



**Issue date: 04Jun2002**

CASE NO. 2002-LCA-8

*In the Matter of:*

**VEENA RAMACHANDRAN,**  
Prosecuting Party,

vs.

**BLUE STAR INFOTECH,**  
Respondent,

and

**ADMINISTRATOR,**  
**WAGE AND HOUR DIVISION,**  
Party in Interest.

Appearances:

Veena Ramachandran  
Sunnyvale, California

Pro Se

Susan B. Burr, Esq.  
Palo Alto, California

For the Respondent

Jennifer L. Blackman, Esq.  
San Francisco, California

For the Administrator

BEFORE:                   **ALEXANDER KARST**  
                                  Administrative Law Judge

## DECISION AND ORDER

This proceeding arises under the Immigration and Nationality Act, as amended by the Immigration Act of 1990 and amended in 1991, 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), and 1184 (the Act) and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I. Prosecuting Party, Veena Ramachandran, filed with the Wage and Hour Division of the Employment Standards Administration, United States Department of Labor, the complaint against Blue Star Infotech (“Blue Star”) on September 25, 2001, asserting that Blue Star failed to pay H-1B workers the higher of the prevailing or actual wage; that Blue Star failed to provide fringe benefits to H-1B workers equivalent to those provided to U.S. workers; and that Blue Star retaliated or discriminated against her for disclosing information or filing a complaint about a violation of the H-1B laws and regulations. Adriana Iglesias, a DOL investigator, investigated Ms. Ramachandran’s claims and found no H-1B violations. CX 1; RX 1; TR 99, 131. A Determination Letter was issued by the Wage and Hour Division on January 3, 2002. CX 1.

Ms. Ramachandran timely requested a hearing by her letter of January 31, 2002. *See* 20 C.F.R. § 655.820. She asserted that Blue Star committed the following violations: caused her to work outside her classification; paid her below the prevailing wage; displaced American workers; did not recruit in good faith; did not post Labor Conditions Applications (“LCA”) at various work sites; did not pay similar wages to workers with the same experience; did not have a system of wage increases; paid her husband below prevailing wages; and retaliated against her for filing a complaint with the Department of Fair Employment and Housing and State Labor Commissioner. The case was heard on March 1, 2002.

Under the Act, an employer may hire workers from “specialty occupations” to work in the United States as nonimmigrants for prescribed periods of time. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. These workers are issued H-1B visas by the Department of State upon approval by the Immigration and Naturalization Service (“INS”). 20 C.F.R. § 655.705(b). An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the U.S. Department of Labor (“DOL”) by filing a Labor Conditions Application (“LCA”) before the worker is given an H-1B visa. *Id.* An LCA filed by an employer must set forth, *inter alia*, the prevailing wage rate, working conditions, including hours, shifts, vacation periods, and fringe benefits. 20 C.F.R. §§ 655.731 and 655.732. Upon certification of the LCA by the DOL, the employer is required to pay the prevailing wage and implement the working conditions set forth in the LCA. *Id.*

Ms. Ramachandran worked for USIN International (“USIN”), a wholly owned U.S. marketing subsidiary company of Blue Star. Blue Star, an Indian corporation headquartered in Bombay, India, provides software consulting services to major corporations around the world. CX 3.<sup>1</sup> USIN was established in 1991 and reorganized in 1995 to become a Blue Star Limited subsidiary company. In 1999, USIN boasted a gross annual income of \$4 million and had 42 employees. CX 3, p. 17.

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<sup>1</sup>CX references Prosecuting Party’s exhibits; RX references Respondent Administrator’s Exhibits; TR references the hearing transcript.

Ms. Ramachandran's husband, Ramachandran Bala,<sup>2</sup> came to the United States on an H-1B visa arranged by Blue Star in January of 1999. TR 35:22. Ms. Ramachandran accompanied him. She resided with her husband at the time she was offered a Sales Manager position with Blue Star in her appointment letter dated August 16, 1999. CX 4. In that letter, Blue Star offered her a salary of \$55,200 per year, medical insurance, and an incentive of \$24,000 per year. The incentive was offered "for each financial year, on a prorated basis, on 100% achievement of targets which will be set for [Ms. Ramachandran] each year." CX 4. In addition, "[a]n allowance of US \$1000/per month [was to] be paid in lieu of referenced incentive, from the start of [Ms. Ramachandran's] appointment until such time as referenced incentive becomes applicable." CX 4. With respect to Ms. Ramachandran's duties, the letter stated: "The Company shall be the sole judge to determine whether the work assigned to you is suitable or not and you shall not cease performing a part or the whole of your duties unilaterally." CX 4. The appointment letter was signed by Assar S. Sambtani, Director USIN International, Inc., and Ms. Ramachandran on August 16, 1999. By signing the letter, she agreed to accept the appointment on the stated terms and conditions and agreed to abide by company rules and regulations in force. CX 4, p. 23.

