

U.S. Department of Labor

Office of Administrative Law Judges
William S. Moorhead Federal Office Building
1000 Liberty Avenue, Suite 1800
Pittsburgh, PA 15222

(412) 644-5754
(412) 644-5005 (FAX)



Issue Date: 19 July 2016

CASE NO.: 2016-LCA-17

In the Matter of:

SHONA MEAD,
Prosecuting Party

v.

S3J ELECTRONICS ACQUISITION CORPORATION,
Respondent

Appearances:

Prosecuting Party, *pro se*¹

Michael S. Smith, Esq.,
For the Respondent

DECISION AND ORDER

This matter arises under the provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) and 1182(n), (“INA”) and the regulations thereunder at 20 C.F.R. § 655.800 et seq. and in accordance with 29 C.F.R. Part 18, the Rules of Practice and Procedure of the Office of Administrative Law Judges.

I. PROCEDURAL HISTORY

On July 23, 2015, Shona Mead (“Ms. Mead” or “Complainant”) filed a complaint against S3J Electronics Acquisition Corporation, the Respondent (“S3J” or “the Employer”) with the Department of Labor, (“DOL”) alleging several violations of the H-1B provisions, including that the employer misrepresented a material fact on the Labor Condition Application (“LCA”), failed to pay correct wages and provide certain fringe benefits, failed to provide the Complainant with a copy of the LCA and failed to conduct a bona fide termination. On March 25, 2016, the Administrator of the Wage and Hour Division (“Administrator”) issued Administrator’s

¹ Ms. Mead is a pro se litigant, therefore I will construe her complaints and papers that she files “liberally in deference to [her] lack of training in the law” and with a degree of adjudicative latitude. *Young v. Schlumberger Oil Field Serv.*, ARB Case No. 00-075, ALJ Case No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), citing *Hughes v. Rowe*, 449 U.S. 5 (1980). See also *Nalinabai P. Chellaurai v. Infinite Solutions, Inc.*, ARB Case No. 03-072, ALJ Case No. 03-LCA-004 (ARB July 24, 2006); *Guy Santiglia v. Sun Microsystems, Inc.*, ARB Case No. 03-076, ALJ Case No. 2003 LCA-2 (ARB July 29, 2005).

Determination Pursuant to Regulations at 20 C.F.R. Part 655 H-1B Specialty Occupations under the Immigration and Nationality Act (INA) administered by the Department of Labor (DOL). The Administrator found that S3J “failed to pay wages in violation of 20 C.F.R. § 655.731. Citing 20 C.F.R. § 655.805(a)(2), the Administrator also found “the violation includes failure to pay the required wage for productive time and failure to provide the H-1B nonimmigrant with payment for return transportation to her home country.” The Administrator did not assess civil money penalties. The Administrator ordered S3J to pay back wages a net amount of \$4,526.33 after the deduction of required taxes to Ms. Mead and ordered S3J to comply with 20 C.F.R. § 655.805(a)(2) in the future. The Administrator did not indicate whether this amount included transportation costs and provided no discussion or explanation of the dates, wages or calculations it used to determine this amount.

On March 31, 2016, Ms. Mead appealed the Administrator’s determination and requested a formal hearing before an Administrative Law Judge (“ALJ”). A hearing was scheduled for May 3, 2016. By letter dated April 27, 2016, S3J indicated that it would be ceasing all business activities effective on the close of business on April 29, 2016 and would not be participating in the appeal of this matter. On April 28, 2016, the undersigned issued an Order to Show Cause Why Default Judgment Should Not be Granted Against Respondent, S3J Electronics Acquisition Corporation. Respondent failed to respond to the Order to Show Cause. The Complainant submitted her timely response to the Order to Show Cause in which she alleged that S3J is the parent name of a second corporation, Momentum Lighting,² and requested the May 3, 2016 hearing to go forward. On the same date, the undersigned’s clerk confirmed in a call with the Respondent’s representative that the Respondent would not attend the scheduled hearing.

Considering the Respondent’s failure to respond to the Order to Show Cause and indication that it will not appear or participate in this matter, a hearing was determined to be unnecessary and an inefficient use of resources. It was determined that a decision on the record would be the best way to proceed. The hearing was cancelled and the parties were given additional time to submit evidence, affidavits of testimony and closing briefs.

Complainant timely submitted exhibits i-x, which the undersigned correspondingly re-numbers as Complainant’s Exhibits (“CX”) 1-10 for clarity. Complainant also timely submitted a declaration titled “Affidavit Regarding My Testimony.” Closing briefs were due May 17, 2016 and Complainant submitted a brief along with her evidence. Respondent did not submit evidence or a brief.

II. PARTIES’ CONTENTIONS

The Complainant contends that the Employer did not complete a bona fide termination of her employment with S3J, the Employer did not pay the required wage, and the employer inaccurately determined and described the LCA Prevailing Wage and Wage Level.

The Respondent did not respond.

² Momentum Lighting has not been joined as a party in this matter. *See* Fed. Rules Civ. Proc. R. 18-22.

III. ISSUES

1. Whether the improper prevailing wage determination was used on the LCA pursuant to 20 C.F.R. § 655.731(a)(2);
2. Whether the Employer completed a bona fide termination of Ms. Mead's employment and if so, when;
3. What, if any, remedies are appropriate?

