

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 March 2007

CASE NO.: 2006-LCA-25

In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION,
EMPLOYMENT STANDARDS ADMINISTRATION,
Prosecuting Party

v.

CREIGHTON UNIVERSITY,
Respondent

Appearances:

Kim Prichard Flores, Esq.
For the Prosecuting Party

Roger L. Hiatt, Esq.
Bryan S. Hatch, Esq.
For the Respondent

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER MODIFYING ADMINISTRATOR'S DETERMINATION

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

Under the Act, an employer may hire nonimmigrant workers from other countries to work in the United States in "specialty occupations" for prescribed periods of time. 8 U.S.C. § 1101(a)(15)(H)(i)(b). An employer seeking to hire a nonimmigrant worker on an H-1B visa must first obtain certification by filing with the Department of Labor ("DOL") a Labor Condition Application ("LCA") specifying the number of nonimmigrant workers sought, the occupational classification, the wage rate, the date of need, and the period of employment. 20 C.F.R. §§ 655.730-31. Once DOL certifies the LCA, the Immigration and Naturalization Service ("INS") can then approve the nonimmigrant's H-1B visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700(a)(3). The Department of State then issues the H-1B visa. 20 C.F.R. §

655.705(b). The Administrator of the Wage and Hour Division (“Administrator”) is the prosecuting party for any suspected violations of this program.

PROCEDURAL HISTORY

Dr. Ademola Abiose filed a complaint with the Wage and Hour Division, alleging that the Respondent had imposed on him a penalty for early departure from his job in the amount of \$115,092.60, in violation of the Act. After conducting an investigation, the Administrator issued a Determination dated May 25, 2006, in which it found that the Respondent is attempting to cause a prohibited deduction from or reduction in the payment of the required wage by imposing an early cessation penalty upon Dr. Abiose. As a result, the Administrator stated that the Respondent should cease any attempts to collect this amount. The Administrator further advised that the payment of back wages in the amount of \$115,092.60 may be sought, and civil money penalties may be assessed, if Dr. Abiose is required to pay this amount to the Respondent.

On June 8, 2006, the Respondent requested a hearing before an Administrative Law Judge. I was assigned the case and set the matter for a July 25, 2006 hearing in Des Moines, Iowa. The hearing was then rescheduled for October 18, 2006. After a conference call between respective counsel and this Court on October 16, 2006, the parties agreed that a hearing was unnecessary and that the matter may be decided on the briefs and evidence submitted to this Court.

On January 3, 2007, the parties submitted a Revised Joint Stipulation of Facts, which lists 55 stipulations of fact (Stipulations (“Stip.”) 1-55). In addition to its brief, the Administrator submitted 25 exhibits (Complainant’s exhibits (“CX”) A-Y). In addition to its brief, the Respondent submitted four exhibits (Respondent’s exhibits (“RX”) 1-4). Both parties submitted reply briefs on February 16, 2007.¹

FACTUAL BACKGROUND

Dr. Abiose is a Nigerian national who pursued medical training in the United States on a J-1 visa. (CX F; CX D). He is a medical doctor, who is board-certified in internal medicine, specializes in cardiology, and is licensed to practice medicine in Iowa and Nebraska. (Stip. 1-2). Dr. Abiose completed a cardiology fellowship in 2002 at the University of Connecticut. (Stip. 3).

The Respondent, through its Cardiac Center, operates Outreach Clinics in Onawa, Iowa, a medically underserved area. (CX D). Beginning in December 2000, the Respondent sought to hire a cardiologist to work in Onawa, in an effort to increase the accessibility of cardiology services there. (CX D). Despite substantial recruitment efforts, the Respondent had difficulty attracting a large applicant pool for the position. (CX D). Dr. Abiose responded to an advertisement for the position placed in July 2001. (CX D). He interviewed for the position and was subsequently selected as the top candidate. (CX D).

¹ Because of a technical error in its reply brief, the Respondent then submitted a corrected reply brief on February 23, 2007.

The Letter of Offer, Addendum, and Faculty Agreement between Dr. Abiose and the Respondent

On January 4, 2002, the Respondent sent a Letter of Offer to Dr. Abiose for the position of Assistant Professor in the Cardiology Division (“Letter of Offer”). (CX A; Stip. 5). It stated that the offer was contingent upon, *inter alia*, the obtaining of an H-1B visa and work permission. (CX A at 1). The Letter of Offer also quoted a base salary of \$66,866.00 and guaranteed Dr. Abiose faculty productivity compensation (“FPC”) in the amount of \$133,414.00 and an additional FPC of \$7,023.00 contingent upon the Cardiology Division meeting productivity and budgetary goals. (CX A at 1; Stip. 7-8).² The Letter of Offer stated that the FPC of \$133,414.00 was guaranteed for Years One and Two but not guaranteed in Years Three and beyond. (CX A at 1; Stip. 8).

The Letter of Offer then stated that Dr. Abiose “would be expected to remain a faculty member for at least two years from the last year of [his] guaranteed [FPC] compensation.” (CX A at 2; Stip. 9). Thus, it anticipated a four-year commitment. It stated that should Dr. Abiose resign before the completion of additional non-guaranteed years, he would be required to pay a *pro rata* share of his annual guaranteed FPC. (CX A at 25; Stip. 9). The Letter of Offer also stated that, because the Respondent and third-party St. Joseph Hospital (“CUMC”)³ shared recruitment costs and financial risks, Dr. Abiose would have to enter into a third-party Recruitment Agreement (also referred to as “Relocation Agreement”) between the Respondent, CUMC, and himself. (CX A at 2; Stip. 10). A draft of the Recruitment Agreement was attached. The Letter of Offer stated that Dr. Abiose would work four days per week in Onawa, Iowa and one day per week in Omaha, Nebraska. Additionally, he would be on-call each day in Onawa with at least two three-day weekends off each month. (CX A at 3; Stip. 11).