On September 23, 1999, Ms. Ramachandran's LCA was filed, and it was approved by the DOL one week later. CX 2. The LCA was submitted for the position of Sales Manager with a pay rate of \$55,200 and a prevailing wage of \$57,100, employment to begin on November 1, 1999 and end on November 1, 2002. CX 2. On October 8, 1999, Blue Star submitted a letter in support of Ms. Ramachandran's H-1B visa petition ("petition letter") describing the company and the duties Ms. Ramachandran would perform as a Sales Manager. CX 3. Mr. Bala, Ms. Ramachandran's husband and then Regional Manager, wrote:

As a Sales Manager with USIN International, Ms. Ramachandran will be responsible for developing business in the western region of the United States. In this capacity, her specific duties will include working closely with customers to find out their specific needs; liaising with offshore software teams in India or other agencies to develop solution proposals for customers; performing account management duties; and ensuring that deliveries are made on time and to the customer's quality specifications. She will be responsible for ensuring customer satisfaction and growing the business; developing new customer accounts based on referrals from the existing ones; and ensuring proper compliance with legal and commercial formalities. She will also be responsible for overseeing and evaluating the performance of personnel assigned to work at customer locations as well as administering their direction and operations in accordance with local laws and regulations in matters pertaining to visas, work permits; taxation and securing professional counsel when necessary. This position requires an individual with a bachelor's degree

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<sup>2</sup>Mr. Bala's birth name is Ramachandran Bala; however, on his passport and visa, it was inverted to Bala Ramachandran.

or the foreign equivalent in business administration, computer information systems or a related field and relevant experience.<sup>3</sup>

CX 3, pp. 17-18.

Ms. Ramachandran's H-1B visa application was signed by Mr. Bala on October 11, 1999, and Ms. Ramachandran's attorney at that time, Norman C. Plotkin, notified her by letter dated December 13, 1999 that her H-1B petition was approved by the INS. CX 2, p. 11. The petition was valid from December 3, 1999 through November 1, 2002. *Id.* Ms. Ramachandran, however, worked for Blue Star only from December 1999 to September 2001 for reasons addressed below. TR 7:17.

In Ms. Ramachandran's post-trial brief, she outlines six main complaints of H-1B violations committed by Blue Star, which appear to succinctly address the numerous contentions in her pretrial statement and trial testimony. These six claims are as follows: (1) forced to work outside her classification as Sales Manager; (2) paid below prevailing wages; (3) denied benefits; (4) discriminated and retaliated against for protected activity; (5) denied wage increases; and (6) various other INA violations. 20 C.F.R. § 655.805(a)(1)-(16) provides an exclusive list of the H-1B violations the Administrator may investigate, each corresponding with requirements laid out in 20 C.F.R. §§ 655.731-655.739, 655.801, and 655.760(a).

### **First Complaint – Forced to Work Outside Classification as Sales Manager**

Ms. Ramachandran alleged that Blue Star made a material misrepresentation on her LCA pursuant to 20 C.F.R. § 655.805(a)(1). She claims she was made to do administrative work related to the processing of INS documents, finance work, and human resource work while her LCA indicated her job title as that of Sales Manager. She claims she spent 50 percent or more of her time on these tasks. Her evidence consisted of her own testimony, that of Mr. Bala, her husband, and that of Michael Brown, another former employee. Each testified that Ms. Ramachandran spent more than half of her time working on "administrative" duties related to INS, financial, and HR work, and that she had voiced her complaint about her administrative duties to her superiors at Blue Star. TR 36, 41.

