

U.S. Department of Labor

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Issue Date: 20 April 2010

Case No.: 2009-LCA-00046

In the Matter of

**ADMINISTRATOR, WAGE AND HOUR DIVISION,
EMPLOYMENT STANDARDS ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR,**

Prosecuting Party,

and

BISHNU S. BAIJU,
Complainant,

v.

BUSINESS OUTREACH CENTER NETWORK, INC.,
Respondent.

DECISION AND ORDER

I. JURISDICTION

This is a proceeding pursuant to 20 C.F.R. Part § 655, et seq., promulgated to implement the H-1B provisions of the Immigration and Nationality Act (“the Act”, hereinafter), 8 U.S.C. §§ 1101(a)(15)(H)(i)(B) and 1182(n), and in accordance with 29 C.F.R. Part 18 (the Rules of Practice and Procedure of the Office of Administrative Law Judges).

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). Such 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). In order for the H-1B visa to be issued, the employer must file a Labor Condition Application (“LCA”) with the Department of Labor (“DOL”), and describe the wage rate and working conditions for the prospective employee. 8 U.S.C. § 1182(n)(1)(D); 20 C.F.R. §§ 655.731 and 732. Once DOL certifies the LCA, 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).

II. PROCEDURAL HISTORY

On September 18, 2009, the Administrator of the Wage and Hour Division of the United States Department of Labor (“Administrator”) issued a Notice and Determination that Business Outreach Center Network (“Respondent”) had failed to pay its former employee, Bishnu S. Baiju (Complainant) in accordance with the rules and regulations governing the H-1B program. The Administrator directed Respondent to pay Mr. Baiju \$30,580.28 for nonproductive time, as defined by the Act. On September 30, 2009, Respondent filed a timely request for a hearing before the Office of Administrative Law Judges (“OALJ”). In addition, Complainant objected to the back pay calculation of the Administrator. The case was assigned to me and I issued a Notice of Hearing scheduling the matter for November 18, 2009, in New York City, New York. The parties appeared on that date, but were not prepared to proceed as neither had given notice to the other of their respective appeals. Accordingly I continued the hearing until January 29, 2010.

Respondent was represented by counsel at the rescheduled hearing, and Mr. Baiju represented himself.¹ I concluded that Complainant was competent to present his case, and I admitted to the record exhibits RX-1, and the parties pre-hearing statements, identified as ALJX-2 (A)-(F) and ALJX-3(A)-(B).² Tr. at 6-8. Respondent had submitted evidence together with pre-hearing statements in advance of the hearing, which evidence and statements were also provided to Complainant. I have identified those exhibits for ease of discussion herein as RX-2(a)-(C) and RX 3-(A) through (D). Claimant also provided his exhibits CX-1 through CX-11, which were inadvertently not admitted at the hearing, but which were acknowledged by me. I admit all eleven exhibits now, along with ALJX-1 (the Administrator’s determination, discussed *infra*). The parties did not submit post-hearing briefs. This matter is now ripe for adjudication. The following Decision and Order is based on a thorough review of the evidence, the arguments of the parties at hearing, and on the applicable law.

III. CONTENTIONS OF THE PARTIES

Respondent argues that it effected a bona fide termination of Mr. Baiju on or about June 27, 2008, as defined by the applicable regulations, thereby ending the obligation to pay Mr. Baiju’s wages. Respondent acknowledged an obligation to pay Mr. Baiju for unused vacation days but argues that he is owed only three days.

Mr. Baiju’s position is that there was not a bona fide termination. Respondent did not offer Mr. Baiju reimbursement for his transportation costs to return home or notify the INS as required by the regulations. Additionally, Mr. Baiju claims that he is owed payment for four days vacation and a bonus that was awarded to other employees.

¹ In a letter dated October 26, 2009, the Administrator stated that it would not be participating in the hearing. Counsel for the Administrator stated that she had advised Mr. Baiju to obtain his own attorney.

² In this Decision and Order, “RX” refers to Respondent’s exhibit; “CX” refers to Mr. Baiju’s exhibits; “ALJX” refers to exhibits adopted by the undersigned, and “Tr.” refers to the hearing transcript of January 21, 2010.

IV. ISSUES

At the hearing, the parties agreed that the issues presented for adjudication are as follows:

- 1) Whether Respondent violated the act by failing to pay wages to Complainant after he was terminated on June 27, 2008.
- 2) Whether Respondent owes Complainant payment for three days of vacation, or four.
- 3) Whether Complainant is owed a bonus from Respondent.

A careful review of the pleadings also reflects that Complainant alleged that Respondent discriminated against him by terminating his employment when he asked for a bonus.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Stipulations

The parties agreed that Complainant's actual wage was \$52,000 per year. I find that this stipulation is supported by the record, and I adopt it as a finding herein.

