused to provide the Prosecuting Party with such payment (CX 14, Dec. 4, 2006); the next day, however, the Respondent acknowledged its responsibility (RX 9, Dec. 5, 2006). Ms. Somerville approved the purchase of a ticket (RX 13, Jan. 25, 2007). A ticket from Newark, NJ to Bangalore, India for travel on February 24, 2007, was issued on January 25, 2007. RX 13. The record reflects this travel date was the date the Prosecuting Party chose, and that the Prosecuting Party requested travel to Bangalore. CX 33, RX 9. By January 31, 2007, the record indicates, a ticket may have been issued but the Prosecuting Party had not received it; I infer this because the Prosecuting Party was asking about the status of the ticket.⁵³ CX 33. Ultimately, on February 2, 2007, the Prosecuting Party received an e-ticket. CX 17.

Though the Respondent accepted responsibility for this cost on December 5, 2006 and a ticket was issued on January 25, 2007, the Respondent did not tender the ticket to the Prosecuting Party until February 2, 2007. I therefore find that the Respondent did not meet this requirement for a bona fide termination of the Prosecuting Party's employment until that date.

⁵³ It appears that the Respondent may have tried to deliver a ticket via e-mail, but confused the Prosecuting Party with another employee who had the same first and last names. CX 33; RX 9.

The regulation does not require that an employer provide a ticket for an employee; rather, under the regulation, an employer must provide the “reasonable cost” of return transportation. § 655.731(c)(7)(iii). The cost of the ticket the Respondent paid was \$950.00. RX 9. In his 2008 WHD complaint, the Prosecuting Party asserts that this payment was insufficient. See RX 20. The burden to establish the reasonableness of its payment for return travel rests with the employer. Amtel Group of Fla. v. Yongmahapakorn, ARB No. 04-087 (ARB, Sept. 29, 2006), slip op. at 11-12, aff’d on recon., ARB No. 07-104 (Jan. 29, 2008). Because the Respondent provided an airline ticket to Bangalore, India, the city of the Prosecuting Party’s choice, I find that the Respondent’s tender of a ticket was sufficient to establish the reasonableness of the cost of the transportation to Bangalore. Also, the Prosecuting Party did not return to India until April 2009. T. at 204. By opting to stay in the United States, he did not incur any additional travel-related expenses in February 2007. I find that, under such circumstances, by tendering an air ticket to Bangalore costing \$950.00, the Respondent provided the “reasonable cost” of return transportation.

Because the Respondent did not fulfill all of the requirements to effect a bona fide termination of the Prosecuting Party’s employment until February 2, 2007, I find that the Respondent effected the bona fide termination on that date. Accordingly, I further find that the Respondent’s wage obligation to the Prosecuting Party continued up to February 2, 2007.

The Prosecuting Party has asserted that the Respondent continued to have a wage obligation to him, at least up to March 2009, the ending date specified in the Respondent’s initial LCA petition. Prosecuting Party’s brief at 20-24. The Prosecuting Party posits that the Respondent’s action in offering him transportation back to India in February 2007 put him in “travel status” and converted his employment status from U.S.-based to employment based in India. Id. Because the Respondent’s bona fide termination of the Prosecuting Party’s employment is established, as set forth above, I find there is no basis, in law or fact, for the Prosecuting Party’s position.

Interestingly, there is evidence that, shortly after the Respondent effected its bona fide termination of the Prosecuting Party’s employment, the Prosecuting Party obtained employment with another employer, Compunnel. T. at 266-67. On May 29, 2014, the Board issued a Decision and Order (ARB D&O) relating to the Prosecuting Party’s complaint against that employer.⁵⁴ Gupta v. Compunnel Software Group, Inc., ARB No. 12-049, ALJ No. 2011-LCA-045 (ARB May 29, 2014).