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of H-1B Process

Under the INA, an employer may hire nonimmigrant foreign workers to work in "specialty occupations"³ that require specific knowledge and a relevant degree for prescribed periods of time. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. To apply for an H-1B visa, the employer must file a Labor Condition Application ("LCA") with the DOL in which the employer describes the wages, working conditions and benefits to be provided to the prospective H-1B employee and attests that the employer will comply with certain obligations. 20 C.F.R. §§ 655.700 (a)(3), 655.705(c). If the DOL certifies the LCA, the prospective employer files a petition with U.S. Citizenship and Immigration Services ("USCIS") of the Department of Homeland Security ("DHS"). If USCIS grants the petition, the prospective worker applies for the H-1B visa with the Department of State and may begin work with the employer after the H-1B visa is issued. 20 C.F.R. § 655.705(a), (b).

The LCA states that the employer will offer the H-1B worker wages that are at least (1) the actual wage paid by the employer to other individuals with similar experience and qualifications for the same position, or (2) the prevailing wage level for the occupational classification in the area of employment, whichever is greater. 8 U.S.C. § 1182(n)(1)(A)(i).

B. Summary of Evidence

1. *Declaration Testimony and Other Statements*

Ms. Mead provided a written statement of her testimony titled "Affidavit Regarding My Testimony," signed and dated May 6, 2016, in which she both explained facts and provided argument to support her allegations. Her other evidence submissions also provide relevant facts and argument.

Ms. Mead stated that she had a successful and accomplished sixteen-year professional career prior to her employment at S3J. (Affidavit Regarding My Testimony ("Declaration") at

³ "Specialty occupations" are occupations that require "theoretical and practical application of a body of highly specialized knowledge," and "a bachelor's or higher degree in the specific specialty (or its equivalent)" as a minimum for entry into the occupation in the U.S. 8 U.S.C.A. § 1184(i)(1); 20 C.F.R. § 655.715.

2). She expected to be fairly compensated in salary and benefits as described by her job offer from S3J. (*Id.*) She stated that she worked only thirty days into the H-1B period that was authorized until July 30, 2017 and was promised Green Card sponsorship along with her position. (*Id.*) She also would receive a 7% equity share in the company, effective January 1, 2015. (*Id.*) The visa authorized her to begin working on August 5, 2014. Ms. Mead began work on August 11, 2016 and the appointment to her position at S3J began August 11, 2014. (CX 1; Declaration at 3). She was the only H-1B employee and the only employee at her seniority and wage level. (CX 1).

Ms. Mead stated she was paid at a rate of \$50,000 per year for the period of August 11, 2014 up to and including October 3, 2014. (Declaration at 3). No evidence shows that Ms. Mead worked for S3J beyond that date. Ms. Mead also stated that she and S3J had agreed that she would start at \$50,000 and her salary would increase over eighteen months to the agreed-upon \$150,000 salary. (CX 1). Ms. Mead agreed with the Administrator that she had been underpaid; however, she believes that she is entitled to more than the Administrator determined. (Declaration at 4). Ms. Mead believes that the Wage Skill Level listed on the LCA should be Level 4 rather than Level, 1 and the title “Chief Executives/Officers” should have been used on the LCA instead of “Marketing Manager.” (*Id.*) She seeks to be paid at the rate of \$215,467 per year, as a Level 4 Chief Executive/Officer. (*Id.* at 3). She seeks return transportation airfare of \$626 and interest. (*Id.* at 4). She also included a chart which listed the prevailing wage rates of Marketing Manager Level 1 and 4 and Executive/Officer Level 4 with various dates and the following headings: (1) Pub conversation revealing issue Sept. 30 and Oct. 3, 2014, (2) USCIS contacted by S3J Oct. 6, 2014, (3) ESTA Visa application in UK May 18, 2015, (4) Return to US as “visitor” on ESTA June 6, 2015, (5) Date of ALJ hearing May 3, 2016, and (6) Bona fide termination complete, still outstanding. She calculated the wages from each prevailing wage to each date, except the bona fide termination, which she listed as “TBD.” (*Id.*) The amounts listed range from \$3,900.33 to \$370,544.88. (*Id.*)

Ms. Mead stated that she has been disadvantaged by the lack of fringe benefits that had been offered but not provided, including green card, 7% equity share and 2x bonus programs. (*Id.*) She also has been disadvantaged by the “ramifications on other obligations,” stress and anxiety and “opportunity cost.” (*Id.*) She stated, “It is difficult to attach a precise cost or value to many of these factors and I would revert my trust to the you [sic], the OALJ [sic] to consider a fair reflection to these significant issues.” (*Id.*)

S3J Electronics was later known as S3J Electronics Acquisition Corporation. (*Id.* at 2). Ms. Mead believed internal disputes between the owner of S3J, Don Doody, minority owner, Bill Schmitz, and Mr. Doody’s wife, Kristi Doody were motivation to remove her from her position. (*Id.*) She had a meeting in a bar on September 30, 2014 with Bill Schmitz, the minority owner, that she described as “unclear and inconclusive.” (*Id.*) She did not expect that this meeting that she had proposed “as a catch-up to discuss website development and new branding names” could be “seriously comprehended as the termination meeting” of her role with S3J. (*Id.* at 2). She did not have a formal conversation or anything in writing and found the experience to be disrespectful. (*Id.* at 2, 4, 5). Bill Schmitz did not require her to return company equipment. (*Id.* at 4). Her last paycheck was through October 3, 2014. (*Id.* at 3).