B. Summary of H-1B Process

Pursuant to the Act and its implementing regulations, certain classes of aliens who are not considered "immigrants" may work in the United States for prescribed periods of time and prescribed purposes. 8 U.S.C. § 1101(a)(15). One class of such aliens, known as "H-1B workers" are issued specific visas to work on a temporary basis in "specialty occupations". 8 U.S.C. § 1101(a)(15)(H); 20 C.F.R. § 655.700(c)(1). A "specialty occupation" is one that requires theoretical and practical application of highly specialized knowledge and attainment of a bachelor's degree or higher in the specialty. 8 U.S.C. § 1184(i); 20 C.F.R. § 655.715. Visas issued to such workers are limited to a six-year period of admission and are restricted in number in any fiscal year. 8 U.S.C. § 1184(g).

INS identifies and defines the occupations covered by the H-1B category and determines an individual's qualifications. The U.S. Department of Labor ("DOL") administers and enforces the labor conditions applications ("LCA") relating to the alien's employment. 20 C.F.R. § 655.705. Employers who seek to hire individuals under an H-1B visa must first file a LCA with DOL, and certification of the application is required before INS approves the visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); see also 20 C.F.R. Part 655, Subparts H and I. In the LCA, the employer must represent the number of employees to be hired, their occupational classification, the actual or required wage rate, the prevailing wage rate and the source of such wage data, the period of employment and the date of need. 20 C.F.R. §§ 655.730-734; 8 U.S.C. § 1182(n).

After the LCA is certified, the employer submits a copy of the certified LCA to the INS along with the non-immigrant alien's visa petition to request H-1B classification for the worker. 20 C.F.R. § 655.700. If the visa is approved, the employer may hire the H-1B worker. Employers are required to pay H-1B workers beginning on the date when the nonimmigrant first is admitted to the United States pursuant to the LCA. 20 C.F.R. § 655.731(c)(6). Employers are required to pay H-1B employees the required wage for both productive and non-productive time. Employment-related nonproductive time, or "benching", results from lack of available work or lack of the individual's license or permit. 8 U.S.C. § 1182(n)(2)(c)(vii); 20 C.F.R. § 655.731(c)(7)(i). The employer's duty to pay the required wage ends when a bona fide termination occurs, but if the employer rehires the "laid off" employee, a bona fide termination is not established. 20 C.F.R. § 655.731(c). An employer need not pay wages for H-1B visa workers in nonproductive status at their voluntary request or convenience. *Id.* The employer must notify the INS that it has terminated the employment relationship so that the INS may revoke approval of the H-1B visa. 8 C.F.R. § 214.2(h)(11). Employers must notify INS that the employment relationship has been terminated so that the visa petition may be canceled. 20 C.F.R. § 655.731(7)(ii); 8 C.F.R. § 214.2(h)(11); 8 C.F.R. § 214.2(h)(4)(iii)(E).

C. Summary of the Evidence

1) Testimonial Evidence

The following summary of the testimony of the witnesses who appeared at the hearing emphasizes those facts that I consider most probative and relevant to my findings. However, in reaching my findings of fact and conclusions of law, I have carefully considered all of the testimony of all of the witness, taking into account all relevant and probative evidence. I have evaluated the testimonial evidence by assessing its inherent consistency and consistency with other evidence of record. I have also made assessments of the credibility of the witnesses, considering the source of information, its reasonableness, its consistency with other evidence, and the demeanor and behavior of the witnesses.

Bishnu S. Baiju

Mr. Baiju testified on his own behalf at the hearing on January 29, 2010. At my urging, he identified what he believed to be the issues in dispute: the date of his bona-fide termination; the amount of leave accrued; and Respondent's failure to pay him a bonus. Tr. at 41, 42, 44. He also agreed that his actual wage for purposes of the law is \$52,000 a year,³ and that a \$700 payment that he made to Respondent was refunded to him. Tr. at 42, 44.

Mr. Baiju described his work as Respondent's financial manager. He disputed that he was fired for his performance, and stated his belief that he was fired on June 27, 2008, for asking why he was not given a bonus when they were awarded to other employees. Tr. at 45. Complainant denied being told that he was being discharged because of his performance. *Id.* Although he attempted to return to Respondent's building on multiple occasions, he was either

³ Mr. Baiju has argued that he should have been paid a higher rate based on a different job classification. As he was told at the hearing, the job classification and attendant rate cannot be appealed in this adjudication. *See* 20 C.F.R. § 655.840(c) (expressly forbidding administrative law judges from determining the validity of wage determinations).

locked out or not allowed into the office. Tr. at 47. He made repeated requests for Respondent to “clear his account”. He explained what he meant by that at the hearing:

Mr. Baiju: If they don’t want to place me back to my job then they have to close my account. They didn’t clear my account, instead they assigned me -- one of the staff came to manhandle me.^[4]

Judge Bullard: All right.