The Letter of Offer was signed by Syed M. Mohiuddin, M.D., Chief, Division of Cardiology and Eugene C. Rich, M.D., Tenet Professor and Chair, and approved by M. Roy Wilson, M.D., M.S., Dean and Vice President for Health Sciences, on behalf of the Respondent. (CX A at 4; Stip. 5). Dr. Abiose signed an “Acknowledgement” of the Letter of Offer on January 12, 2002, which indicated his agreement to its general terms. The Acknowledgement also stated that Dr. Abiose’s final acceptance was contingent upon the issuance of a Faculty Employment Agreement.

For reasons discussed below, Dr. Mohiuddin and Dr. Abiose signed a letter dated May 29, 2002, which indicated that it was “an Addendum to the Letter of Offer” (“Addendum”). (CX H). The Addendum stated that by signing it, “Dr. Abiose has committed to practice medicine at The Cardiac Center of Creighton University in Onawa, Iowa for a minimum of 40 hours per week for a minimum of three years starting July 1, 2002.” (CX H).

² The Faculty Agreement defines “FPC” as “income derived from [Dr. Abiose’s] clinical services (i.e. “professional medical services to patients.”). (CX N at 11 &1). The Faculty Agreement further stated that the Respondent would bill and collect all of Dr. Abiose’s patient care charges and that disposition of FPC payments would be derived from income in excess of budget target and expenses. (CX N at 11).

³ The hospital entity relevant to this case has been referred to as “St. Joseph Hospital,” “Creighton University Medical Center,” or “CUMC” at varying points in the proceedings. For the sake of consistency, I refer to it as “CUMC.” I also note that CUMC is an entity separate from the Respondent.

On June 27, 2002, the Respondent and Dr. Abiose executed a Clinical Faculty Agreement (“Faculty Agreement”), effective July 1, 2002. (CX N). John P. Schlegel, President, signed on behalf of the Respondent. (CX N at 7). In an Affidavit, Stanette Kennebrew, Associate Dean, Administration & Finance, stated that “[t]he [Faculty] Agreement...is separate and independent of the third party [Recruitment Agreement] with CUMC and solely addresses employment of the candidate with Creighton University.” (RX 1 at Paragraph 2).

The Faculty Agreement sets forth the general duties required of Dr. Abiose and the Respondent. (CX N at 1-4). It also details the terms of his compensation. (CX N at 2 and Exhibits B1 and B2). The Faculty Agreement states that “[t]he term of this Agreement shall be for one year commencing on the 1st day of July, 2002 and ending on June 30, 2002.” (CX N at 4). Notably, it further states:

This Agreement, along with those Exhibits and attachments as referenced, constitute the entire understanding and agreement between the parties hereto and supersede all previous agreements, oral or in writing, between the parties. This Agreement cannot be changed or modified except by another Agreement in writing executed by both parties. The terms and provisions of this Agreement are severable, and should any clause or provision hereof be determined to be invalid, illegal, or unenforceable, or be declared invalid for any reason whatsoever, this Agreement shall be construed and read as if such invalid or unenforceable clause were omitted.
(CX N at 6).

Finally, the Faculty Agreement stated that it “shall be deemed to have been made and shall be construed and interpreted in accordance with the laws of the State of Nebraska.” (CX N at 6).

The Respondent and Dr. Abiose signed two Letters of Renewal, each of which renewed his appointment as outlined by the terms of the Faculty Agreement. (RX 3). Each letter also detailed specific compensation for the forthcoming year. The first extended his appointment from July 1, 2003 to June 30, 2004. (RX 3 at 1). It was signed on behalf of the Respondent by Cam Enarson, Vice President for Health Sciences and Dean, School of Medicine, on November 21, 2003. Dr. Abiose signed on January 5, 2004. (RX 3 at 1). The second extended Dr. Abiose’s appointment from July 1, 2004-June 30, 2005. (RX 3 at 2). Dr. Enarson signed on behalf of the Respondent on June 29, 2004 and Dr. Abiose signed on July 23, 2004. (RX 3 at 2).

The Recruitment Agreement between Dr. Abiose, the Respondent, and CUMC

On May 7, 2002, Dr. Abiose, the Respondent, and CUMC executed the three-way Recruitment Agreement. (CX E). The agreement facilitated the establishment of Dr. Abiose’s cardiology practice within CUMC’s service area. (CX E at 1). It placed Dr. Abiose in a group practice setting and required him to maintain a full time practice in the service area.

The Recruitment Agreement stated that its term shall be four (4) years, commencing as of July 1, 2002 and ending June 30, 2006. (CX E at 1; Stip. 16). Specifically, it stated that Dr. Abiose shall “[m]aintain a full time practice of [Cardiology] in medical office space located within [CUMC’s] service area for a term of not less than four (4) years, commencing on or about July 1, 2002. (CX E at 2). The Recruitment Agreement stated that, in exchange for the Respondent’s assistance in recruiting Dr. Abiose, CUMC would reimburse the Respondent for specifically identified costs actually incurred by the Respondent and pay outside vendors directly on behalf of Dr. Abiose. (CX E at 1). These expenses included up to \$10,000.00 in actual moving expenses and \$7,500.00 for initial marketing support. (CX E at A-1; Stip. 17). CUMC also agreed to a “collections guarantee” of \$41,749.25 per month in Year One and \$41,920.08 per month in Year Two. (CX E at A-1; Stip. 18). Pursuant to this guarantee, CUMC was to pay Dr. Abiose the difference between his actual collections and the guaranteed amount on monthly basis. (CX E at B-1).⁴

The Recruitment Agreement further states that:

[Dr. Abiose] and [Respondent] understand that this Agreement provides that if [Dr. Abiose] leaves the hospital service area at any time during the four year term of this Agreement, [Dr. Abiose] and [Respondent] will be obligated to repay [CUMC] all of the benefits that [CUMC] has paid to [Dr. Abiose] and [Respondent] per Paragraph A-1, A-2, and A-3, within thirty (30) days of the date [Dr. Abiose] leaves the service area; provided, however, that for each full month [Dr. Abiose] has complied with [the agreement], the repayment amount due...shall be reduced by one forty-eighth (1/48) of the total funds distributed. (CX E at A-2; Stip. 19).