⁵⁴ Under the applicable procedural regulation, I may take official notice of adjudicative facts. 29 C.F.R. § 18.201. Similar to the analogous provisions of the Federal Rules of Evidence (“FRE”) and of Civil Procedure regarding judicial notice, Part 18.45 provides, “Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice.” 29 C.F.R. § 18.45; see also 29 C.F.R. §18.201. However, a court may take judicial notice of a document filed in another court “not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384 (2d Cir. 1992) (emphasis added); see also Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger U.S.A., 146 F.3d 66, 69-70 (2d Cir. 1998) (explaining, “Facts adjudicated in a prior case do not meet either

By Order dated November 12, 2014, I invited the parties to respond regarding the effect, if any, that the ARB's determination that Compunnel owed back wages to the Prosecuting Party had on the Respondent's back wage liability, if any, to the Prosecuting Party. Both the Prosecuting Party and the Respondent submitted responses to my Order.

The Board has held that, as a matter of law, an employee cannot be granted the right to work concurrently for two H-1B employers. Batyrbekov v. Barclays Capital, ARB No. 13-013, ALJ No. 2011-LCA-25 (ARB July 16, 2014), slip op. at 13. Moreover, as a practical matter, I find that employment with a second employer effectively renders an employee unavailable for work with his original employer.

The Prosecuting Party testified that he worked for Compunnel in 2007 and admitted that Compunnel paid him for the period from February 2007 to July 2007. T. at 266. Accordingly, I find that, even if the Respondent had not effected a bona fide termination of the Prosecuting Party's employment, the Prosecuting Party was not available for work with the Respondent during the time he was working for Compunnel, and so the Respondent would not have any wage obligation in those timeframes to the Prosecuting Party. See § 655.731(c)(7)(ii).

Computing Back Wages Owed to the Prosecuting Party

Under the regulation, an employer must pay an H-1B employee the "required wage" for the entire time period up to the bona fide termination of employment, except for time periods during which the employee was not available for work based on personal circumstances unrelated to his employment. § 655.731(c)(7)(ii). Based on the foregoing, I find the applicable time period for which the Respondent may owe back wages to the Prosecuting Party is from November 28, 2006 to February 2, 2007.

The required wage is defined as the higher of the actual wage for the specific employment in question or the prevailing wage at the geographic location. § 655.715. For the Prosecuting Party's position under the applicable approved LCA in November 2006 (EAC-07-010-52367), the prevailing wage listed in the LCA was \$86,237.00 per year. This is lower than the Prosecuting Party's actual wage of \$105,000.00 per year. I find, therefore, that the back wages should be calculated based on the Prosecuting Party's actual wages of \$105,000.00 per year, or \$8,750.00 per month. 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).

As Mr. O'Shaughnessy noted, the Prosecuting Party's wages received for November 2006 were less than his monthly salary because the Respondent prorated the full month's salary of \$8,750.00 against the number of work days the Prosecuting Party worked up to November 27,

test of indisputability contained in [FRE] 201(b) [Judicial Notice of Adjudicative Facts]: they are not usually common knowledge, nor are they derived from an unimpeachable source"); Bruce Lee Enters., LLC v. A.V.E.L.A., Inc., 2013 U.S. Dist. LEXIS 31155, at *28-30 (S.D.N.Y. Mar. 6, 2013).

2006. T. at 308-09; RX 8. Per RX 8, the Prosecuting Party received \$7,556.82 for the period from November 1 to November 27, 2006. In order to receive his full wage for the month of November, he must receive \$8,750.00. Accordingly, I find the Prosecuting Party is owed an additional \$1,193.18 for November 2006.

The Prosecuting Party is owed his full wages for the months of December 2006 and January 2007. At the rate of \$8,750.00 per month, I calculate the total amount owed for these two months to be \$17,500.00.

The Prosecuting Party is also owed wages for February 1 and 2, 2007. Mr. O'Shaughnessy testified that daily wages are calculated on a pro-rata basis, using the number of work days in the month. T. at 309. February 1 and 2, 2007 were a Thursday and Friday, so I will consider them to be workdays. In February, a 28-day month, there are 20 workdays. Consequently, the Prosecuting Party's daily wage rate for February 2007 would be \$437.50. Accordingly, for the two days in February for which the Prosecuting Party is owed wages, the total amount owed to him would be \$875.00.