Mr. Baiju: If they had terminated me they would clear my account and they could let me go. I could find another job better than that job.

Judge Bullard: Isn’t it true -- I have no idea what you mean by “clear your account”, what do you mean by that?

Mr. Baiju: They have not cleared that \$700 dollar,^[5] they had not cleared me my leave money, they had not cleared me my –

Judge Bullard: All right, how does any of that prevent you from finding another job somewhere?

Mr. Baiju: Because everywhere I go they first ask where were you working, and they contact them. And once they contact them they reject me. That’s the employment package in this country.

Judge Bullard: Well, how do you know --

Mr. Baiju: If the employee was to -- they’re first ask[ed] where you are working before.

Judge Bullard: All right.

Mr. Baiju: And once they contact them I don’t get a job.

Judge Bullard: On July 8th -- well, do you recall getting a letter dated July 8th, 2008, signed by Nancy Carin? You introduced it into evidence, so I guess you remember it. It’s a letter that says -- refers to the meeting on June 27th, and it says, “As of June 27th you are no longer an employer of BOC Network. We issued your final payroll check through June 30th, 2008.” Do you recall that letter?

⁴ It is unclear when this happened. Ms. Carin and Mr. Baiju both testified that he returned to the building at one point and she asked him to leave

⁵ Both sides stated that this issue was resolved.

Mr. Baiju: That letter only on hearing on November 18th, in 2009, before then that I have no idea what is they are talking about.

Judge Bullard: Where did you live, July 8th, 2008?

Mr. Baiju: In the same address where I have just -- given now.

Judge Bullard: And you're saying you never received this letter?

Mr. Baiju: I have no idea about that letter, I have not received any payment, I have no received any letter.

Tr. at 47-49. Mr. Baiju said that he was paid through the end of June. Tr. at 50.

Complainant testified that he received an email offering him transportation to his country of origin, and he responded with a letter to Ms. McNair (CX-9). Claimant denied receiving Respondent's written termination correspondence in June, 2008, and alleged he only received it on November 18, 2009. Tr. at 53. Complainant admitted receiving emails after June 27, 2008 that referred to his termination. He received an email from Ms. McNair on July 3, 2008, in which he was asked to complete a time sheet. He explained that he returned to Respondent's place of business to get payments he was due, but was physically kept out of the office. Tr. at 54-55.

Nancy Carin

Ms. Carin testified at the hearing on January 29, 2010. She hired Mr. Baiju in early March of 2008. Tr. at 59. Although his official title was "financial manager," she explained that Complainant's role more closely fit the description of "financial specialist" in the way the jobs were described in the Department of Labor guidelines. Mr. Baiju was the only full-time employee in the department, which also included a part-time bookkeeper and assistant, she said. Tr. at 65. Respondent did not offer Mr. Baiju a contract, but rather sent him an engagement letter stating what his salary would be. Tr. at 69. Mr. Baiju was eligible for the same health and vacation benefits (after a ninety-day probationary period) as all of Respondent's employees, Ms. Carin said. Tr. at 70.

Mr. Baiju worked for Respondent for just more than three months, Ms. Carin said. She described problems with his job performance, his relationship with colleagues, and his relationship with representatives of other organizations that provided funding for Respondent. Tr. at 59. Ms. Carin testified that there were issues involving whether Complainant was performing all of his job duties and getting reports to where they belonged. She believed that major changes in work process and better supervision of Complainant were required to make the situation work. She explained that she often received emails from Complainant that she did not know how to handle. She worked in getting a meeting together with Mr. Baiju and Gregory Libertiny, the treasurer of Respondent's board of directors, to try to solve some of the problems.

Ms. Carin testified that the meeting was held towards the end of June, 2008. She intended the meeting to be an evaluation and discussion with Mr. Baiju to clarify the problems she perceived with the job, but she felt that the meeting did not go well. She explained, "it didn't produce any positive results, the initial part of the meeting, and there was no positive plans, there was just accusations and, you know, I think we didn't see any light at the end of the tunnel." Tr. at 61. Ms. Carin and Mr. Libertiny took a break to confer and decided to tell Mr. Baiju that he was being fired. Ms. Carin said that he responded by saying "I hereby resign. You don't have to let me go, I resign." And we said, 'Fine, that is totally fine with us.'" Tr. at 61.

Respondent followed up with correspondence formally terminating Mr. Baiju, but Ms. Carin described a confusing series of letters from him after that meeting.

I don't want to define them as "strange" but the fact of the matter is, Mr. Baiju communicated back as if he still worked at the organization, which was very confusing for me, and so we sent a registered letter with [a] clear description of the fact that he no longer worked at the organization. In that letter we included his vacation pay. However, the registered letter came back to us.