She learned from DOL Investigator, Shequeila Birdsong, that S3J notified USCIS, but Ms. Mead did not include a date of her phone conversation with the investigator. (*Id.* at 4). She has not been offered any payment for transportation back to her foreign residence, nor has she received payment as ordered in the DOL Administrator’s Determination. (CX 2). Ms. Mead borrowed money to return to the U.K. on May 6, 2015. (Declaration at 4). She does not believe that S3J has completed a bona fide termination. (*Id.*; CX 1; CX 2).

By a letter dated May 12, 2016 and titled “Notification of an Amendment,” which I construe to be an amendment to her declaration, Ms. Mead stated she believed that she “may have incorrectly noted the date the respondent apparently notified the USCIS of their intent to terminate employment.” She stated it “was most likely not October 6th, 2014 and more likely March 20th, 2015.” She reiterated that she did not receive notification to enable her to clarify a date and stated that “I trust in the DOL’s investigations to corroborate an actual date that the respondent apparently completed just one of the required steps in order to effect a Bonafide Termination under H-1B Provisions of the Immigration and Nationality Act.”

2. *Documentary Evidence*

Complainant’s Exhibits⁴

- CX 1: Complainant’s Appeal of Administrator’s Determination and request for a hearing, dated March 31, 2016; screenshots from Foreign Labor Certification Data Center Online Wage Library, www.flcdatcenter.com, showing search results for Marketing Manager and Chief Executive and corresponding wages for levels 1 through 4;⁵ Job Description Chief Marketing Officer S3J Electronics Acquisition Corp.⁶
- CX 2: Complainant’s Prehearing submission, dated April 21, 2016; (1.1)⁷ scan of Summary of Violation and Remedy from Administrator’s Determination; (1.2) screenshot from DOL Employment Standards Administration presentation explaining that an employer’s obligation to pay ends only after bona fide termination shown by notification of the employee and USCIS and payment of transportation home if required; (1.3) screenshot from foreignlaborcert.doleta.gov Termination of Employment Question and Answer; (1.4) pages 11 and 12 of *Amtel Group of Florida, Inc. v. Rungvichit Yongmahapakorn*, ARB Case No. 04-087; ALJ Case No. 2004-LCA-006 (Sept. 29, 2006); (2.1) screenshot of page 7 of Employment & Training Administration: Prevailing Wage Determination Policy Guidance, revised Nov. 2009, flcdatcenter.com, listing descriptions of Level I-IV for LCA; (2.2) see above at CX 1; (2.3) see above at CX 1; (2.4); scanned copy of Complainant’s job offer letter, dated May 14, 2014 and signed by Bill Schmitz, President and Shona Mead on May 19 and 20, 2014, respectively; (2.5) Complainant’s resume as of August 2014; (2.6) see above at CX 1; scanned copies of blank “2014 Corporate &

⁴ The documentary evidence provided here is assumed to be reliable.

⁵ This was also submitted as CX 2 (2.2) and (2.3).

⁶ This was also submitted as CX 2 (2.6).

⁷ These numbers refer to the Complainant’s additional numbering in her evidentiary submission.

Functional Goals Draft,” “Focus on ... Continuous Improvement Draft – For Team Discussion” listing Shona, Bill and Kristi as facilitator/leader for listed goals and blank “Product Development & Innovation Roadmap;” (2.8) screenshot of email and response, dated December 23, 2014, scheduling an appointment with Dr. Lange at Greater Rochester Chiropractic and photo of Dr. Leslie W. Lange’s business card with four semi-legible receipts from Greater Rochester Chiropractic .

CX 3: Complainant’s Response to April 28, 2016 Order to Show Cause, dated April 28, 2016.

CX 4: Labor Condition Application for Nonimmigrant Workers ETA form 9035CP – General Instruction for the 9035 & 9035E U.S. DOL, Section G Employment and Prevailing Wage Information.

CX 5: LCA for Nonimmigrant Workers ETA Form 9035 & 9035E for Shona Mead.

CX 6: VISANOW Global Immigration Signature Card Power of Attorney, signed by Bill Schmitz, dated June 11, 2014.

CX 7: 2014 W-2 for Shona Mead from Employer, S3J Electronics Acquisition Corp.

CX 8: Email correspondence between Shona Mead, Donald Doody, Bill Schmitz and Kristi Doody from September 24, 25, 26, and 29, 2014 discussing potential name changes, rebranding and logo design for S3J Electronics, S3J Electronics Acquisition Corp. and Momentum Lighting.

CX 9: Two screenshots from Momentumlighting.com titled, “Momentum Lighting Intelligent Solutions for a Brighter World” that note S3J Electronics Acquisition Corp. is the parent company and located in Buffalo, New York.

CX 10: Screenshot from Washington.intercreditreport.com titled, “S3J Electronics Acquisition Corp DBA Momentum Lighting.”

C. Discussion

Prevailing Wage Rate

“The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application.” 20 C.F.R. § 655.731(a)(2). An employer is not required to use any specific method to determine the prevailing wage and “may utilize a wage obtained from an OFLC NPC (OES),⁸ an independent authoritative source, or other legitimate source of wage data.” *Id.*

⁸ These acronyms stand for “Online Foreign Labor Certification National Processing Center (Occupational Employment Statistics).”