The Administrator argues that the position description in the petition letter presented by Blue Star for Ms. Ramachandran's H-1B petition ("Form I-129") clearly stated that administrative work was part of her job description. TR 107-111; CX 3; RX 16, p. 88. The Administrator further argues that Mr. Bala's testimony described administrative duties as part of Ms. Ramachandran's duties. TR 50-53, 111; RX 16, p. 88. Blue Star avers that neither the percentage of Ms. Ramachandran's time spent on administrative duties nor her complaints to Blue Star about these duties is relevant to the issue, *i.e.*, whether the LCA application submitted for Ms. Ramachandran's H-1B visa accurately identified her duties. The Administrator and Blue

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<sup>3</sup>Ms. Ramachandran received her B.S. Degree from the University of Poona in India and also has a Master's Diploma in Business Administration from the Deccan Education Society's Institute of Management Development & Research in Poona. In 1999, Ms. Ramachandran had more than 14 years of employment experience in the field of computer information systems. CX 3, pp. 18, 20.

Star both note that the petition letter, which was signed by Ms. Ramachandran's husband, Mr. Bala, clearly identified the "additional" duties for which Ms. Ramachandran would be responsible.

In her post-trial brief, Ms. Ramachandran points out that her LCA was signed September 23, 1999, but that the petition letter describing her position was dated October 8, 1999. She argues that she never accepted the description in that letter because she did not sign it. She refers to the definition of "Sales Manager" from the U.S. DOL's Bureau of Labor Statistics to support her argument that administrative, finance, and human resource work are not within a sales manager's duties. CX 9a. Ms. Ramachandran cites two decisions to buttress her claim, *Administrator, Wage and Hour Div. US DOL v. Native Technologies, Inc.*, 96-LCA-2 (ALJ Nov. 3, 1997) and *Exotic Granite & Marble, Inc., v. US DOL*, 98-JSA-1 (ALJ Feb. 12, 1998). However, the first one was appealed and partially reversed by the Administrative Review Board on May 28, 1999, ARB Case No. 98-034. Neither decision is analogous to the instant case.

In *Native*, the employer conceded to having never intended that the complainant be employed in the occupation listed on his LCA. *Id.* at 5. In *Exotic Granite*, the complainant's LCA application was approved by the DOL in March of 1993; the petition letter describing the position was submitted April 15, 1993; and pursuant to a DOL investigation a few years later, a letter from the employer was submitted on August 28, 1996 offering quite a different position description—one requiring far fewer qualifications than the original position described in 1993. 98-JSA-1 at 5, 9-10. The ALJ held that the prevailing wage determination survey used by the DOL in its investigation was proper, based on the LCA and April 15, 1993 letter rather than the later August 1996 letter. Although not a binding appellate decision, *Exotic Granite* actually bolsters the Administrator's position. In it and the instant case, the petition letters expounded upon the duties of the positions listed on the LCAs, and both letters were submitted to the INS *after* the LCAs were approved by the DOL. In the instant case, Adriana Iglesias, the DOL investigator, testified that it is "typical" for a petition letter to be submitted about two weeks after an LCA is approved. TR 109:24. I credit this statement because I find that Ms. Iglesias's testimony throughout direct and cross examination was clear, lucid, consistent, and credible.

Furthermore, Ms. Ramachandran signed her appointment letter which clearly stated that Blue Star was to have sole discretion regarding her job duties. CX 4. She was also given a copy of the October 8, 1999 petition letter. She may not have signed it, but she certainly had notice that INS administrative, human resource, and finance work would be part of her job as evidenced by the following statements about her job description: "performing account management duties" and "responsible for overseeing and evaluating the performance of personnel assigned to work at customer locations as well as administering their direction and operations in accordance with local laws and regulations in matters pertaining to visas, work permits; taxation and securing professional counsel when necessary." CX 3, p. 18; RX 16, p. 89. Although Ms. Ramachandran submitted exhibits showing that upper management had at some point planned to reduce or eliminate these aspects of her job, the fact that this did not happen does not constitute an H-1B violation. Additionally, her supervisor, Pradip Mitra, stated in a letter dated June 21, 2001 and signed by Ms. Ramachandran on the same date, that "the processing of INS paperwork for consultants is considered to be part of the duties incidental to selling the services of . . . consultants." CX 10.