Tr. at 62. Ms. Carin testified that the registered letter was not signed for. Tr. at 71. Ms. Carin saw Complainant after his termination when he returned to Respondent's place of business after his termination and refused to leave. She had to advise him that he no longer worked for the company.

Ms. Carin next saw Complainant at an unemployment benefit hearing involving Mr. Baiju's collecting benefits while employed with Respondent. It was at that time that Ms. Carin advised Complainant that Respondent would pay for him to return to his country of origin. She had not made the offer earlier because she was not aware of Respondent's obligation to do so. Ms. Carin followed up the verbal offer by sending Complainant an email. Respondent had sent Complainant a check for three days of vacation pay, but the check was not cashed, and Respondent eventually cancelled the check.

Ms. Carin did not realize when Complainant was discharged that Respondent needed to notify the government about the termination, and a letter informing INS of Complainant's termination was not sent until after the Administrator began an investigation. Tr. at 63. She did, however, notify Respondent's attorney's office to withdraw Respondent's sponsorship of Mr. Baiju's green card application after he was terminated. Tr. at 71. Ms. Carin did not speak with the attorney until the Administrator's investigation several months later.

Complainant was paid through the end of June, Ms. Carin said, even though he did not work until the end of the month. Tr. at 73. Respondent nevertheless was willing to pay him for vacation days, even though he was paid for days he did not work. Id. Ms. Carin explained Respondent's policy with vacation benefits as allowing employees to earn one day for every month that they worked. She calculated that Mr. Baiju was owed three vacation days, based on having worked three complete months. Although she intended to send another check after the first one was returned, Ms. Carin said, neither she, nor anyone else working for Respondent ever did. Tr. at 72-73. Ms. Carin explained that she could not pay the vacation by direct deposit

because Complainant was no longer on payroll, and their payroll agent can only process payments to current employees. Tr. at 75-76.

With regard to the bonus payments given to other employees, Ms. Carin said that bonuses were paid to four employees out of approximately twenty who worked for Respondent. She said that the bonuses were based upon work performed in 2007, and paid out of funds left over from the fiscal year ending in June 2007. Tr. at 67-68. Bonuses are recommended by the Board after evaluating performance. Upon cross examination, Ms. Carin corrected her statement to add that one of the individuals who was paid a bonus had been hired more recently, in 2008, and was given a bonus because the employee's salary "was way underneath what they were performing at, and we gave them a bonus." Tr. at 85. The majority of employees did not receive a bonus.

Ms. Carin believed that Complainant was paid the same as everyone else who worked for Respondent. She understood that Complainant filed for unemployment benefits based upon his employment with Respondent. Tr. at 74.

2) Documentary and Other Evidence

CX-1: Description of Job

Narrative description by Mr. Baiju of his experience working for Respondent.

CX-2: Labor Condition Application

A copy of the electronically filed Labor Condition Application for Mr. Baiju's H-1B visa, filed by Respondent. Signed by Nancy Carin on March 5, 2008. Approved by the Department on March 6, 2008, starting the same date. Sets Mr. Baiju's rate of pay at \$52,000 per year for the position of financial specialist, with a prevailing wage for that position and location of \$39,707.

CX-3: Petition to USCIS, March 6, 2008

Ms. Carin's letter to USCIS asking to make Respondent the designated employer on Mr. Baiju's H1-B visa. The letter describes the position of "financial specialist" and its responsibilities, and the qualifications of Mr. Baiju.

CX-4: Appointment Letter

Mr. Baiju refers to this letter, dated March 4, 2008, as his contract. It details his salary and benefits, Respondent's requirements of a 90-day probationary period, and vacation policies. States that Mr. Baiju would earn one day of vacation for each month of work during his first year of employment, and 1.5 days per month in the second year. Vacation days would not vest until Mr. Baiju completed the probationary period.

CX-5: DOL Listing for “Financial Manager”

A printout from the Department’s Foreign Labor Certification Data Center of the salary levels for financial managers in the New York-New Jersey Metropolitan Area.

CX-6: Retainer agreement

This exhibit contains two documents: an agreement between Respondent and Mr. Baiju that he will repay Respondents’ legal costs should he leave before completing his probationary period (ending June 6, 2008); and a retainer agreement between Respondent and Respondent’s counsel limited to work on immigration matters regarding Mr. Baiju.

CX-7: Receipt for \$700

A receipt for funds paid by Mr. Baiju to Mr. Seadie on March 5, 2008.

CX-8: Records of conference

Records showing that Mr. Baiju attended a conference on behalf of Respondent.

CX-9: Travel cost correspondence

This exhibit consists of three letters. First chronologically (second in order) is an April 27, 2009, email from Respondent to Mr. Baiju asking him to contact an employee of Respondent regarding his travel costs to return home. Second chronologically (third in order) is a letter to Mr. Baiju from Respondent dated April 28, 2009, formally offering to pay the travel costs. On May 5, 2009, Mr. Baiju responded with a two-page letter that repeated his accusations regarding Ms. Carin and Respondent and his willingness to return to work. However, he also requested payment for his unproductive time.