The Complainant alleges that an improper prevailing wage determination was used on the LCA associated with her position pursuant to 20 C.F.R. § 655.731(a)(2). On the LCA, the Employer noted that the prevailing wage source used was OES and specifically noted that the wage was from the OFLC Online Data Center. (CX 5). The LCA lists the prevailing wage as \$80,974 per year at wage level 1. Screenshots of the Foreign Labor Certification Data Center Online Wage Library that show for OES/SOC title of Marketing Managers located in the Buffalo-Niagara Falls, New York area at wage level 1, the salary is \$38.93 per hour and \$80,974 per year. (CX 1). The regulations state that an employer may use a wage obtained from OFLC and OES. 20 C.F.R. § 655.731(a)(2). Here, the Employer indicated that it used data from sources specifically named in the regulations and the amount listed on the LCA, \$80,974 per year, is identical to that listed on the screenshot from the Foreign Labor Certification Data Center Online Wage Library. Therefore, the Employer did not use an improper prevailing wage determination on the LCA.

Job Description and Duties

An employer is required to pay an H-1B employee based on the LCA submitted for that employee's H-1B visa, not based on what work the H-1B employee performs. 20 C.F.R. § 655.731(c)(8). The Complainant has provided two pages of a case which applies here.⁹ See CX 2 (1.4); *Amtel Group Of Florida, Inc. v. Rungvichit Yongmahapakorn*, ARB Case No. 04-087; ALJ Case No. 2004-LCA-006 (ARB Sept. 29, 2006), *recon. denied*, ARB Case No. 07-104 (ARB January 29, 2008).

In *Amtel*, the H-1B employee, Rungvichit Yongmahapakorn, had alleged in her complaint that her employer, Amtel, had violated the INA by failing to pay her the prevailing wage for the job she actually performed, alleging that Amtel had filed a false LCA. *Amtel*, ARB Case No. 04-087. The Administrative Law Judge ("ALJ") agreed and used the prevailing wage of the job she performed, that is the prevailing wage of vice president instead of internal auditor. *Id.* There, Amtel had a separate LCA filed for a different employee who was categorized as vice president. *Id.* However, the Administrative Review Board ("ARB") determined that the ALJ had erred. Amtel had submitted Yongmahapakorn's LCA for the position of internal auditor; it had never submitted an LCA for Yongmahapakorn seeking to employ her as vice president. *Id.* The Administrative Review Board ("ARB") reversed the ALJ, finding that the employer's required wage was the wage listed on the LCA, the only LCA pursuant to which the employee's visa had been approved. *Id.* This was pursuant to 20 C.F.R. § 655.731(c)(8), which states, "If the employee works in an occupation other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working." *Id.*

Here, the dispute over the wage rate is quite similar to that in *Amtel*. Ms. Mead alleges that S3J has violated the INA by failing to pay her for the position of "Chief Executive/Officer," level 4, as she had been performing the duties of this position, and she alleges S3J has

⁹ Ms. Mead only provided the pages of this case which discuss the issue of bona fide termination. I however reviewed this case in its entirety.

misrepresented the position on the LCA. S3J filed an LCA for Ms. Mead and categorized her as a “Marketing Manager,” level 1. This LCA was approved for Ms. Mead’s H-1B visa. Consequently, S3J’s wage obligation is based on the job of Marketing Manager, level 1, at \$80,974 per year, even if Ms. Mead performed duties more complex than those listed in the description provided from the OFLC Online Data Center. (CX 5).

The Complainant has alleged that her position at S3J as “Chief Marketing Officer” is more akin to the OES title “Chief Executives/Officers” with responsibilities more similar to level 4, fully competent, than to the job titled “Marketing Manager,” level 1, entry level. The description for Marketing Manager includes duties such as planning, directing and coordinating marketing policies and programs, developing pricing strategies, ensuring customer satisfaction, overseeing product development and monitoring trends that indicate the need for new products and services. (CX 1). The description for Chief Executive includes duties such as determining and creating policies, providing overall direction of companies, and planning, directing and coordinating operational activities at the highest level of management with staff assistance. (CX 1). The job description for the Complainant’s position of “Chief Marketing Officer” at S3J includes responsibilities such as serving as “brand steward,” pioneering the brand, ensuring the company “delivers on its brand promise” via marketing and public relations, defining the product portfolio, developing marketing campaigns, and monitoring trends.

Comparing the description of the Complainant’s position with the descriptions from the Foreign Labor Certification Data Center Online Wage Library, it is determined that the title “Marketing Manager” accurately reflects the description of the “Chief Marketing Officer” position. Therefore, not only did the Employer use a proper prevailing wage determination, it also used a proper description of the position. Also, Ms. Mead has presented no evidence, other than her assertions, that the Employer misrepresented her position or job level. As described above, the LCA is the controlling document for determining prevailing wage rate. I additionally note that the wage for Marketing Manager, level 1 is listed at \$80,974 per year, at level 4 is listed at \$152,776 per year and Chief Executive/Officer, level 4 is listed at \$215,467 per year. (CX 1; CX 2). The wage promised to Ms. Mead was \$150,000, quite similar to Marketing Manager, level 4. Had she reached the \$150,000 pay level promised after six months, her wages would have been within 1% of the prevailing wage for Marketing Manager, level 4.

In sum, S3J’s wage obligation is based on the job of Marketing Manager, level 1, at \$80,974 per year. I find Employer therefore, used a proper prevailing wage determination, and proper description of the position.