The Code of Federal Regulations requires that the LCA must state “[t]he occupation, by Dictionary of Occupational Titles (DOT) Three-Digit Occupational Groups code<sup>4</sup> and by the employer’s own title for the job.” 20 C.F.R. § 655.730(c)(1)(i). In Ms. Ramachandran’s LCA, the three-digit code “039” for “Sales Manager” was designated as the position most closely aligned to Ms. Ramachandran’s position. Although the DOL’s Bureau of Labor Statistics description of a “11-2022 Sales Manager”<sup>5</sup> does not mention HR, finance, or administrative work, this does not mean that Blue Star misrepresented a material fact on Ms. Ramachandran’s LCA. CX 9a. The information available from the Bureau of Labor Statistics is merely for informational purposes, not intended as a beacon for mandatory compliance by employers.<sup>6</sup> The Code of Federal Regulations does not mandate that an H-1B nonimmigrant’s actual position correspond with the Bureau of Labor Statistics’ job descriptions, only that a DOT three-digit code and an employer’s own title for the job be listed. Blue Star did this and thus was in compliance with regulations.

With respect to Ms. Ramachandran’s first complaint, I find as follows: that Blue Star did not make a material misrepresentation on her LCA which would constitute a violation of 20 C.F.R. § 655.805(a)(1); that Ms. Ramachandran was not required to perform work outside of her job description; that her position as sales manager encompassed administrative/INS, finance, and HR work; that these duties were not “added” after her LCA was filed; that a copy of the H-1B petition and position description support letter was provided to Ms. Ramachandran thus giving her notice of her various duties; and that Ms. Ramachandran had clear advance notice of, and agreed to, Blue Star’s sole discretion in designating her job duties; and that the position designated on her LCA was in compliance with 20 C.F.R. § 655.730(c)(1)(i).

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<sup>4</sup>In a Federal Register Notice dated September 30, 1999, the Office of Management and Budget (“OMB”) announced that the 1998 Standard Occupational Classification (“SOC”) was to replace the Dictionary of Occupational Titles (“DOT”). The hierarchical structure, numbering system, and occupational categories of the 1998 SOC have changed from those previously found in the DOT and are presented in Appendix A of the September 30, 1999 Notice. Notice, 64 Fed. Reg. 53,135, 53,136 (1999).

<sup>5</sup>Ms. Ramachandran’s exhibit 9a references the new numbering system, which has superseded the DOT system.

<sup>6</sup>The September 30, 1999 Federal Register Notice states:

The 1998 SOC was designed, as was the 1980 SOC, solely for statistical purposes. . . . Consequently, as has been the case with the 1980 SOC (Statistical Policy Directive No. 10, Standard Occupational Classification), the 1998 SOC is not to be used in any administrative, regulatory, or tax program unless the head of the agency administering that program has first determined that the use of such occupational definitions is appropriate to the implementation of the program's objectives. If the terms, "Standard Occupational Classification" or "SOC" are to be used in the operative text of any law or regulation to define an occupation or group of occupations, language similar to the following should be used to ensure sufficient flexibility: "An occupation or grouping of occupations shall mean a Standard Occupational Classification detailed occupation or grouping of occupations as defined by the Office of Management and Budget, subject to such modifications with respect to individual occupations or groupings of occupations as the Secretary (Administrator) may determine to be appropriate for the purpose of this Act (regulation). Notice, 64 Fed. Reg. 53,135, 53,140 (1999).

## **Second Complaint – Paid Below Prevailing Wages/Prevailing Wage Study was a Non-Standard Wage Study**

Ms. Ramachandran alleges that Blue Star committed a violation of 20 C.F.R. § 655.805(a)(2)(i),(ii) by failing to pay her the prevailing wage for her position as Sales Manager and failing to use a State Employment Security Agency (SESA) wage study pursuant to 20 C.F.R. § 655.731(a)(2). She argues that Blue Star instead used a non-standard wage study in support of its prevailing wage rate as stated on its LCAs. She claims the wage study used by Blue Star was entitled “AEA benchmark of 1998.” Ms. Ramachandran’s Amd’d. Pre-trial Stmt., p. 2. Ms. Ramachandran emphasizes that her employment with Blue Star began on December 20, 1999, “which would have been nearly at the end of the two year period of the study.” *Id.* Ms. Ramachandran suggests the 1999 Metropolitan and Balance State Area Occupational Employment and Wages Estimates study as a more appropriate alternative. She points out that based on this study, the mean salary for a Sales Manager in the San Jose area in the computer industry is \$94,450.