Finally, the Recruitment Agreement stated that it “embodies the entire understanding of the parties. There are no further or other agreements or understandings, written or oral, among the parties regarding the subject matter hereof unless expressly set forth herein.” (CX E at 5).

The Recruitment Agreement was signed by Dr. Abiose, Philip P. Gustafson, President, on behalf of CUMC, and Stanette Kennebrew and Daniel E. Burkey, Vice President, Administration & Finance, on behalf of the Respondent.

The J-1 Visa Waiver

Proceeding concurrently with these preliminary steps in the employment process, the Respondent and Dr. Abiose were attempting to get a J-1 Visa waiver for Dr. Abiose. (Stip. 20). The foreign residency requirement of the J-1 Visa program would have required Dr. Abiose and his dependent family members to return to Nigeria for two years at the expiration of his J-1 Visa. (Stip. 21). On January 5, 2002, Dr. Abiose signed the J-1 Visa Waiver Policy Affidavit and Agreement, requesting the Iowa Department of Public Health to recommend the waiver. (CX B; Stip. 21). The Waiver stated that Dr. Abiose would work for a minimum of forty (40) hours per

⁴ The Recruitment Agreement defined “collections” as “all monthly fees and charges resulting and collected from [Dr. Abiose’s] performance of professional or ancillary services for patients[.]” (CX E at B-1).

week in a designated shortage area and for a period of at least three (3) years. (CX B at 1; Stip. 21).

On January 28, 2002, the Respondent sent two letters to the Iowa Department of Public Health, Center for Rural Health & Primary Care. First, in a letter signed by Dr. Mohiuddin, the Respondent asked the Department to act as an interested government agency to recommend a waiver of the J-1 Visa's two year home residence requirement for Dr. Abiose. (CX D; Stip. 22). Second, in a letter signed by Susan K. Walsh, Administrative Director, the Respondent stated that it would submit an annual report to monitor compliance with Dr. Abiose's three year service obligation at The Cardiac Center in Onawa, Iowa. (CX C; Stip. 23). This letter referred to the term of four years contained in the Letter of Offer. (CX D at 1). It then reiterated Ms. Walsh's letter, stating that the Respondent would submit annual reports to monitor the compliance of Dr. Abiose's "three-year service obligation to the State of Iowa and The Cardiac Center in Onawa, Iowa." (CX D at 3).

On May 21, 2002, Dr. Abiose inquired about the status of his J-1 Visa waiver with the U.S. Department of State. (CX G; Stip. 25). Dr. Abiose testified that, on May 29, 2002, he received a message from the State Department informing him that to be eligible for both a waiver of the J-1 Visa home residency requirement and an H-1B Visa, his contract had to comply with the J-1 rules and regulations. (CX Y at Paragraph 8).⁵ Specifically, the waiver review officer requested that the clause containing the duration of the contract be modified to read "for a minimum of three years" instead of four years. (CX Y at Paragraph 8).

Dr. Abiose further testified that, on May 29, 2002, he contacted Dr. Mohiuddin and explained to him that his contract duration had to be changed to comply with the J-1 waiver regulations. (CX Y at Paragraph 9). According to Dr. Abiose, Dr. Mohiuddin agreed to modify his contract by writing an addendum to the initial Letter of Offer. (CX Y at Paragraph 9). Dr. Mohiuddin and Dr. Abiose then signed the aforementioned May 29, 2002 Addendum.⁶ In an Affidavit, Dr. Mohiuddin stated that by signing it, he did not intend to amend the Recruitment Agreement entered into by Dr. Abiose, the Respondent, and CUMC, which set forth a term of four years. (RX 2 at Paragraphs 2 & 8).⁷ Dr. Abiose faxed the Addendum to the State Department. (Stip. 32).

On May 30, 2002, Taylor O. Kay, Waiver Review Officer, sent a letter to the Vermont Service Center, Immigration and Naturalization Service, recommending that the J-1 Visa waiver be granted for Dr. Abiose. (CX K; Stip. 33). The letter states that the contract is for three years and lists The Cardiac Center of Creighton University as the facility. (CX K). In December 2003, the Respondent filed an ETA 750, Application for Alien Employment Certification, with DOL, as the first step to seek permanent residence in the United States for Dr. Abiose, the J-1 foreign residency waiver having been granted. (Stip. 39). That proceeding was allowed to

⁵ Dr. Abiose made this statement in a Stipulation of Expected Testimony, dated November 13, 2006. (CX Y).

⁶ There exists a point of contention over who wrote the Addendum. Dr. Abiose testified that Dr. Mohiuddin "agreed to modify my contract by writing an Addendum." (CX Y at Paragraph 9). In an affidavit, however, Dr. Mohiuddin stated that Dr. Abiose prepared the Addendum. (RX 2 at Paragraph 5). Because both doctors signed the Addendum, I find this discrepancy to be immaterial.

⁷ To that end, Dr. Mohiuddin stated that he has no authority, nor does he hold himself out as having any authority, to amend contracts entered into by CUMC. (RX 2 at 6).

proceed to completion, even after the resignation of Dr. Abiose, and was certified by DOL on December 8, 2005. (RX 4; Stip. 40).

The H-1B Visa

The Respondent also took steps to secure an H-1B Visa on behalf of Dr. Abiose. On May 16 2002, it sent a letter to the Nebraska Service Center, Immigration & Naturalization Service. (CX F; Stip. 24). The Respondent stated that it agreed to hire Dr. Abiose for an initial three-year period. (CX F at 1; Stip. 24).