Enforceable Wage

“The enforceable wage obligation for an employer of an H-1B nonimmigrant is the actual wage level or the prevailing wage level listed in the LCA, whichever is greater. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731(c)(6)(i), 655.731(c)(7)(i).” *Nalinabai P. Chelladurai v. Infinite Solutions, Inc.*, ARB Case No. 03-072; ALJ Case No. 03-LCA-004 (ARB Apr. 26, 2006), *reconsideration denied*, July 24, 2006; *Nikesh K. Jain v. Empower IT, Inc. d/b/a/ Infobahn Technologies*, ARB Case No. 08-077, ALJ Case No. 2008-LCA-008 (ARB Oct. 30, 2009). The prevailing wage is a “floor;” an employer may not pay less than the prevailing wage, but it may

pay more. The actual wage is the wage paid by the employer to all other individuals with substantially similar experience and qualifications who perform the same duties and have the same responsibilities as the H-1B employee. 20 C.F.R. § 655.713(a)(1). If there are no other employees with substantially similar experience, qualifications, duties and responsibilities, then the actual wage is the wage that the employer pays to the H-1B nonimmigrant. *Id.*

In *Chelladurai*, the job offer listed a higher wage, but only the prevailing wage rate was listed on the LCA, so the prevailing wage rate was used as the rate. *Id.* The ARB has also upheld an ALJ's determination that the employee should be paid the prevailing wage rate of \$25.74 per hour rather than the \$20 per hour paid by the employer. *Adm'r, Wage and Hour Division, U.S. DOL, v. Native Technologies, Inc.*, ARB Case No. 98-034, ALJ Case No. 96-LCA-2 (ARB May 28, 1999). The employer was liable for the difference between the prevailing wage rate of \$25.74 and the \$20 per hour paid, or \$5.74 per hour based on a 40 hour work week. *Id.* In *Jain*, the employer paid the complainant more than the prevailing wage during part of the complainant's employment, so was not responsible for back wages for that time because the employer paid at least the prevailing wage. *Jain*, ARB Case No. 08-077.

Ms. Mead has stated that she was the only H-1B employee and no other employees had a similar position or experience. (CX 1). There is no evidence that S3J employed other individuals with similar experience, qualifications, duties and responsibilities as the Complainant, therefore the actual wage is the wage that S3J paid to Ms. Mead. Ms. Mead has indicated that she was paid at a rate of \$50,000 per year. (CX 1; CX 2). Although she and the Employer agreed to a higher salary of \$150,000 per year, Ms. Mead indicated that she and the Employer agreed that this salary would materialize over an 18 month period with \$50,000 raises every six months. (CX 1). The Complainant's 2014 W-2 from her employment with S3J shows that she was paid \$8,000 in 2014. (CX 7). Ms. Mead stated in her declaration that she began work on August 11, 2014 and was paid from August 11, 2014 up to and including October 3, 2014, which is eight weeks of paid employment. (Declaration at 3).

The prevailing wage on the LCA is \$80,974 per year. Because \$80,974 is higher than the actual wage of \$50,000 per year that was being paid to Ms. Mead, the enforceable wage is the prevailing wage of \$80,974 per year. I find, Ms. Mead should be paid the prevailing wage of \$80,974 for the eight weeks of her employment with S3J and is entitled to the difference as back wages from August 11, 2014 through October 3, 2014.

Bona fide Termination

An employer need not pay wages to an H-1B employee "if there has been a bona fide termination of the employment relationship." 20 C.F.R. § 655.731(c)(7)(ii). The employer has the burden of proof to establish bona fide termination by a preponderance of the evidence. *Ravikumar Gupta v. Jain Software Consulting, Inc.*, ARB Case No. 05-008, ALJ Case No. 2004-LCA-39 (ARB Mar. 30, 2007); *Adm'r v. Ken Techs., Inc.*, ARB No. 03-140, ALJ No. 2003-LCA-015, slip op. at 4-5 (ARB Sept. 30, 2004). An employer must complete three steps to complete a bona fide termination; it must: (1) notify the employee that the employment relationship is terminated, (2) notify DHS/USCIS that the employment relationship has been terminated, and (3) provide the employee with payment for transportation home in certain

circumstances. *Kevin Limanseto v. Ganze & Co.*, ARB Case N. 11-068, ALJ Case No. 2011-LCA-005 (ARB June 6, 2013); *Ravikumar Gupta v. Jain Software Consulting, Inc.*, ARB Case No. 05-008, ALJ Case No. 2004-LCA-39 (ARB Mar. 30, 2007); *Amtel*, ARB Case No. 04-087. The employer is liable for the reasonable cost of transportation to the H-1B employee's last place of foreign residence if the employee is dismissed from employment prior to the end of the authorized H-1B visa period. 8 C.F.R. § 214.2(h)(4)(iii)(E).

The ARB has held that the date that all three steps of bona fide termination are completed is the date that relieves the employer of its liability for payment of wages. *Adm'r & Wirth v. Univ. of Miami, Miller Sch. of Med.*, ARB Case Nos. 10-090,10-093, ALJ Case No. 2009-LCA-026 (Dec. 20, 2011) (the employer notified the employee and offered airfare six months prior to when it notified USCIS and was found liable for wages until the last step was complete). However, it has also explained that failure to report an H-1B employee's termination to DHS "is the critical element of proof that there was no *bona fide* termination of the employment relationship" that would relieve an employer of the liability to pay an H-1B employee's salary for the entire three year period of the H-1B visa. *Mao v. Nasser Eng'g & Computing Servs.*, ARB No. 06-121, ALJ No. 2005-LCA-036 (ARB Nov. 26, 2008); *see also Amtel*, ARB Case No. 04-087.