The base wage listed on her LCA is \$55,200, and the prevailing wage at that time according to the wage study used by Blue Star for a Sales Manager was \$57,100. Ms. Ramachandran’s actual gross monthly pay as shown by Blue Star’s payroll records was \$5,600, which equates to \$67,200 per year. RX 18. 20 C.F.R. § 655.731(c) states that “[t]he required wage must be paid to the employee, cash in hand, free and clear, when due,” and “[f]uture bonuses and similar compensation may be credited toward satisfaction of the required wage obligation if their payment is assured (*i.e.*, they are not conditional or contingent on some event such as the employer’s annual profits).” The additional income above and beyond the actual wage found on her LCA constituted a \$1,000 monthly commission, which does not appear to be conditional or contingent on any event because it was consistently part of each of Ms. Ramachandran’s paychecks from September 2000 to August 31, 2000. RX 18, pp. 230, 240, 248, 257, 265, 273, 284, 294, 304, 312, 323. On June 21, 2001, Blue Star gave Ms. Ramachandran advance notice of a change to its policy on advance incentive payments, stating that it would no longer make incentive advances to its sales employees as of October 1, 2001. The new policy would provide incentives in an annual lump sum. CX 10. Because Ms. Ramachandran ceased working at Blue Star prior to the implementation of the new incentive policy and was thus not affected by it, I need not address whether it was conditional on some event. Therefore, I find that during the applicable period, Ms. Ramachandran was not paid below the prevailing wage listed on her LCA, and Blue Star was not in violation of 20 C.F.R. § 655.731(c).

With respect to the wage survey used by Blue Star to arrive at the stated prevailing wage, the Wage and Hour Division investigated the wage survey and concluded that it did not violate 20 C.F.R. § 655.731(a)(2) and that it met all the criteria set forth in 20 C.F.R. § 655.731(b)(3)(iii)(B) & (C). Thus, it did not find a failure to pay wages pursuant to 20 C.F.R. § 655.805(a)(2). The Administrator’s evidence consisted of the testimony of the DOL investigator, the testimony of the Wage and Hour Acting Supervisor who reviewed the investigation for accuracy, completeness, and compliance, and exhibits showing the wage rate surveys used for other employment positions within Blue Star.

Section 655.731(a) states that the required wage rate must be the greater of the actual wage rate or the prevailing wage. The prevailing wage must be determined as of the time of filing the LCA, and “the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a SESA, an independent authoritative source, or other legitimate sources of data.” 20 C.F.R. § 655.731(a)(2). The Wage and Hour Division determined that “Blue Star used legitimate sources of wage surveys provided to them by the State of location to establish its prevailing wage rate for [Ms. Ramachandran’s] position.” DOL Pre-trial Stmt., p. 5. Thus, contrary to Ms. Ramachandran’s assertions, the failure to use an SESA wage study is not an H-1B violation. Neither the Administrator nor Ms. Ramachandran has submitted into evidence the 1998 AEA Benchmark wage survey for the Sales Manager position; however, its publication date ostensibly meets one criterion listed in 20 C.F.R. § 655.731(b)(3)(iii)(B), *i.e.*, the wage survey appears to have been published within 24 months of the filing of Ms. Ramachandran’s LCA. Nevertheless, because Ms. Ramachandran relies only on conjecture without any evidence to support her allegation that the AEA wage survey did not comply with the Code of Federal Regulations, she has not sustained her burden of proof on this issue. Although Ms. Ramachandran would prefer a wage rate study that reflects a \$94,000 mean annual salary for Sales Managers, the DOL is under no obligation to compare legitimate prevailing wage rate surveys when it has concluded that the survey utilized by Blue Star satisfies the criteria set forth in the regulations.

In her post-trial brief, Ms. Ramachandran cites to another ALJ decision:

When Wage and Hour conducts an investigation into a LCA, and if the wages paid to the H-1B nonimmigrant are in dispute, it *may* request from ETA [Employment and Training Administration] a prevailing wage determination, which Wage and Hour is required to use as the basis for determining violations and computing back wages, if such wages are found to be owed.  
655.731(d)(1).