On May 29, 2002, the Respondent filed with DOL, Employment and Training Administration (“ETA”), an LCA on behalf of Dr. Abiose. (CX I; Stip. 27). The LCA listed the Respondent as the employer and July 1, 2002-June 30, 2005 as the period of employment. (CX I at 1). Daniel Burkey signed the form on behalf of the Respondent. DOL approved the LCA on June 5, 2002. (CX I at 3; Stip. 34). The Respondent also filed a petition for H-1B status for Dr. Abiose with the INS. (CX X). Daniel Burkey and Stanette Kennebrew both signed on behalf of the Respondent. (CX X at 3). The petition listed the dates of intended employment as July 1, 2002-June 30, 2005. (CX X at 2).

On June 20, 2002, the INS approved the Respondent’s H-1B petition for Dr. Abiose. (CX L; Stip. 35). The Notice of Action approving the petition stated that the approval was valid from July 1, 2002-June 30, 2005. (CX L; Stip. 36). It further authorized Dr. Abiose to work for the Respondent, “but only as detailed in the petition and for the period authorized.” (CX L; Stip. 36). It also stated that any change in employment would require a new petition. (CX L).

On June 24, 2002, the Respondent’s attorney informed the Respondent that the H-1B Petition and Change of Status for Dr. Abiose was approved by INS. (CX M; Stip. 37). Counsel further advised the Respondent that Dr. Abiose was authorized for employment at its Onawa, Iowa clinic from July 1, 2002-June, 30, 2005. (CX M). Counsel also stated that she would send the original approval notice to Dr. Abiose. (CX M).

Dr. Abiose’s Resignation and the Resulting Dispute

On May 14, 2005, Dr. Abiose sent a Letter of Resignation to Dr. Mohiuddin with an effective date of June 30, 2005. (CX P; Stip. 40).

On June 6, 2005, CUMC sent a letter to the Respondent stating that one of the conditions of the Recruitment Agreement was that Dr. Abiose practice in CUMC’s service area for a period of four years, beginning on July 15, 2002. (CX Q at 1; Stip. 41). The letter also stated that under the terms of the Recruitment Agreement, Dr. Abiose and the Respondent are jointly and severally liable for repayment of funds (i.e. moving expenses, marketing expenses, and the collections guarantee) in the event of a breach of the Agreement. (CX Q at 1; Stip. 41). The letter stated that CUMC performed a reconciliation of these funds and found that Dr. Abiose and the Respondent must repay CUMC \$115,092.60. (CX Q at 1; Stip. 41). This reconciliation showed \$9,698.59 in moving expenses, \$7,500.00 in marketing expenses, and \$424,757.00 in collections guarantees, for a total of \$441,955.59. (CX Q at 2; Stip. 42). The reconciliation also

showed that 12.5 months remained on the Recruitment Agreement. (CX Q at 2; Stip. 42). Therefore, the \$115,092.62 represents 12.5/48 of the \$441,955.59. On April 6, 2005, the Respondent provided a check to CUMC for \$115,092.90. (CX U; Stip. 52).

On June 10, 2005, Dr. Mohiuddin sent a letter to Dr. Abiose on behalf of the Respondent. (CX R; Stip. 46). The letter stated to Dr. Abiose that he had signed the Recruitment Agreement with the Respondent and CUMC for a term of four years. (CX R at 1; Stip. 46). Dr. Mohiuddin also reported that CUMC had performed the aforementioned reconciliation and had requested the repayment of funds. (CX R at 1; Stip. 46). He noted that, pursuant to the Recruitment Agreement, if Dr. Abiose were to leave the Hospital Service Area at any time during the four-year term, the physician and University would be obligated to repay CUMC specified funds. (CX R at 1). Dr. Mohiuddin further stated that “Creighton has paid [\$115,092.60] to CUMC and is looking to you for reimbursement of this amount.” (CX R at 1; Stip. 46). Dr. Mohiuddin also referenced the Letter of Offer, which stated that if Dr. Abiose left Respondent’s employ before the completion of four years, he would be required to repay a pro rata share of his annual guaranteed FPC. (CX R at 1). Dr. Mohiuddin then informed Dr. Abiose that the Respondent requested payment of \$115,092.60 by August 1, 2005. (CX R at 2).⁸

On August 4, 2005, the Respondent filed suit against Dr. Abiose in the Iowa District Court in and for Monona County, Iowa. (CX T; Stip. 47). It alleged breach of contract and unjust enrichment and sought damages in the amount of \$115,092.60. (CX T at 3). The Respondent based its suit on the Recruitment Agreement, stating that it met all its obligations under that agreement but that Dr. Abiose breached it by resigning prior to the completion of the four-year term and failing to repay the Respondent the sum of damages. (CX T at 2). Additionally, the parties have stipulated that the Respondent filed the suit based on advice of legal counsel that not to seek repayment would violate certain federal laws. (Stip. 47).

LEGAL DISCUSSION

The Act and Regulations

The Act applies to nonimmigrant aliens with respect to whom, *inter alia*, “the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title....” 8 U.S.C. § 1101(a)(15)(H)(i)(b). Section 1182(n)(1) then lists the attestations an employer must state and the procedures it must follow to obtain an LCA for an employee. The Secretary of Labor reviews the LCA and shall provide certification within seven days of application, unless the LCA is incomplete or inaccurate. 8 U.S.C. § 1182(n)(1). Section 1182(n)(2) then details the Secretary of Labor’s responsibilities in administering and enforcing the program.

⁸ Here, I note that \$115,092.60 represents the amount the Respondent paid to CUMC, pursuant to CUMC’s reconciliation, not the pro rata share of the guaranteed FPC detailed in the Letter of Offer. The Letter of Offer listed two years of annual guaranteed FPC at \$133,414.00, for a total guaranteed FPC of \$266,828.00. A pro rate share of this amount for a purported failure to serve 12.5 months of a four year agreement would equate to \$69,486.44 (i.e. (12.5/48) x \$266,828.00).