Ms. Mead relies on a strict interpretation of *Amtel* in her request for wages equaling the entirety of her H-1B visa period, August 11, 2014 when she started work, until July 30, 2017, the end of her visa period. In *Amtel*, the employer was required to pay for the entire three year period, but it had only met a single step of bona fide termination; it had only notified the H-1B employee. *Amtel*, ARB Case No. 04-087. The ARB has also required the employer to pay three years of wages in *Mao*, where the employer had notified the employee, but did not notify DHS. *Mao*, ARB No. 06-121. The employer in *Mao* additionally had agreed to place the employee on personal leave and had the employee work on at least one other project during his visa period. *Id.* In *Limanseto*, the ARB determined that there was no bona fide termination when the employer had notified the H-1B employee, but had not notified USCIS until after the employee filed his complaint. ARB Case N. 11-068. There, the employer reimbursed airfare after the case concluded. *Id.* In *Wirth*, notifying USCIS was the step that the employer had not completed and it was liable until USCIS was notified. ARB Case Nos. 10-090, 10-093. Administrative Law Judges have also found that an employer effected bona fide termination without the employer paying for the H-1B employee's transportation home. In these cases, however, the H-1B employee had remained in the U.S. working for a different employer or remained on a different visa. *See e.g. Vojtisek-Lom v. Clean Air Technologies Int'l, Inc.*, ALJ No. 2006-LCA-009, *aff'd on other grounds*, ALJ No. 2006-LCA-009 (ARB July 30, 2009); *Adm'r, Wage and Hour Division v. Itek Consulting, Inc.*, ALJ No. 2008-LCA-00046 (May 6, 2009).

The ARB has upheld as within the ALJ's discretion an ALJ's determination that "substantial compliance" with a rule is sufficient to meet an employer's burden to comply with technical requirements of an H-1B regulation. *Guy Santiglia v. Sun Microsystems, Inc.*, ARB Case No. 03-076, ALJ Case No. 2003-LCA-2 (ARB July 29, 2005) (the employer was found to have substantially complied with certain posting requirements when it posted one notice instead of two). "Substantial compliance" is "compliance with the essential requirements, whether of a contract or statute." *Id.*, *citing* Black's Law Dictionary 1280 (5th ed. 1979). Under the doctrine

of substantial compliance, a minor violation of a statutory requirement may be excused when the party complies with the “essential requirements.” Under the cases from the ARB, notification to USCIS and to the H-1B employee turn the determinations of whether an employer has effected bona fide termination of an employee. Therefore, the notification steps appear to be the essential requirements for bona fide termination. Paying the cost of transportation, on the other hand, appears to be a step less vital to the termination because in cases where the employee remained in the U.S. for employment, an employer effected bona fide termination despite not supplying transportation costs, although the employers were ultimately required to reimburse the costs.

There is no dispute that Ms. Mead’s employment with S3J ended by October 3, 2014. However, Ms. Mead has presented conflicting facts as to the exact ending date. She has repeatedly stated that her employment was terminated on September 30, 2014, although she was unsatisfied with the informal meeting and the employer did not provide a written dismissal. (CX 1; CX 2). She has stated that she was paid for her work from August 11, 2014 until October 3, 2014 and has not asserted that she is entitled to unpaid wages for work performed later than October 3. (Declaration at 3). Contradicting herself, Ms. Mead has also stated in her declaration that she only worked thirty days into her H-1B visa. (*Id.* at 2). This would put her ending date on September 19, 2014. I do not find 30 days of employment to be credible because Ms. Mead has also included emails between her employers and her from September 24 to 29, 2014 which discuss S3J business. (CX 2). Ms. Mead has not indicated that she continued to work for S3J after October 3, 2014, although she retained some company equipment for some time beyond that date. (CX 1). I find that the start date of August 11, 2014, termination date of September 30, 2014 and final pay of October 3, 2014 are more credible than her statement that she worked only thirty days because the email evidence establishes that she was still working until at least September 29, 2014. I therefore find that the S3J notified Ms. Mead that their employment relationship was terminated on September 30, 2014 and effective as of her last day of pay, October 3, 2014, thereby meeting this step of bona fide termination.

There is also no dispute that S3J notified USCIS; Ms. Mead stated in her appeal from the Administrator’s findings that S3J properly informed USCIS that her employment was terminated. (CX 1). She learned that this step had been properly completed when she spoke with a DOL investigator, but did not state the date of the conversation or date S3J notified USCIS. (Declaration at 4). Because the Complainant has admitted that S3J properly informed USCIS that her employment was terminated, I find that this step of bona fide termination was met.

The actual date of notification to USCIS is unclear. The Administrator did not state the notification date or any dates in its findings, but only awarded \$4,526.33 in back wages without explanation. Ms. Mead has set forth two dates when this may have happened. She has stated in her declaration that October 6, 2014 was the notification date. (Declaration at 4). In Ms. Mead’s letter titled “Notification of an Amendment,” dated May 12, 2016, she stated that “it was most likely not October 6, 2014 and more likely March 20, 2015.” Ms. Mead has not provided any explanation as to why she chose March 20, 2015 as the notification date. Based solely on the Administrator’s award of only \$4,523.33, it appears that the Administrator determined that bona fide termination occurred on or around October 3, 2014, and I believe October 6 to therefore be a credible date that S3J notified USCIS. However, the Administrator provided no dates. My implied date assumed from the Administrator’s back wage award is not enough to establish this

fact. Further, it is the employer's burden to establish that it effected bona fide termination and the Employer has provided no evidence. Consequently, Ms. Mead receives the benefit of S3J failing to meet its burden of proof. Because she stated that it is more likely S3J notified USCIS on March 20, 2015 and insufficient evidence contradicts this, I find that S3J properly notified USCIS that Ms. Mead's employment had been terminated on March 20, 2015.