In sum, the back wages the Respondent owed to the Prosecuting Party were as follows:

November 2006:	\$1,193.18
December 2007:	8,750.00
January 2007:	8,750.00
February 2007:	<u>875.00</u>
TOTAL:	\$19,568.18

The record reflects that the Respondent paid the Prosecuting Party \$8,076.92 (four weeks' base salary) pursuant to the severance agreement. Because the Respondent paid the Prosecuting Party this amount in lieu of continuing to pay his wages, I deduct this amount from the amount owed by the Respondent's back wage obligation. Accordingly, the total amount owed to the Prosecuting Party is reduced to \$11,491.26.⁵⁵

The record includes a back wage calculation made by a WHD investigator. CX 34. This document indicates that the WHD investigator calculated back wages for the period from January 1, 2007 to January 23, 2007.⁵⁶ The investigator also calculated back wages based on a prevailing wage of \$92,789.04, rather than the Prosecuting Party's actual wage of \$105,000.00.⁵⁷

⁵⁵ I have not considered the Respondent's payment of accrued vacation time to the Prosecuting Party as a payment that should be credited toward the back wage obligation, because under the regulation, an H-1B employee is entitled to the same benefits from an employer that a U.S. worker has. § 655.731(c)(3). Though there is no specific evidence on this point, I will presume that for all workers who leave employment, the Respondent pays the employee the value of vacation days accrued but not taken. See T. at 190 (accrued vacation paid even if employee does not sign severance agreement); see also CX 6 (summary of benefits).

⁵⁶ The document does not indicate how the WHD investigator determined these were the starting dates and ending dates of the Respondent's back wage obligation.

⁵⁷ I note that the prevailing wage the WHD investigator used was the prevailing wage used in the

The investigator determined the total amount of back wages owed to the Prosecuting Party was \$5,736.96.⁵⁸ I find that the WHD investigator's determination was not accurate because she did not use the full period for which back wages were due, and she based the Respondent's back wage obligation on the prevailing wage, rather than the actual wage.

Effect of the 2008 Settlement

As contained in the record and discussed at the hearing, in 2008 the Prosecuting Party, through his attorney, approached the Respondent with allegations that the Respondent had violated various provisions of the Act and the H-1B regulations. RX 15. After negotiations, the Respondent paid \$7,000.00 to settle the Prosecuting Party's allegations. CX 19, 20; see also T. at 45-47. The check for this settlement was drawn on the account of "Headstrong Services, LLC," and was payable to the Prosecuting Party's attorney. CX 20. The Prosecuting Party has conceded he received a portion of the settlement proceeds from his attorney. T. at 235; see also CX 20.

The Prosecuting Party admitted that in 2010 he attempted to rescind the settlement agreement, based on an assertion that the 2008 settlement was fraudulent. T. at 236; see also CX 23. The Prosecuting Party contended that the 2008 settlement should be rescinded because the Respondent did not notify USCIS to cancel his approved H-1B employment under receipt no. 06-122-50383, but only the approved H-1B employment under receipt no. 07-010-52367; therefore, he posited, there was no bona fide termination of his employment and the Respondent owed him wages through November 8, 2007, the end of the approved H-1B period. CX 23. I note that the record indicates that the Prosecuting Party has not returned the money he received in the 2008 settlement to the Respondent. T. at 64. Nor is there any evidence of record that the Prosecuting Party attempted to tender this amount back, either in 2010 when he first attempted to rescind the 2008 settlement agreement or at any time since.

At the hearing, the Prosecuting Party asserted that the 2008 settlement is ineffective or void.⁵⁹ He stated that the settlement was not paid by Headstrong, Inc., his employer, but rather was paid by Headstrong Services, LLC. T. at 234-37. At the hearing, Mr. O'Shaughnessy testified that Headstrong Services, LLC paid all non-payroll obligations of the Headstrong companies, and that because a settlement agreement was such an obligation, Headstrong Services, LLC paid it. T. at 314-16. As discussed above, I find that the fact that an obligation was not paid by Headstrong, Inc., but rather was paid by Headstrong Services, LLC does not invalidate the Respondent's action. Rather, it was consistent with the Respondent's business

initial LCA petition, (receipt no. 06-122-50383) rather than the prevailing wage of \$86,237.00 listed in the second LCA petition (receipt no. 07-010-52367). Additionally, the prevailing wage the WHD investigator used (\$92,789.04) varied from the prevailing wage listed in the initial LCA petition (\$92,789.00) by \$0.04. See CX 3.