Subpart H of the Regulations applies to employers seeking to employ foreign workers under the H-1B visa classification. 20 C.F.R. § 655.700(c)(1). The Regulations state that it is the employer's responsibility to submit a completed LCA, whereby it makes certain representations and agrees to several attestations regarding the employer's responsibilities. 20 C.F.R. § 655.705(c)(1).

One such attestation is that the employer pays the H-1B employee the required wage. 20 C.F.R. § 655.731. The required wage is the greater of either (1) the actual wage rate paid by the employer to similarly qualified employees who perform the specific employment in question or (2) the prevailing wage rate for the occupational classification in the area of intended employment. 20 C.F.R. §§ 655.731(a)(1) & (2). Where there are no other similar employees, the actual wage shall be the wage paid to the H-1B nonimmigrant worker by the employer. 20 C.F.R. § 655.731(a)(1). The required wage must be paid to the employee, cash in hand, free and clear, and when due. Reductions in or deductions from wages are only allowed as authorized by § 655.731(c)(9).⁹

The Regulations specifically prohibit a deduction from or reduction in the payment of the H-1B nonimmigrant's required wage as a penalty for ceasing employment prior to a date agreed to by the nonimmigrant and the employer. 20 C.F.R. § 655.731(c)(10)(i). However, the employer is permitted to receive *bona fide* liquidated damages from the H-1B nonimmigrant who ceases employment with the employer prior to an agreed date, but only if the requirements of § 655.731(c)(9)(iii) are satisfied. The distinction of liquidated damages and a penalty is to be made on the basis of the applicable state law.

Additionally, the Regulations state that a LCA certified by DOL is valid for the period of employment it states. 20 C.F.R. § 655.750(a). Moreover, the validity period shall not begin before the LCA is certified and shall not exceed three years. 20 C.F.R. § 655.750(a).

Subpart I covers the investigation and enforcement of the H-1B visa program. It authorizes the Administrator, through investigation, to determine violations relating an employer's filing of an LCA or compliance with the LCA or provision of Subparts H or I. 20 C.F.R. § 655.805. The Administrator is specifically authorized to determine whether an H-1B employer has failed to pay the required wages. 20 C.F.R. § 655.805(a)(2). Upon completion of the investigation, the Administrator shall issue a determination letter setting forth its findings. 20

⁹ § 655.731(c)(9) states that, for purposes of satisfying the employer's wage obligation, an "authorized deduction" must completely comply with one of the following criteria:

- (i) Deduction which is required by law (e.g. income tax, FICA); or
- (ii) Deduction which is authorized by a collective bargaining agreement or is reasonable and customary in the occupation and/or area of employment (e.g. union dues, contribution to health insurance policy covering all employees, etc.); or
- (iii) Deduction which meets the following requirements:
 - (A) Is made in accordance with a voluntary, written authorization by the employee;
 - (B) Is for a matter principally for the benefit of the employee;
 - (C) Is not a recoupment of the employer's business expense;
 - (D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered; and
 - (E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act and its implementing regulations.

C.F.R. § 655.815. Any interested party may seek review of this determination by an Administrative Law Judge. 20 C.F.R. § 655.820(a). The Administrative Law Judge shall issue a decision based on this review. 20 C.F.R. § 655.840.

The H-1B Program, the Employment Relationship, and the Employment Agreement

The H-1B visa program authorizes and regulates the employment relationship between a nonimmigrant worker and his or her employer. To that end, the Regulations state that they apply “to all *employers* seeking to *employ* foreign workers under the H-1B visa classification[.]” 20 C.F.R. § 655.700(c) (emphasis added). Additionally, as noted above, the Act and Subpart H of the Regulations describe an employer’s responsibilities in seeking authorization and the attestations the employer must adhere to concerning the H-1B employee’s conditions of employment. Moreover, with particular relevance to this case, the subsection allowing for bona fide liquidated damages also applies to the employment relationship, specifically when an H-1B nonimmigrant “ceases *employment* with the *employer* prior to an agreed date.” 20 C.F.R. § 655.731(c)(10)(i)(B) (emphasis added). Therefore, the relationship at issue is that between the employee and employer.

Correlatively, the specific employment relationship between a particular H-1B employer and its employee is embodied by their “employment agreement.” That agreement establishes the relationship between two specific parties and sets forth the terms and conditions of employment. Therefore, it accounts for the elements of a specific employment relationship. Thus, the terms and enforcement of the employment agreement must comport with the H-1B requirements.

The Contentions of the Parties

In this case, the Administrator contends that, by seeking payment of \$115,092.60 from Dr. Abiose, the Respondent is attempting to cause a prohibited reduction in or deduction from the required wage, in violation of 20 C.F.R. § 655.731. The Administrator makes two principal arguments in favor of this position: (1) that Dr. Abiose did not breach the relevant employment agreement such that the Respondent has no basis for seeking repayment; and (2) that, if this Court finds such a breach, the repayment the Respondent seeks amounts to a penalty rather than liquidated damages.

In its first argument, the Administrator contends that the Respondent is seeking a “rebate” of the required wage, and, thus, an unauthorized reduction of that wage. To that end, the Administrator argues that Dr. Abiose did not leave his employment early as he signed three employment contracts with the Respondent and fulfilled each one. (CX N; RX 3). The Recruitment Agreement, conversely, was a payment arrangement between CUMC and the Respondent and not an employment obligation between Dr. Abiose and the Respondent. Additionally, to the degree that the Recruitment Agreement bound Dr. Abiose to a four-year term of service, that term is not valid by law, and therefore unenforceable. Specifically, the Administrator points out that the LCA only authorized Dr. Abiose to work for three years. Moreover, the Respondent had notice that Dr. Abiose was only authorized to work for three years. Finally, the Administrator contends that because the Letter of Offer appended the

Recruitment Agreement, and was amended by the Amendment to a term of three years, it was reasonable for Dr. Abiose to conclude that the Recruitment Agreement was also so modified.