CX-10: Advertisement for finance manager position with respondent

A job listing for “Finance Manager” with Respondent, listed on March 17, 2009. The source of the job listing is not given.

CX-11: Mr. Baiju’s resume and letter to Respondent

The letter is an email dated April 15, 2009, to Ms. Carin, asking to be reinstated to his job. It refers to a conversation between Mr. Baiju and Ms. Carin on April 1, 2009, in which she offered to have Respondent pay Mr. Baiju’s transportation costs to his country of origin. Mr. Baiju sent a copy of the email to the Administrator.

RX-1: EEOC Dismissal

A copy of the Equal Employment Opportunity's Commission's ("EEOC") Dismissal and Notice of Rights dated May 9, 2009 includes the EEOC's notice to Respondent that a potential charge had been filed, and Mr. Baiju's initial complaint dated March 26, 2009, alleging that he was fired because of his race and gender on June 27, 2008.

RX-2A: Letter dated July 8, 2008 to Complainant from Nancy Carin

Letter confirmed that on June 27, 2008 Complainant was advised that his services were not required and that he responded by resigning. He was advised that he was not considered an employee of Respondent as of June 27, 2008.

RX-2B: Letter from Ms. Carin to Complainant dated July 3, 2008

Letter accepts Complainant's resignation and advised him that he was being reimbursed for his attendance at a conference.

RX-2C: Letter from Complainant to Nancy Carin, attached to email dated June 27, 2008

Complainant addresses his differences about work assignments, complaining that his time was wasted with accounting work rather than doing fund raising, and complaining about Ms. Carin inviting a member of the Board to discuss his work with her and him, and accusing him of racial discrimination. The letter ends with his offer of resignation and thanks for his time working with Respondent.

RX-3A: Letter dated March 5, 2009 from Respondent to USCIS

Letter advises that Complainant no longer employed by Respondent and requests cancellation of H-1B approval.

RX-3B: Letter dated April 7, 2009

Letter from USCIS to Respondent acknowledging revocation of H-1 B petition

RX-3C: Email from Complainant to Respondent dated July 7, 2008

Correspondence advises that Complainant was aware of a future job offer and needed to resign his current position, and advising that he had "tendered advance notice of resignation already".

RX-3D: Decision from Unemployment Insurance Appeal Board case involving Complainant

Decision issued April 27, 2009 concluded that Complainant had certified that he had not worked on days when he actually worked for Respondent, thereby collecting benefits to which he was not entitled.

ALJX-1: Administrator's Determination, September 18, 2009

Neither party has introduced the Administrator's findings as an exhibit, however, I take official notice of the document per 29 C.F.R. § 18.45. The Administrator's letter to Respondent states that it conducted an investigation and found that Respondent failed to pay wages as required. Accordingly, the Administrator ordered Respondent to pay back wages of \$30,430.28 to Mr. Baiju for the period covering the weeks ending July 5, 2008 to April 4, 2009, along with any applicable interest. The Administrator did not explain the reasoning for the dates selected or wage rate used in calculating the amount.

ALJX-2 Complainant's pre-trial statements

Statements pursuant to notice of hearing, dated November 25, 2009.

(A) Complainant's pre-trial statements argued that he is entitled to business expenses of \$5,645. Claimant argues that no bona fide termination was effected at any time, noting that although he was offered transportation to his country of origin, Respondent did not tender him the costs for that expense. Complainant also argued that he is entitled to interest on his unpaid vacation equivalent payment of \$700.00. Claimant also claims that Respondent is responsible to make payments for FICA and other payroll taxes on that vacation payment. He argued that this payment should have been made by direct deposit. Complainant argued that he is entitled to a bonus, and supports that contention with a copy of an email that he forwarded to Respondent on July 3, 2008.

(B) Complainant again argued that he is entitled to reimbursement of business expenses and further argued that Respondent's cited legal precedent is not relevant to his circumstances.

(C) Complainant argued that Respondent's evidence should be excluded as untimely. I overruled this objection. Respondent attached most of its documentary evidence to pre-hearing statements that were provided to me and, according to certificates of service, were served upon Complainant. Complainant argued that he was retaliated against and was discharged from his employment with Respondent for asking for a bonus and fringe benefits on June 27, 2008. Again, he argued that no bona fide termination was effected.

(D) Complainant alleges that he continues to be in "benched" status, and is entitled to his salary and fringe benefits for the period from July 1, 2008 to the current time. Complainant again argued that he was entitled to business expenses, but at the time of the hearing before me, that argument was not made.

(E) In an email dated January 23, 2010, Complainant referred to an agreement between the parties for Respondent to pay him business expenses in the amount of \$4,945.00.