*Administrator, Wage and Hour Div., U.S. DOL v. Drazin, 2001-JSA-00003 (ALJ May 30, 2001)* (emphasis added). In the instant case, Wage and Hour was not required to use an ETA wage determination because wages were not found to be owed Ms. Ramachandran. Because I find Ms. Ramachandran’s claim that Blue Star used a nonstandard prevailing wage study to be unsubstantiated, I find the *Drazin* case to be inapposite.

### **Third Complaint – Denial of Benefits**

Ms. Ramachandran complains that she was denied a Bay Area cost of living allowance, a family round trip airline ticket to India, and commissions incentives, which combined equal \$25,400.<sup>7</sup> She alleges that because she was denied these benefits, Blue Star did not meet its prevailing wage requirement, a violation of 20 C.F.R. § 655.805(a)(2), which states that it is a violation to fail “to pay wages (including benefits provided as compensation for services), as required under § 655.731.” The Administrator argues that the incentives of which Ms.

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<sup>7</sup>Bay Area allowance June 2000 to August 2001 = \$7,000; airline ticket = \$3,400; incentives for April 2000 to March 2001 = \$12,000; incentives for April 2001 to August 2001 = \$3,000.

Ramachandran complains do not constitute appropriate fringe benefits; rather, they constitute contractual benefits negotiated between individual nonimmigrant H-1B workers and the employer, and are governed by state law. The Administrator claims that the DOL has no jurisdiction over state employment contracts. Ms. Iglesias, the DOL investigator, and Ms. Rincon, acting supervisor in the investigation, testified that the H-1B regulations cover fringe benefits, such as health care and pension plans, but not commissions. TR 118:4-8, 176:6, 177-78.

Section 655.731(c)(3) defines benefits as including cash bonuses, stock options, paid vacations and holidays, health, life, disability and other insurance plans, retirement and savings plans. It states that “the employer shall offer H-1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more strict eligibility or participation requirements for the H-1B nonimmigrant(s) than for similarly employed U.S. workers(s) [sic].” 20 C.F.R § 655.731(c)(3)(i). Thus, under this section, the only way Blue Star could have committed a violation is if it failed to provide H-1B workers equivalent fringe benefits to those provided to U.S. workers. Based on the exhibits and evidence presented at trial, I find that Ms. Ramachandran has not proven that Blue Star offered different benefit packages to H-1B workers than it offered to its American workers. There were only two American workers during the period in question, and neither was “similarly employed” in a position comparable to that of Ms. Ramachandran. All workers were offered health insurance and retirement plan access. TR 117-120; RX 18, 19. Section 655.805(a)(2) states that a “failure to pay wages (including benefits provided as compensation for services)” in accordance with § 655.731 is a violation. Because I find no hint of an agreement or a promise to provide a Bay Area allowance or an airline ticket in either the appointment letter, LCA, H-1B petition, or petition letter, I hold that these contentions are irrelevant to the benefits covered under the regulations. As for the commissions Ms. Ramachandran feels she is owed, the terms are outlined in the appointment letter. Pursuant to that agreement, Ms. Ramachandran was paid \$1,000 per month “in lieu of referenced incentive . . .” CX 4, ¶ 1; RX 18. She also received medical insurance pursuant to the appointment letter and a return ticket to India pursuant to the petition letter. *See* CX 3, p. 19; RX 18. Because Ms. Ramachandran was paid in excess of the prevailing wage, I find no § 655.805(a)(2) violation. Had Blue Star’s alleged failure to pay commissions brought her actual wage below the prevailing wage, this would be actionable under H-1B regulations. Therefore, any grievance Ms. Ramachandran has with Blue Star regarding incentives and commissions should be taken up in another forum.

#### **Fourth Complaint – Discrimination and Wrongful Termination**

Ms. Ramachandran avers that “[e]ver since [she] complained of H1B and Department of Labor violations and filed complaints with Government departments, the company started a brutal process of retaliation against [her].” Cl. Post-Trial Brief, p. 24. She claims Blue Star gave her retaliatory memos and denied her allowances and benefits, which culminated in a wrongful termination on September 5, 2001. Ms. Ramachandran claims Blue Star violated 20 C.F.R. § 655.805(a)(13), which indicates that discrimination against an employee for protected conduct is an H-1B violation. Section 655.801(a) defines “protected conduct”:

No employer . . . shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee because the employee has . . . disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of section 212(n) of the INA or any regulation relating to section 212(n), including this subpart I and subpart H of this part . . . .”