Alternatively, the Administrator argues that, to the extent that this Court finds that Dr. Abiose terminated his employment agreement with the Respondent early, the money the Respondent seeks to recover amounts to a penalty rather than liquidated damages. Therefore, it is attempting to cause an impermissible reduction in or deduction from the required wage. To that end, the Administrator makes two arguments that the amount is unreasonable and, therefore, a penalty. First, it contends that the sum is unreasonably large in the context of the case. Specifically, the Administrator points out that the amount of \$115,092.60 represents over half the total the Respondent paid out of pocket toward Dr. Abiose's three years of wages.¹⁰

Second, the Administrator contends that the repayment clause in the Recruitment Agreement is unreasonable because it does not consider other sources of revenue that the Respondent and CUMC received. Accordingly, there is no evidence that Dr. Abiose's leaving after three years resulted in any real economic loss for these entities. Thus, the clause does not amount to bona fide liquidated damages. Additionally, the Administrator argues that the repayment clause of the Recruitment Agreement is unenforceable on public policy grounds. To that end, the Administrator states that enforcing the clause would allow an employer to represent to the federal government an employment period of three years but bind an H-1B employee to a longer term. Thus, enforcing the four-year term of the Recruitment Agreement would allow the Respondent to circumvent the requirements of the H-1B program.

The Respondent contends that the H-1B program allows it to seek the \$115,092.60. It puts forth three principal arguments: (1) This amount constitutes bona fide liquidated damages; (2) Even after repayment of this amount, Dr. Abiose will have earned \$233,035.81 more than the prevailing wage; and, (3) The Respondent is required to collect this amount from Dr. Abiose or be subject to possible violations several federal laws.

With respect to its first argument, the Respondent asserts that the legally operative document that sets forth the term of Dr. Abiose's employment is the Recruitment Agreement. According to the Respondent, Dr. Abiose breached this agreement by not completing four years of service. As described above, the Recruitment Agreement contained the reimbursement provision that gave rise to the \$115,092.60 total. The Respondent further contends that this sum constitutes bona fide liquidated damages for three reasons: (1) The reimbursement provision was agreed upon in advance of the commencement of Dr. Abiose's services; (2) The provision accounted for damages that would be difficult to ascertain at the time Dr. Abiose signed the agreement; and (3) The reimbursement provision was reasonably proportionate to the damages caused by Dr. Abiose's breach.

With respect to the second argument, the Respondent points out that from July 1, 2002-June 30, 2005, Dr. Abiose was paid a total of \$689,050.90. The prevailing wage for that period totals \$340,922.49. Therefore, after subtracting the \$115,092.60 the Respondent seeks from the total he was paid, the Respondent still would have paid Dr. Abiose \$573,958.30, which far exceeds the prevailing wage.

¹⁰ The rest of his wages came from the FPC pool, which CUMC subsidized.

Finally, with respect to its third argument, the Respondent states that several federal laws require it to seek reimbursement from Dr. Abiose. It claims that failure to do so may result in a loss of its tax exempt status under the Internal Revenue Code, may constitute an impermissible “inducement” under the Anti-Kickback Statute, and potentially cause its agreement with Dr. Abiose to violate the Stark Law.

Analysis

The issue facing this Court is whether the \$115,092.60 the Respondent seeks to collect is an attempt to cause a prohibited deduction from or reduction in wages or an attempt to recover permissible bona fide liquidated damages. If this amount does not represent bona fide liquidated damages, the Respondent’s attempt to recoup it would be prohibited under the H-1B program as no other authorized basis for such a recovery exists. For this amount to constitute bona fide liquidated damages, two conditions must be present: (1) Dr. Abiose must have breached an “employment agreement” with the Respondent such that he ceased employment prior to an agreed date; and (2) The damages the Respondent seeks must represent bona fide liquidated damages rather than a penalty. If either condition is absent, the Respondent’s pursuit of this amount is prohibited under the H-1B program.

A. Did Dr. Abiose breach the Employment Agreement with the Respondent?

As explained above, the employment agreement is the relevant accord in determining compliance with the H-1B program as it embodies the specific employment relationship between a particular H-1B employer and employee. Therefore, with respect to the first condition, it is first necessary to identify Dr. Abiose’s “employment agreement.” After which, it must be determined whether Dr. Abiose breached that agreement.

1. Identification of the Employment Agreement

In this case, the specific employment relationship between Dr. Abiose and the Respondent was established through the series of agreements, culminating with the July 1, 2002 Faculty Agreement (CX N) combined with the two subsequent Letters of Renewal (RX 3). Therefore, these three documents collectively constitute their “employment agreement.” (hereinafter considered and referred to collectively as the “Employment Agreement”).

In reaching this conclusion, I first note that the “employer” in this case is the Respondent. The Regulations state that “[t]he person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H-1B nonimmigrant is deemed to be the employer of that H-1B nonimmigrant.” 20 C.F.R. § 655.715. The Respondent filed the petition on behalf of Dr. Abiose. (CX X at 3). Therefore, the Respondent was Dr. Abiose’s “employer” for purposes of this matter.

I next note that the Employment Agreement is established by the agreement between Dr. Abiose and the Respondent and not the three-way Recruitment Agreement between Dr. Abiose, the Respondent, and CUMC. Indeed, these were two separate agreements, which governed two

distinct matters: (1) The Employment Agreement governed the employment relationship between Dr. Abiose and the Respondent; and (2) The Recruitment Agreement governed the placement of Dr. Abiose's cardiology practice in CUMC's service area. The separateness of these agreements is established by the language of the relevant documents and supported by the statement of a Respondent's representative.