(F) Complainant summarized his calculations of back wages due, based upon a monthly salary of \$4,333.35 x 32 months, calculated on a base wage of \$52,000.00 per year. He calculated fringe benefits of \$36,000.00, leave money of \$800.00, a bonus of \$2,500.00, litigation expense of \$3,000.00 and what he concluded was the difference between what he

perceived as the correct prevailing wage (\$84,157.00) and his actual wage during the period of his employment. Complainant also asserted that he was discriminated against in retaliation for requesting payments, and alleged that Respondent has given negative references to potential employees. He did not specify an amount of damages, but advised that he would compromise his alleged back wage claim.

ALJX-3 A&B Respondent's pre-trial statements

Attached to Respondent's pre-trial statement is a statement signed by Nancy Carin. I accord more weight to Ms. Carin's testimony, as she testified at the hearing. In addition, Respondent submitted a copy of its LCA for Complainant, which is in evidence at CX-2.

D. Discussion of Facts and Law

1. Does Respondent owe Mr. Baiju wages?

To protect nonimmigrant employees, the regulations strictly define the circumstances in which employers are not required to pay wages. The requirement lapses when the employee is away from their duties voluntarily, or if circumstances such as an accident or illness render the employee temporarily unable to work if such periods are not covered under a benefit plan or other laws. 20 C.F.R. § 655.731(c)(7)(ii). Additionally, "payment need not be made if there has been a bona fide termination." *Id.* (emphasis in original). The Administrative Review Board ("ARB") has identified three elements of a bona fide termination:

- 1) There must have been notice to the employee;
- 2) Employer must offer reimbursement for the cost of transportation to the employee's last place of foreign residence, per 8 C.F.R. § 214.2(h)(4)(iii)(E); and
- 3) Employer must notify the INS of the termination, per 8 C.F.R. § 214.2(h)(11).

Gupta v. Jain Software Consulting, Inc., No. 05-008, slip op. at 5 & n.3 (ARB March 30, 2007). Employers have the burden of proving that a termination is bona fide. *Id.* The ARB has further stated that "whether a termination is bona fide does not turn solely on whether the employer notified INS. The employer should be permitted to present other evidence concerning whether it terminated the H-1B employee. Filing such notification with INS constitutes additional, not conclusive evidence of termination." Administrator, Wage and Hour Division v. Ken Technologies, Inc., No. 03-140, slip op. at 5 (ARB Sept. 30, 2004).

To summarize the evidentiary record on this point, Mr. Baiju was discharged from his employment with Respondent on June 27, 2008. I find that Ms. Carin's account of his firing is credible, and conclude that Complainant was told that he was going to be fired and elected to resign. Ms. Carin's testimony is supported by two letters from Ms. Carin to Complainant, dated July 3, 2008 (RX-2B) and July 8, 2008 (RX-2A). In each of the letters, Ms. Carin notes that Complainant resigned his position, and in the letter dated July 8, 2008, she notes that he was advised that his services were no longer needed as of June 27, 2008, on which date he was no longer considered an employee. In an email dated June 27, 2008, Complainant tendered his resignation. RX-2C. In another email from Complainant to Respondent, he advised that he was

aware of a future permanent position and had to resign his current position, and acknowledged that he had “tendered advance notice of resignation already”. RX-3C. In addition, the record reflects that Complainant had filed for unemployment benefits based upon his record of employment with Respondent. RX-3D. Accordingly, I find that Complainant should have reasonably been aware that his employment was terminated on June 27, 2008.⁶

Although Respondent gave unequivocal notice to Complainant of his discharge from employment, it did not immediately follow up with two steps required under the law to effect a bona fide termination. Respondent failed to offer him transportation home and failed to notify the government of his termination contemporaneously to his discharge. Respondent offered to pay for Complainant’s transportation home first informally at an unemployment hearing in 2009, which was confirmed in writing on April 27, 2009. CX-9. In a letter dated March 5, 2009, Respondent advised USCIS that Complainant no longer worked for BOC. RX-3A. USCIS acknowledged the revocation of Complainant’s H-1B status by letter dated April 7, 2009. RX-3B. Ms. Carin testified that Respondent was not aware of its obligation to perform these two actions until the Administrator initiated its investigation of Respondent.

As the result of its investigation, the Administrator concluded that Respondent had failed to effect a bona fide termination until the week of April 4, 2009. The Administrator calculated back wages from July, 2008 until that date. ALJX-1. I infer from this finding that the Administrator accepted that a bona fide termination was effected at the time that Respondent advised USCIS of Complainant’s work status, which followed a written offer to Complainant to purchase his transportation to his country of origin. Although the ARB has held that filing a notice of termination with the INS is not the only indicator of a bona fide termination, (see, Ken Technologies, supra.). Respondent has not provided an acceptable rationale under that holding for failing its regulatory obligations.