She offers Claimant’s Exhibit 10 as proof that she complained; however, this letter written by her on July 2, 2001 does not constitute a complaint of a violation of section 212(n) or any related regulation. It merely addresses dissatisfaction with the new incentive policy and states that her supervisor “asked [Ms. Ramachandran] to go to the Dept of Labor with [her] question.” CX 10.

The Department of Labor investigator did not investigate Ms. Ramachandran’s complaint of retaliation because the only complaints filed prior to the time Blue Star allegedly discriminated or retaliated against her, were with the Department of Fair Employment and Housing and the Equal Employment Opportunity Commission. TR 101; Cl. Op. Stmt., p. 5, Cl. Am. Pre-Trial Stmt., p. 3. Under 20 C.F.R. § 655.801(a), such complaints do not fall within the purview of section 212(n) of the INA or regulations corresponding thereto. Ms. Ramachandran has presented no evidence showing a specific INA-related complaint either to Blue Star or any other person or entity for which she was allegedly retaliated against. Thus, I find Blue Star did not violate 20 C.F.R. § 655.801(a).

### **Fifth Complaint – Failure to Receive Wage Increases**

Ms. Ramachandran contends that she was paid the same salary throughout her employment with Blue Star. Pursuant to 20 C.F.R. § 655.731(a)(2)(ix), “every H-1B nonimmigrant is to be paid in accordance with the employer’s actual wage system, and thus to receive any pay increases which that system provides.” Ms. Ramachandran has failed to provide any evidence of a wage system used by Blue Star that provides pay increases. Lack of wage increases alone does not constitute an H-1B violation. Furthermore, 20 C.F.R. § 655.805 sets forth the list of violations the DOL may investigate, and the absence of a system of wage increases is not on the list.

### **Sixth Complaint – Other INA Violations**

#### **1. Failure to Post LCA for Director Position**

Ms. Ramachandran asserts that Blue Star did not post an LCA for a Director position for which it hired a new H-1B nonimmigrant, Pradip Mitra, in the San Jose Metropolitan area in April 2001. She stated that Blue Star exercised preference for nonimmigrant workers over U.S. workers because it did not post the LCA in advance. TR 19. She thus claims Blue Star committed a violation under 20 C.F.R. § 655.805(a)(5) by failing to provide notice of the filing of LCA pursuant to 20 C.F.R. § 655.734. Section 655.734(a)(1)(ii) requires that “the employer, on or within 30 days before the date the LCA is filed . . . provide a notice of the filing of the LCA.” Ms. Ramachandran’s evidence on this point consists of her own testimony and that of witness Michael Brown who stated that he did not see an LCA posted for a Director position.

TR 79:5. The Administrator's evidence consists of the DOL investigator's testimony and that of her supervisor.

An employer may document compliance with the notice requirement with a copy of the dated notice to the union or notification of the dates and locations and methods where the work site notice was provided. Such documentation must be included in the public access file. The Administrator argues in its pre-trial brief that this documentation was found by the DOL in the public access file, as required. At trial, Ms. Iglesias confirmed this. TR 121:18. She testified that she visited the establishment, saw the LCA postings, conducted interviews and saw the public access file which both "showed that [the LCAs] were posted at the work site." TR 121:20. Because neither party submitted exhibits showing a timely or untimely posting of LCAs for the position of Director, the evidence appears to be equal. As the prosecuting party has the ultimate burden of proving each allegation, Ms. Ramachandran has not met her burden on the notice issue.

## 2. False Statements Made by Blue Star to DOL During Course of Investigation

Ms. Ramachandran argues that Blue Star declared it employed two American employees, while Ms. Iglesias testified there were more. She also indicates that Blue Star stated that it placed all of its employees with Hewlett Packard, but points to Ms. Iglesias's testimony that H-1B employees were placed in other locations as well. These allegations do not fall within the H-1B violations listed under 20 C.F.R. § 655.805(a)(1)-(16) and are thus beyond the jurisdiction of this tribunal.