First, the Recruitment Agreement specifically anticipates that Dr. Abiose and the Respondent would enter into a separate employment agreement. It obligates Dr. Abiose and the Respondent to "[e]nter into a written Engagement Agreement pursuant to which [Dr. Abiose] will practice [Cardiology] in [CUMC's service area]." (CX E at 2).¹¹ Therefore, by its very terms, the Recruitment Agreement considers a separate agreement, executed by Dr. Abiose and the Respondent, to govern the other's employment relationship.

Second, the Faculty Agreement states, "This Agreement, along with those Exhibits and attachments as referenced, constitute the entire understanding and agreement between the parties hereto...." (CX N at 6). Similarly, the Recruitment Agreement states, "This Agreement embodies the entire understanding of the parties. There are no further or other agreements or understandings, written or oral, among the parties regarding the subject matter hereof unless expressly set forth herein." (CX E at 5). Therefore, when these statements are taken together, it is evident that the parties to each of the respective agreements anticipated that they would be separate.

Finally, in a December 8, 2006 Affidavit, Stanette Kennebrew, Associate Dean, Finance and Administration, for the Respondent stated, "The [Faculty] Agreement...is separate and independent of the [Recruitment Agreement] and solely addresses the employment of [Dr. Abiose] with Creighton University." (RX 1 at Paragraph 21).

Thus, the arrangement between Dr. Abiose and the Respondent is the relevant accord at issue.

Finally, that the Faculty Agreement and subsequent Letters of Renewals constitute the Employment Agreement is established by the plain language of the documents. First, the Faculty Agreement states generally that its purpose is to engage Dr. Abiose "as an *employee* of the University...." (CX N at 1)(emphasis added). Additionally, with respect to prior agreements between Dr. Abiose and the Respondent, the Faculty Agreement states that it constitutes the entire understanding of the parties and that it "supersede[s] all previous agreements, oral or in writing, between the parties." (CX N at 6). Therefore, by its own terms, the Faculty Agreement supersedes the Letter of Offer and Amendment, both of which predate it. Additionally, the first Letter of Renewal expressly took effect at the expiration of the term of the Faculty Agreement

¹¹ The Recruitment Agreement then states that "[t]he terms and conditions of the Engagement Agreement shall not conflict with the terms and conditions of this Agreement." (CX E at 2). As indicated above, the Recruitment Agreement provided for a term of four years. As explained below, the Faculty Agreement between Dr. Abiose and the Respondent was for a term of one year, with successive renewals each for one additional year. (RX 3). The fact that the Faculty Agreement and Letters of Renewal did not comply with the terms of the Recruitment Agreement, while no doubt of interest to those involved in this case, has no bearing on identifying the relevant employment agreement between Dr. Abiose and the Respondent. Nor does it have any bearing on whether Dr. Abiose breached that agreement such that the Respondent may be entitled to liquidated damages.

and the second Letter of Renewal expressly took affect at the expiration of the first Letter of Renewal. (RX 3). Both Letters of Renewal expressly incorporated the terms of the Faculty Agreement. (RX 3). Therefore, the Faculty Agreement and subsequent two Letters of Renewal collectively constitute the Employment Agreement between Dr. Abiose and the Respondent.

2. Did Dr. Abiose breach the terms of the Employment Agreement?

Dr. Abiose did not breach the terms of the Employment Agreement by ceasing his employment with the Respondent on June 30, 2005. To that end, the Faculty Agreement lists a term of July 1, 2002-June 30, 2003. The first Letter of Renewal lists term of July 1, 2003-June 30, 2004. (RX 1). The second Letter of Renewal lists a term of July 1, 2004-June 30, 2005. (RX 1). Therefore, the Faculty Agreement and subsequent Letters of Renewal, considered collectively as the single Employment Agreement, stand for a term of July 1, 2002-June 30, 2005.

Supporting this finding is the fact that the certified LCA, and corresponding H-1B visa that the Respondent obtained on behalf of Dr. Abiose, authorized employment from July 1, 2002-June 30, 2005 (CX I; CX L). Moreover, as stated above, the INS's approval of the H-1B petition stated that any changes would require approval of a new petition. (CX L).¹² Therefore, the authorization the Respondent obtained on behalf of Dr. Abiose supports the language of the Employment Agreement.¹³

Thus, by ceasing employment with the Respondent on June 30, 2005, Dr. Abiose did not breach the terms of his Employment Agreement with the Respondent.

B. Application of the Liquidated Damages Subsection

Because Dr. Abiose did not breach the Employment Agreement with the Respondent, the \$115,092.60 cannot constitute bona fide liquidated damages. As stated above, § 655.731(c)(10)(i) only allows for the collection of liquidated damages when the H-1B employee “ceases *employment* with the *employer* prior to an agreed date.” (Emphasis added). Thus, the provision expressly covers agreements governing the employment of the H-1B employee by the employer, and, correlatively, breaches of those agreements. In other words, this regulatory provision does not cover agreements governing matters other than the employment of the H-1B employee by the employer.

¹² As stated above, that the Respondent filed an ETA 750 with DOL on behalf of Dr. Abiose, as the first step to seek permanent residence for him. (Stip. 39). However, DOL did not certify this petition until December 8, 2005, after the expiration of the Employment Agreement and time authorized by the H-1B visa. Therefore, the Respondent did not obtain authorization for Dr. Abiose beyond June 30, 2005. Thus, its filing of the ETA 750 does not countervail the support of the H-1B visa for the three year period of employment listed by the Employment Agreement.

¹³ Therefore, it is unnecessary to consider the Administrator's argument that, because the LCA only authorized three years of employment, the four-year term of the Recruitment Agreement is not valid by law. Specifically, because the Employment Agreement governs Dr. Abiose's employment relationship with the Respondent, and it comports with the LCA, the issue of whether the ancillary Recruitment Agreement comports with the LCA is immaterial for the purposes of this proceeding.