⁵⁸ The investigator then applied the amount of the Prosecuting Party's May 2008 settlement, \$7,000.00, against this back wage liability, and concluded that the Respondent had no additional back wage liability due to the Prosecuting Party. I will discuss the effect of the Prosecuting Party's May 2008 settlement below.

⁵⁹ The Prosecuting Party did not address the 2008 settlement in his post-hearing brief.

practice to have Headstrong Services, LLC pay such obligations, with the intent of binding all of the Headstrong entities. Accordingly, I find that the Respondent's settlement payment was valid, and was intended to address any complaint the Prosecuting Party had against his employer, Headstrong, Inc.

The record reflects that, in consideration for the settlement of his allegations and payment of the \$7,000.00 tendered by the Respondent, the Prosecuting Party executed a release discharging the Headstrong, Inc., and all of its affiliated companies, from any obligation which the Prosecuting Party had, or may have, in connection with "any matter arising on or before the date of the execution" of the agreement, which was May 8, 2008. CX 19. Specifically, according to the settlement agreement, the Respondent owed no additional amounts to the Prosecuting Party for wages, back pay, bonuses, benefits, etc. As the parties stipulated, a representative of the Respondent also signed the agreement. CX 19; T. at 25. I find that this action reflects the Respondent's intention to likewise be bound by its provisions. Further, I find that the Prosecuting Party's 2010 allegation of "fraud" has no merit. Indeed, as discussed above, I have found that the Respondent's notice to USCIS, citing only the second approved LCA (receipt no. 07-010-52367) was proper. Accordingly, I find that any claim the Prosecuting Party had regarding the Respondent's obligation to pay him back wages, or benefits, or travel expenses of any kind, was completely extinguished by the Prosecuting Party's execution of the settlement agreement and release, and the concomitant payment of \$7,000.00.⁶⁰

Respondent's Obligation to Pay Benefits

The Prosecuting Party also has alleged that the Respondent failed to pay applicable benefits during his period of employment. Under the regulation, an employer must offer an H-1B employee benefits to the same extent that the employer offers benefits to similarly-situated U.S. workers. § 655.731(c)(3). The Prosecuting Party raised this issue in his 2008 complaint.⁶¹ RX 20. The Administrator's March 2014 Determination Letter did not make an explicit finding regarding whether the Respondent failed to pay benefits to the Prosecuting Party. Notwithstanding that the Administrator's Determination did not specifically address the benefits issue, I have jurisdiction to adjudicate this aspect of the Prosecuting Party's complaint. Batyrbekov v. Barclays Capital, ARB No. 13-013, ALJ No. 2011-LCA-25 (ARB July 16, 2014), slip op. at 15-16.

The burden is on the Prosecuting Party to establish his entitlement to benefits. Id., at 16. Though the Prosecuting Party asserts that the Respondent failed to pay him benefits equivalent to

⁶⁰ I acknowledge that this amount is less than what I have computed the Respondent's back wage obligation to be. Nevertheless, I find that it represents a reasonable compromise of the Prosecuting Party's claim against the Respondent, and note in particular that the Prosecuting Party received payment approximately 45 days after his attorney sent a demand letter to the Respondent. I note that the Prosecuting Party was represented by counsel when he signed the settlement agreement. In this Decision, I render no findings relating to the Prosecuting Party's attorney's representation of the Prosecuting Party's interests.

⁶¹ The Prosecuting Party checked Box 4(e) on the Form WH-4, which alleges that an employer failed to pay fringe benefits equivalent to those provided to U.S. workers.

those given to U.S. workers during his employment, the Prosecuting Party did not provide evidence on this issue. When the Respondent terminated the Prosecuting Party's employment, the severance agreement indicated that the Respondent would pay the Prosecuting Party's accrued vacation. CX 13. The Respondent did so. RX 8. There is no evidence of record that the Respondent's payment for accrued vacation pay was insufficient, or that the Respondent failed to pay the Prosecuting Party benefits equivalent to those paid to U.S. workers.