## 3. Misrepresentation as to Place of Employment on LCA

Ms. Ramachandran claims that Blue Star would bring in H-1B consultants with LCAs for one location, but then farm out the consultants to other companies where they would work at different locations for six months to one year at a time. She argues that new LCAs for the new locations were not posted, thus misrepresenting place of employment pursuant to 20 C.F.R. § 644.805(a)(1). After comparing the employee placement with the applicable LCA, Ms. Iglesias found that the designation of place of employment on the LCAs were in fact correct and accurate. TR 111-12. Ms. Ramachandran mentions one specific employee who she believes did not have a LCA posted during the time he worked in Dearborn, Michigan. Cl. Post-Trial Brief, p. 27. Ms. Iglesias testified that during the DOL's investigation, she compared the LCA with the prevailing wage survey and with the payroll to ascertain whether each employee was being paid the prevailing wage for the area in which he or she worked. She matched the payroll to the prevailing LCA for each and every region in which Blue Star employed its workers. TR 148:3-14. Administrator's Exhibits 10 through 15 are offered to show that various employees of Blue Star were paid the prevailing wage for their position and location. On balance, I find that the Administrator's evidence is sufficient to show that Blue Star's employees were paid according to the LCAs posted in the places they worked. I also find that Ms. Ramachandran's evidence is insufficient to show that the LCAs were not posted at the proper work sites. Thus, I find there was no misrepresentation of place of employment.

#### 4. Displacement of and Failure to Recruit U.S. Workers

Ms. Ramachandran alleges that Blue Star displaced American workers, pursuant to 20 C.F.R. §§ 655.805(a)(10) and 655.738, by not posting current and accurate prevailing wage LCAs; she also contends that Blue Star failed to recruit U.S. workers, a violation of 20 C.F.R. §§ 655.805(a)(9) and 655.739. As I have concluded that the LCAs did accurately reflect the prevailing wages for the particular locations and that Ms. Ramachandran failed to prove the LCAs were not posted at the requisite times, I also conclude that American workers were not displaced. Additionally, I find that the regulations concerning displacement and failure to recruit U.S. workers do not apply to Blue Star because Blue Star is not an H-1B dependent employer, pursuant to 20 C.F.R. § 655.736. The DOL investigation revealed that during the applicable time period, Blue Star employed 38 employees in the United States, 31 L-1B permit employees and 7 H-1B employees. RX 3. In one of its LCAs, Blue Star claimed it was an H-1B dependent employer; however, this isolated assertion without substantiation does not persuade me that Blue Star is indeed H-1B dependent. I find the DOL's H-1B Narrative Report submitted by the Administrator along with Ms. Iglesias's and Ms. Rincon's testimony to be more compelling. See RX 3; TR 124-126, 179-182. Therefore, because I find that the ratio of employees to H-1B workers met the requirements in § 655.738, Blue Star is not subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers as described in §§ 655.738 and 655.739, respectively.

However, even if I were to accept that Blue Star is an H-1B dependent employer, I find that all H-1B exempt employees met the requirements for the exemption found in 20 C.F.R. § 655.737(b), *i.e.*, all have either a Master's Degree or earn at least \$60,000 annually. RX 3, 18, 19. Thus, it would not be subject to the additional obligations described in 20 C.F.R. §§ 655.738 and 655.739.

Finally, even assuming, *arguendo*, that Blue Star was H-1B dependent and not subject to § 655.737, the DOL's investigation revealed that Blue Star advertised the vacant position, sufficiently to have satisfied the regulation requiring H-1B dependent employers to recruit in good faith. There is insufficient evidence in the record to corroborate Ms. Ramachandran's allegations that Blue Star displaced U.S. workers. She claims that within 90 days after she commenced work with Blue Star, a U.S. worker was displaced, and within 90 days of the filing of Mr. Mitra's H-1B petition, the company president, an American, was displaced. Ms. Ramachandran has not satisfied the displacement criteria listed in § 655.738(c)(3) as she has failed to show that U.S. workers were "laid off from a job that is essentially the equivalent of the job for which an H-1B nonimmigrant is sought."

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For the above stated reasons, I find that the preponderance of the evidence before me

shows that Blue Star did not commit any of the alleged violations listed under 20 C.F.R. § 655.805(a)(1)-(16).

Accordingly, all of Ms. Ramachandran's claims are denied.

ALEXANDER KARST  
Administrative Law Judge

AK:sp