In the case at hand, it is undisputed that Ms. Mead was dismissed prior to the end of her authorized H-1B visa period. The LCA lists the authorized period of employment from July 30, 2014 to July 30, 2017. (CX 5). She was dismissed prior to this on September 30, 2014 and her last day of paid employment was October 3, 2014. (CX 1; CX 2; Declaration at 3). It is also undisputed that the Employer did not provide return transportation to the Complainant, airfare costing \$626. (CX 2). Therefore, the final step of bona fide termination was not met.

However, S3J substantially complied with the bona fide termination requirements because it both notified the H-1B employee and notified USCIS, the "critical element of proof" that the ARB has repeatedly used as a determining factor of whether an employer effected bona fide termination. Unlike in *Amtel* and *Limanseto*, S3J notified USCIS and did so prior to Ms. Mead filing her complaint on July 23, 2015. ARB Case No. 04-087; ARB Case N. 11-068. Unlike in *Mao*, Ms. Mead has not indicated that she has worked on or will be working on other projects for S3J, nor has she asserted that she is owed back pay for dates other than August 11, 2014 until October 3, 2014. ARB No. 06-121. No evidence establishes that S3J provided transportation and Ms. Mead returned to the U.K. on May 6, 2015 using borrowed money. (Declaration at 4). The pattern of ARB decisions demonstrates that the notification steps are the vital steps in effecting a bona fide termination. Because S3J met the essential steps of notification of the employee and USCIS, I find that it effected bona fide termination on the date it substantially complied with the steps of bona fide termination, March 20, 2015 as stated by Ms. Mead, despite not yet providing the \$626 cost of transportation to Ms. Mead.

D. Remedies

An ALJ "may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." § 655.840(b). For example, an Administrator ordered back wages of \$1,000 to an employee, and the ALJ modified the order to provide the H-1B employee a higher prevailing wage rate than that used by the Administrator, plus two weeks of unpaid vacation, work related expenses, and fringe benefits including food and housing in the amount of over \$10,000. *Amtel*, ARB Case No. 04-087. In another case, the Administrator ordered over \$9,000 of back wages. *Kuanysh Batyrbekov v. Barclays Capital (Barclays Grp. US Inc.)*, ARB Case No. 13-013, ALJ Case No. 2011-LCA-025 (ARB July 16, 2014). The ALJ determined that the H-1B employee was actually entitled to one month less of wages because the date of bona fide termination was earlier, but upheld the Administrator's determination in part because the employee, not the employer, had requested the hearing. *Id.* On the employee's appeal, the ARB determined that the complainant was actually due even less compensation because the bona fide termination date was even earlier than the date the ALJ had determined. *Id.*

An employer's wage requirement obligation to an H-1B employee "includes the employer's obligation to offer benefits and eligibility for benefits provided as compensation for

services to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.” 20 C.F.R. § 655.731§ 655.731(a). An ALJ may rule on fringe benefits, but the H-1B employee has the burden to provide sufficient evidence that the ALJ can make the requisite calculations. *Batyrbekov*, ARB Case No. 13-013.

ALJs have noted that compensatory damages should be available under the INA, based on the availability of compensatory damages under whistleblower regulations to compensate employees for harms including loss of reputation, humiliation, mental anguish and emotional distress. See e.g. *Dongsheng Huang v. Ultimo Software Solutions, Inc.*, 2008-LCA-00011 (ALJ Dec. 17, 2008), *aff'd* ARB No. 09-044, 09-056 (Mar. 31, 2011), *aff'd* 579 Fed. Appx. 228 (5th Cir. 2014) (unpub.); *Amtel*, ALJ Case No. 2004-LCA-006. The worker must prove these damages by a preponderance of the evidence by showing, “(1) some objective manifestation of distress (sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation), plus (2) a causal connection between the employer’s violation of the anti-retaliation statute and the distress. *Huang*, 2008-LCA-00011, *citing Pierce v. U.S. Enrichment Corp.*, ARB Nos. 06-055, -058, -119, ALJ No. 2004-ERA-1 at 18 (ARB Aug. 29, 2008).

Back Wages – August 11, 2014 to October 3, 2014

An employer is responsible for the difference between the actual wages and the prevailing wage rate. *Native Technologies, Inc.*, ARB Case No. 98-034. Ms. Mead has stated that she was paid at a rate of \$50,000 per year for work from August 11, 2014 to October 3, 2014. This is eight weeks of work. The LCA shows her position to be full time, which is 40 hours per week. Her W-2 shows \$8,000 in wages for 2014. She should have been paid at the prevailing wage rate of \$80,974 per year, as shown on her LCA. This calculates to 40-hour work weeks with pay of \$1,557.20 per week because $80,974.40/52 \text{ weeks} = 1,557.20$. For eight weeks of work, pay at the prevailing wage rate should be \$12,457.60 because $1,557.20 \times 8 = 12,457.60$. Ms. Mead was only paid \$8,000 and therefore was underpaid by \$4,457.60 because $12,457.60 - 8,000 = 4,457.60$. Accordingly, S3J owes \$4,457.60 in back wages to bring Ms. Mead’s paid wages up to the applicable prevailing wage rate.