In addition, I accord weight to Ms. Carin’s acknowledgment to USCIS that Respondent would “file an amended H-1B petition with the USCIS in case of material change in job duties or location” (CX-3 at 4) and conclude that Respondent had constructive notice of its obligation to advise USCIS of Complainant’s termination. Although Respondent contacted its attorney regarding Complainant’s status, the record reflects that the communication was with the attorney’s staff, and was limited to Respondent’s sponsorship of Complainant’s permanent visa application. Accordingly, I find that Respondent did not effect a bona fide termination of Mr. Baiju, and owes him back wages for the period described in the Administrator’s determination.

2. Wage Rate

Although I find that Complainant is due back wages, I further find that the Administrator’s calculations are erroneous. The Administrator calculated a gross amount due of \$30,580.28, without revealing the wage rate that it used for the forty-week period for which it determined Mr. Baiju is owed wages. There is no indication that taxes were pre-deducted from this amount. The total back wages reflect that the Administrator mistakenly used the prevailing wage rate in the LCA (\$39,707 per year) rather than the actual wage rate of \$52,000 per year.

⁶ Complainant further demonstrated his awareness of his discharge by alleging that his employment was terminated in retaliation for alleged protected activity.

The proper wage rate for this calculation is the actual wage that Respondent agreed to pay Mr. Baiju. See 20 C.F.R. § 655.731(a) (“wage shall be the greater of the actual wage rate . . . or the prevailing wage”); and § 655.731(c)(7)(i) (requiring employer to pay “wage for the occupation listed on LCA”). Accordingly, Respondent owes Mr. Baiju forty weeks of salary (\$1,000 per week), or \$40,000.00.

Complainant argues that the wage he was paid was not commensurate with the work he was performing, and contends that a higher level of the position type identified on the LCA would be the appropriate wage rate. 20 C.F.R. § 655.731(c)(8) states: “If the employee works in an occupation other than that identified on the employer’s LCA, *the employer’s required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.* (emphasis added); see Amtel v. Yongmahapakorn, ARB Case No. 04-087, ALJ Case No. 2004 LCA-006, at 6-7 (2006). In these circumstances, the Complainant was paid an actual rate, and not the LCA wage rate, and I find that.

3. Pay for Vacation Days

Mr. Baiju contends that he is owed pay for four vacation days. Respondent believes that he is owed pay for three days, because he did not work four complete months of work. Respondent’s contention is supported by Ms. Carin’s testimony, and the letter addressed to Complainant when he was hired by Respondent. See, CX-4. Respondent’s policy of providing employees one day of vacation for every month worked is clearly set forth. Mr. Baiju did not complete his fourth month of work and thus is not entitled to a fourth day of vacation pay.

4. Bonus Pay

Mr. Baiju also contends that he is owed a bonus, as was awarded to other employees of Respondent. The uncontroverted testimony on this point is that bonuses were awarded to a select few employees, and not across-the-board. Respondent was under no obligation to pay Mr. Baiju a bonus, only to pay him what it agreed to pay him as salary on the labor condition application. Mr. Baiju’s claim on this point is denied.

5. Business Expenses

Complainant’s written argument and submissions refer to unpaid business expenses. There is no evidence of record regarding how such expenses were incurred, and I decline to make a determination regarding those expenses.

6. Tax Deductions

The regulations make it clear that employers of non-immigrant workers must make appropriate tax withholdings and deductions from the wages of employees. The regulatory definition of “cash wages paid” requires that appropriate withholdings for taxes and other legal deductions be taken from earnings. 20 C.F.R. § 655.731(c)(2)(i) through (v). Additionally, cash payments must be reported to the Internal Revenue Service, with appropriate withholding for the

employee's federal income tax and FICA obligations. 20 C.F.R. § 655.731(c)(2); Administrator v. Synergy Sys., Inc., ARB No. 04-076, ALJ No. 2003-LCA-022 (June 30, 2006).

Complainant asserts that Respondent is obliged to make necessary deductions for payroll taxes regarding vacation days. Considering the regulatory scheme, it is clear that if Complainant had been paid for vacation days within a normal work week, deductions and withholdings would have been taken. Accordingly, I find that Respondent is responsible to treat Complainant's back wages and payments in lieu of vacation as wages, and is further required to take appropriate deductions and withholdings from those wages.

7. Penalties

Section 212(n)(2)(C) of the INA, 8 U.S.C. § 1182(n)(2)(C) sets forth certain penalties to protect employees. Given my findings above, penalties are not appropriate to this proceeding. The Administrator did assess a penalty at the rate of 6% on any portion of the debt that was not paid for more than 90 days after the issuance of the determination. It appears from the letter of determination that the penalty was assessed as an "administrative cost . . . to help defray the Government's cost of collecting this debt". ALJX-1. Since the government did not act as prosecuting party in the instant litigation, I do not find it appropriate to assess that penalty.