Under the regulation, an employer may only lawfully employ an H-1B employee at locations other than the location specified in an approved LCA for short time periods. § 655.735(c). And when an employer employs an H-1B worker for a short-term period at a worksite that is different from the worksite specified in an approved LCA, in most cases the employer must pay a per diem consisting of lodging, meal, and incidental expenses. § 655.735(b). In fact, it is not even clear, from the record, whether the Prosecuting Party raised this issue in his 2008 WHD complaint.⁶² RX 20; see also T. at 201-04 (Prosecuting Party discusses his 2008 WHD complaint); 223-24 (Prosecuting Party stated he informed the Respondent (not WHD) that having him work at a site other than site specified on the LCA may be a violation).

Moreover, the issue of whether the Respondent failed to pay the Prosecuting Party applicable benefits was addressed in the 2008 settlement agreement. As noted, the 2008 settlement agreement specifically stated that the Respondent owed the Prosecuting Party no additional amounts for benefits.⁶³ I find, accordingly, that the parties' execution of the 2008 settlement agreement fully extinguished any claim the Prosecuting Party may have had regarding the Respondent's liability for payment of benefits relating to the Prosecuting Party's employment, whether involving vacation or health benefits, or payment of per diem expenses.

Respondent's Alleged Regulatory Violations during Employment Period

The Prosecuting Party also has alleged that the Respondent committed various regulatory violations during the employment period. As discussed above, I have found that the Prosecuting Party's allegation that the Respondent misrepresented material facts on the LCA petition by stating that his job location was in Fairfax was untimely.

In the 2008 WHD complaint, the Prosecuting Party asserted that the Respondent failed to provide him with copies of his LCAs, as required under § 655.734. See RX 20. The Administrator determined that this allegation was substantiated, but did not impose any remedy, other than to direct the Respondent to provide employees with copies of their applicable LCAs in the future. CX 1. The Prosecuting Party did not include this issue in his request for a hearing

⁶² In his Hearing Request the Prosecuting Party raised this as a separate issue. See Hearing Request at 15.

⁶³ I find that this language could reasonably be construed to relate both to benefits equivalent to those paid to U.S. workers and benefits required under the Act's H-1B regulations. The agreement also stated that the Prosecuting Party agreed that the Respondent properly informed him of his health benefits (COBRA) options. CX 13.

before an administrative law judge. Hearing Request. Therefore, I find it is not necessary for me to adjudicate this issue. See § 655.820(c)(3).

CONCLUSION

Based on the foregoing, I conclude the following:

1. The Prosecuting Party's 2008 WHD complaint was timely.
2. The Respondent effected a bona fide termination of the Prosecuting Party's employment by February 2, 2007. Accordingly, the Respondent's obligation to pay back wages to the Prosecuting Party ended on February 2, 2007.
3. The Respondent's back wage obligation to the Prosecuting Party, as of February 2, 2007, totaled \$11,491.26.
4. The Prosecuting Party failed to establish that the Respondent did not offer him benefits equivalent to those offered to U.S. workers.
5. Because in 2008 the Prosecuting Party signed a settlement agreement and release, and accepted the sum of \$7,000.00 in consideration of same, the Respondent does not now owe any back wages or payment of benefits to the Prosecuting Party. Nor does the Respondent owe any ancillary damages to the Prosecuting Party.
6. Because the Respondent has no current monetary liability to the Prosecuting Party, the Respondent does not owe any interest to the Prosecuting Party.
7. The Prosecuting Party has failed to establish that the Respondent retaliated against him. Because no retaliation is established, the Prosecuting Party has failed to establish any entitlement to compensatory damages.
8. The Prosecuting Party has not established any statutory basis for punitive damages.

ORDER

Based on the foregoing, I AFFIRM the Administrator's determination that the Respondent does not currently owe any back wages, or any other amount of money, to the Prosecuting Party. See § 655.840(b).⁶⁴

Adele H. Odegard
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. To be effective, such petition shall be received by the Board within thirty (30) calendar days of the date of this Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. The Board's address is U.S. Department of Labor, Administrative Review Board, Room S5220 FPB, 200 Constitution Ave NW, Washington, DC 20210. 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.

⁶⁴ My other findings are set out in the paragraph above.