Wages Due Until Bona Fide Termination – October 4, 2014 to March 20, 2015

The date of bona fide termination determines the last day an employer is liable for wages. 20 C.F.R. § 655.731(c)(7)(ii); *Wirth*, ARB Case Nos. 10-090,10-093. Ms. Mead has requested payment up to the end of her H-1B visa period, July 30, 2017. Here, S3J effected bona fide termination as of March 20, 2015 by notifying USCIS and thereby substantially complying with the steps of bona fide termination and its liability for wages stops on that date. From October 4, 2014 until March 20, 2015 is 24 weeks. At the prevailing wage rate of \$80,974 per year, or \$1,557.20 per week, this equals \$37,372.80 because $1,557.20 \text{ per week} \times 24 \text{ weeks} = 37,372.80$. Therefore, I find S3J owes \$37,372.80 in wages from the period from her last paid day of work until S3J effected bona fide termination on March 20, 2015.

Transportation

Ms. Mead has requested \$626 for airfare to the U.K., her country of origin. Because no evidence indicates that transportation has been paid and I find \$626 to be reasonable, S3J owes Ms. Mead \$626 as cost of transportation to the U.K.

Interest

The Administrator¹⁰ determined that the Employer's debt "is subject to the assessment of interest, administrative cost charges and penalties in accordance with the Debt Collection Improvement Act of 1996 and Department of Labor policies." The Administrator determined that interest would be assessed "at the Treasury Tax and Loan Account rate," which is 1%, "on any principal that becomes delinquent." It also determined that "administrative cost charges will be assessed to help defray the Government's cost of collecting this debt. A penalty at the rate of 6% will be assessed on any portion of the debt remaining delinquent for more than 90 days." I affirm the Administrator's determination of the interest and potential penalty to be paid.

Other Benefits

The only evidence offered of other benefits is the job offer letter signed by the president of S3J, Bill Schmitz, and Ms. Mead. It shows 30 days paid vacation per year in addition to public holidays, rights to a 7% equity share in the company upon commencement and exercisable from January 1, 2015, a company sponsored Green Card, and other undescribed benefits to be discussed following one year of employment. (CX 2). First, the 7% equity share was not available until January 1, 2015, which is after Ms. Mead was no longer employed at S3J, so this is unavailable on that basis. Ms. Mead does not provide evidence of the value of the other benefits or timeline by which they would be offered, therefore I find there to be insufficient evidence to determine any other possible compensation for fringe benefits. Also, no evidence establishes what benefits the Employer offers to U.S. workers and whether they were similar to those offered to Ms. Mead, so there is insufficient evidence to show what other benefits S3J might have been obligated to provide.

Compensatory Damages

Ms. Mead asserts that she has been subject to stress and anxiety from the uncertainty of losing her job and that she declined other job opportunities. (CX 2). She also notes that she incurred costs of living in the U.S. (*Id.*) She requests compensation for each of these. (*Id.*) She asserts that the stress resulted in neck, shoulder and back pain that required chiropractic treatment from December 2014 until 2015. (*Id.*) She indicated that she visited a chiropractor in December 2014 and included a photo of receipts from this that are not legible. (*Id.*) The email appointment confirmation does not describe the reason for the treatment or indicate that it is for serious stress-related conditions, it only confirms an appointment date in December. (*Id.*) Ms.

¹⁰ I also note that the Administrator assessed no civil money penalties as a result of the Employer's violation and affirm the Administrator's determination that no civil money penalties be assessed. I further affirm the Administrator's order that S3J comply with 20 C.F.R. § 655.805(a)(2) in the future.

Mead's declaration that she felt stress, depression and anxiety until May or June 2015 and required chiropractic treatment is insufficient proof to support a compensatory damage award.

While it is understandable that maintaining a residence and paying costs of living without an income is stressful and burdensome, merely asserting stress is not sufficient to support a compensatory damage award, nor is asserting burdensome or inconvenience. Additionally, Ms. Mead does not assert any amount of compensation she is seeking for compensatory damages. Finally, a personal decision to choose one professional opportunity instead of another is not compensable, even when the opportunity does not work out as expected. Therefore, no compensatory damages are granted.

Total Compensation

Consequently, S3J owes Ms. Mead \$4,457.60 in back wages, plus \$37,372.80 until bona fide termination, and \$626 for transportation. This totals \$42,456.40, plus interest, as described above.

CONCLUSION

S3J did not use an improper prevailing wage determination because it used a source specifically identified in the regulations as an acceptable source of prevailing wage data. The duties Ms. Mead performed in her position at S3J do not determine the required wage obligation. S3J's required wage obligation is based on the job description identified on the LCA, Marketing Manager, level 1, because Ms. Mead's H-1B visa was approved pursuant to that LCA. Marketing Manager" accurately reflects Ms. Mead's job description. S3J's required wage obligation is the prevailing wage listed on the LCA, \$80,974 per year, because it was higher than the actual wage paid to Ms. Mead. S3J effected bona fide termination as of March 20, 2015, when it had notified USCIS and Ms. Mead of her termination, although it has not yet provided transportation costs. The bona fide termination reasonable cost of transportation is found to be \$626 for Ms. Mead's incurred airfare cost to the U.K. on May 6, 2015. S3J owes Ms. Mead the balance of back wages from August 11, 2014 to October 3, 2014 to bring her paid wages up to the prevailing wage rate. S3J also owes wages until it effected bona fide termination, from October 4, 2014 until bona fide termination on March 20, 2015. S3J owes Ms. Mead the reasonable cost of transportation to the United Kingdom.

Accordingly, it is **ORDERED** that the determination of the Administrator is **MODIFIED** such that S3J Electronics Acquisition Corporation shall pay Ms. Shona Mead \$42,456.40, plus interest, for back wages, wages until bona fide termination, and transportation, consistent with the findings above.

So Ordered,

NATALIE A. APPETTA
Administrative Law Judge

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

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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

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