8. Interest

Respondents shall pay prejudgment compound interest on the award of accrued back wages at the applicable rate of interest which shall be calculated in accordance with 26 U.S.C. § 6621. Respondents shall also calculate post judgment interest under 26 U.S.C. § 6621 until satisfaction. Interest should be calculated on the amount of back wages and other compensation due to Complainant before withholdings and deductions.

9. Discrimination

Although Complainant agreed at the hearing that the issues underlying his complaint involved his pay, he also alleged that his termination followed his demand for bonus pay, thereby inferring a complaint of discrimination. Title 20 of the Code of Federal Regulations implements the employment protection provision that the Competitiveness Amendments added to the H-1B visa program at 8 U.S.C. § 1182(n)(2)(C)(iv). Those who employ H-1B workers may not discriminate against them in any manner for complaining internally (to the employer) or externally (to the government) about suspected violations of H-1B program requirements. The regulations provide as follows:

No employer . . . shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee . . . because the employee has . . . [d]isclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation . . . of the INA or any regulation relating to sections 212(n) or (t) . . . or . . . [c]ooperated or sought to cooperate in an investigation or other proceeding concerning the employer's

compliance with the requirements . . . of the INA or any regulation relating to sections 212(n) or (t).

20 C.F.R. § 655.801(a).

It is unclear whether Complainant raised an allegation of discrimination in his complaint with the Administrator, but the record reflects that the Administrator did not investigate allegations of discrimination. In its notice of determination following investigation, dated September 18, 2009, the Administrator concluded that Respondent is responsible to pay back wages to Complainant, and the calculation of back wages makes it clear that they were based on the conclusion that Respondent had not effected a bona fide termination. ALJX 1. In the absence of evidence that the Administrator investigated an allegation of violation of the Act, I have no jurisdiction to review that allegation. See, Nikes K. Jain v. Empower It, Inc., d/b/a Infobahn Technologies, ARB Case No. 08-077 ALJ Case No. 2008-LCA-008(ARB October 30, 2009). In that case, the ARB relied upon its holding in Watson v. EDS Corp., ARB Nos. 04-023, 029, 050, ALJ Nos. 2004-LCA-009, 2003-LCA-030 and Watson v. Bank of America, ARB No. 04-099, ALJ No. 2004-LCA-023, slip op. at 5 (ARB May 31, 2005). In the Watson matters, the ARB concluded that no hearing or appeal was available in instances where the Administrator did not conduct an investigation. Watson cases, supra. It is clear from INA regulations that a hearing may be requested where the Administrator determines after investigation that an employer has either violated or not violated the Act. See, 20 C.F.R. § 655.820(b)(1)(2).

In the instant matter, there is no evidence of record to contradict the plain language of the Administrator's determination, which found only that Respondent owed back wages to Complainant. There is nothing in the determination that suggests that the Administrator's investigation included an inquiry into Complainant's allegations of discrimination. Complainant has provided no evidence to find otherwise. I cannot deduce from the record before me whether the Administrator notified Complainant of the decision that some of Complainant's allegations would not be investigated. However, regardless of whether Complainant was advised of the Administrator's decision, the fact that the allegation of discrimination was not investigated deprives Complainant of further administrative recourse on this issue. See, Watson, supra. The Administrator's authority to determine whether allegations should be investigated is discretionary. See, Jain, supra.

As I have no jurisdiction to make determinations in Complainant's allegation of discrimination, I decline to do so.

VI. CONCLUSION

Respondent failed to properly notify the INS or offer Complainant reimbursement for his transportation costs to return home in a timely manner. Respondent failed to effect a bona fide termination of Complainant's employment until those actions were carried out. Respondent is therefore obligated to pay Complainant for unproductive time. Back wages of \$40,000.00 are therefore due to Mr. Baiju, plus any applicable interest. In addition, Respondent owes Complainant the equivalent of three days pay for vacation time earned. Respondent must take from those payments all appropriate deductions and withholdings and forward them to the

appropriate taxing authority. Respondent does not owe Complainant a bonus or unreimbursed business expenses.

Respondent is not liable for any penalties but is liable for pre-judgment and post-judgment interest.

Complainant's allegations of discrimination were not addressed by the Administrator's investigation, and therefore I am deprived of jurisdiction to hear them.

ORDER

Respondent is hereby ORDERED:

- 1) To pay Complainant \$40,000.00 as back wages due;
- 2) To pay Complainant the equivalent of three days of pay for unused vacation time;
- 3) To calculate pre-judgment and post-judgment interest as described herein on the gross wages due;
- 4) To take all required deductions and withholdings from those payments and deposit them with the appropriate taxing authorities.

This Decision and Order shall supersede the Administrator's findings regarding the amount of back wages.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

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-5220, 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).