This distinction is particularly relevant to this case. Here, we have two agreements- the Employment Agreement and the Recruitment Agreement. Dr. Abiose and the Respondent are parties to both. However, only the Employment Agreement governs Dr. Abiose's employment relationship with the Respondent. The Recruitment Agreement governs Dr. Abiose's placement in CUMC's service area, an ancillary matter. Therefore, § 655.731(c)(10)(i) may only authorize the collection of liquidated damages pursuant to a breach of the Employment Agreement. Because Dr. Abiose did not breach the Employment Agreement, the Regulations do not authorize liquidated damages in this case.

Moreover, due to this lack of authorization, it is unnecessary to consider whether the purported liquidated damages clause in the Recruitment Agreement constitutes bona fide liquidated damages or a penalty.

Therefore, because Dr. Abiose did not breach the Employment Agreement with the Respondent- and even if he had, the Employment Agreement does not contain a liquidated damages provision- the Regulations do not authorize the collection of liquidated damages.

C. Conclusions

Because Dr. Abiose did not breach the Employment Agreement and because the Employment Agreement does not contain a liquidated damages provision, the Regulations do not authorize the Respondent to collect funds from him as liquidated damages. Additionally, because no other basis exists for the Respondent to collect funds from Dr. Abiose based on the Employment Agreement, any attempt for it to do so would constitute a prohibited deduction from or reduction in the required wage.

Moreover, any attempt to collect funds based on the employment relationship between Dr. Abiose and the Respondent would similarly constitute such a violation. As explained above, the H-1B visa program authorizes and regulates the employment relationships between H-1B employees and employers. The Employment Agreement between Dr. Abiose and the Respondent embodies their specific employment relationship. Because no breach of the Employment Agreement occurred, their employment relationship likewise may not serve as a basis for recovery. To allow otherwise would circumvent the H-1B program by permitting the Respondent to recover damages based on the employment relationship when the agreement covering the totality of that relationship does not form the basis for any such allowable recovery. Thus, such a recovery also would constitute an impermissible reduction in or deduction from wages.

This conclusion, however, presents an inherent caveat. Its crux is that because the Employment Agreement, and thus the employment relationship, does not provide the basis for recovering funds, any such recovery would be prohibited under the H-1B program. However, by its very nature, this conclusion does not extend to recovery based on other agreements or bases completely separate from the employment relationship between Dr. Abiose and the Respondent.

To that end, recovery predicated upon a wholly separate basis would not only be outside the scope of the employment relationship but also beyond the purview of the H-1B program.¹⁴

This caveat has particular bearing on the circumstances surrounding this case. The Respondent filed suit in Iowa District Court for recovery of the \$115,092.60 based on an alleged breach of the Recruitment Agreement. As explained above, the Recruitment Agreement is separate from the Employment Agreement. Therefore, recovery based exclusively on the Recruitment Agreement would not be prohibited so long as it is not based in any way on the employment relationship between the Respondent and Dr. Abiose. Rather, to be permissible, the recovery must be based on obligations wholly separate from their employment relationship. To amplify, if the Respondent's basis for recovery is completely separate from the employment relationship, recovery would not violate the provisions of the H-1B program because it would, in turn, be separate from the program. However, if its basis is in any way predicated upon the employment relationship, or obligations arising out of that relationship, recovery would fall within the purview of the H-1B program and be prohibited as no breach of the Employment Agreement occurred.

Therefore, any attempts by the Respondent to recoup the \$115,092.60 based on a purported breach of the Employment Agreement or based in any way on the employment relationship with Dr. Abiose would constitute a prohibited reduction in or deduction from the required wage. However, attempts to recover this amount based on a completely separate rationale would fall outside the purview of the H-1B program and therefore not be prohibited.

SUMMARY

The H-1B visa program authorizes and regulates the employment relationship between an employer and nonimmigrant worker. It requires the employer to pay the worker a required wage. Deductions from or reductions in that wage are prohibited unless authorized by the Regulations. An employer, however, may collect liquidated damages if the employee ceased employment prior to an agreed date. To be entitled to liquidated damages under the H-1B program, the employee must have breached an employment agreement such that he or she in fact ceased employment prior to an agreed date and the damages sought must constitute bona fide liquidated damages rather than a penalty.

In this case, there are two separate agreements to which the Respondent and Dr. Abiose are parties: the Employment Agreement and the Recruitment Agreement. For the purposes of determining the Respondent's entitlement to liquidated damages under the Act and Regulations, the relevant agreement is the Employment Agreement, which embodies the specific employment relationship at issue. The Employment Agreement, comprised of the Faculty Agreement and two subsequent Letters of Renewal, puts forth a three-year term of employment. Dr. Abiose did not breach that term by leaving the Respondent's employ on June 30, 2005.

¹⁴ Correlatively, this Court only has jurisdiction to review the findings of the Administrator, which, in turn, may only investigate and determine violations of the H-1B program. Therefore, issues beyond the purview of the H-1B program exceed this scope of this Court's jurisdiction. This Court's conclusions may not exceed the scope of its jurisdiction.

Therefore, the Respondent may not attempt to collect funds from Dr. Abiose based on a purported breach of the Employment Agreement or based in any way on their employment relationship. To do so would constitute an impermissible deduction from or reduction in the required wage. However, because the H-1B program does not govern matters outside of the employment relationship, recovery predicated upon a wholly separate basis would not violate the provisions of Act or Regulations.

ORDER

Therefore, it is hereby ORDERED that determination of the Administrator is hereby MODIFIED such that the Respondent may not attempt to collect \$115,092.60 based on a purported breach of the Employment Agreement or based in any way on its employment relationship with Dr. Abiose.

A

RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within thirty (30) calendar days of the date of issuance of the administrative law judge’s decision. *See* 20 C.F.R. § 655.845(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge’s decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).