

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 June 2010

Case Number: 2009-LCA-00024

In the Matter of:

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

Prosecuting Party,

v.

SILICONLINKS, INC.,

Respondent.

**Appearances: Jeremy K. Fisher, Esq.,
For the Prosecuting Party.**

**Hari Thatikonda, *pro se*,
For Respondent.**

Before: Judge Robert B. Rae

DECISION AND ORDER

This matter arises under the H-1B provisions of the Immigration and Nationality Act (“INA”), 8 U.S.C. §§ 1101 (a)(15)(H)(i)(B) and 1182(n), and its implementing regulations found at 20 C.F.R. Part § 655, *et seq.* Under the INA, 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-1 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”), describing 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 655.732. Once DOL certifies the LCA, INS can then approve the nonimmigrant's H-1B visa petition. 20 C.F.R. § 655.700(a)(3).

PROCEDURAL HISTORY

On May 12, 2009, the Administrator, Wage and Hour Division of DOL issued a Notice and Determination letter to Narahari Thatikonda, addressed to him as President of Siliconlinks Inc., (hereinafter "Respondent"), notifying him that he violated the H1-B provisions of the INA by requiring or accepting payment of the additional petition fee. The notice directed Respondent to pay \$1,500 in back wages to the H-1B nonimmigrant but did not assess any civil money penalties. Respondent timely requested an appeal before the Office of Administrative Law Judges (OALJ) on May 26, 2009, alleging that it never received a check or money from the H1-B petitioner, Vikas Taank, that Respondent made the required payments to INS and paid legal fees in connection with the application, and that Vikas Taank filed the LCA complaint in retaliation after Respondent rejected his request for documents in connection with his employment.

The case was assigned to me on May 27, 2009 and I issued a notice of hearing scheduled for June 23, 2009 in Washington, D.C. On the date of the hearing, Respondent was the only party present. That same day I issued an Order to Show Cause why the case should not be dismissed for failure of the Prosecuting Party to attend the hearing. After receiving what I felt was an inadequate response from the Prosecuting Party, I dismissed the case on July 13, 2009. The Prosecuting Party appealed my determination on August 21, 2009. The Administrative Review Board heard the appeal, held that I abused my discretion when I dismissed the case, and remanded the matter to me on November 4, 2009. On November 6, 2009 I issued a second notice of hearing scheduled for February 9, 2010 in Washington, D.C.

On January 25, 2010, the Prosecuting Party filed a Motion for Dismissal of Hearing Request because it was unable to reach Respondent or engage him in conducting the pretrial discovery required by my pretrial order. On February 2, 2010 I held a phone conference with all parties to the litigation to ensure that the Prosecuting Party and Respondent, proceeding *pro se*, would be in contact and both agreed that they were ready to proceed to the upcoming hearing. Shortly thereafter, a cataclysmic blizzard struck the Washington D.C. area and shut down the federal government for an entire week, the first day of which was February 8, 2009. Needless to say, no party was in attendance at the February 9 hearing.

I then issued a Second Amended Notice of Hearing, rescheduling the hearing for March 25, 2010 in Washington, D.C. On that date, all parties were present¹ and the weather was relatively clear. After I discussed Respondent's continuing and voluntary desire to proceed with the case *pro se*, I held the hearing and received testimony from the Prosecuting Party's witness, Jessica Shaw, investigator for the Administrator, Wage and Hour Division in Raleigh, NC, and from Hari Thatikonda, representative for Respondent, Siliconlinks, Inc. At the hearing, which will be referred to by the pages of the transcript ("TR") thereto, the parties admitted joint exhibits ("JX") 1 through 11.

HEARING TESTIMONY

Ms. Shaw testified that she has been a wage and hour investigator for approximately ten years at the office in Raleigh, North Carolina, which covers the entire state. TR.10. She has investigated over 300 cases and received training in the enforcement areas of the Fair Labor Standards Act, the H1-B program, and the Medical Leave Act. TR. 11. Ms. Shaw investigated this case along with Tiron Thorpe, a second investigator, after Mr. Taank filed his complaint against Siliconlinks, Inc., alleging that he was asked to pay the \$1,500 processing fee for his H1-B application. TR. 12. Siliconlinks, Inc. is an IT corporation located in Durham, North Carolina. TR. 12.

When Mr. Taank began working at Siliconlinks, he was already present in the United States on a student visa. TR. 13. When Ms. Shaw conducted her investigation, she communicated with both Mr. Taank and Mr. Thatikonda primarily by e-mail because language barriers made telephone correspondence difficult. TR. 13. However, she did meet with Mr. Thatikonda in person at Siliconlinks, during an on-site visit. TR. 14.

After an H1-B applicant company submits an LCA, they are required to pay fees, including an "additional filing fee" in the amount of either \$740 or \$1,500. TR. 18. The evidence that Ms. Shaw collected showed that email correspondence that occurred on April 6, 2007 between Mr. Taank and Respondent suggested that Mr. Taank agreed to pay Respondent for something in connection with his application. TR. 20. A cashed check showed that Siliconlinks, Inc. paid \$1,440 to the United States Citizen Immigration Service (USCIS) on April 19, 2007. TR. 20. Further email correspondence between the two parties on April 27, 2007 showed that Mr. Thatikonda requested that Mr. Taank "drop the check for \$1,500 as soon as

¹ I forgive Respondent's slightly late appearance because of his persistent interest in defending his case.

possible” to his account, and listed the account number. TR. 21. On May 9, 2007 Mr. Taank wrote a check in the amount of \$1,500 to Hari Thatikonda. The check posted to Mr. Taank’s Bank of America account two days later. TR. 23.

Ms. Shaw testified that Mr. Thatikonda’s job title was president of Siliconlinks. TR. 23. When Ms. Shaw asked Respondent what he used the \$1,500 for, he told her it was used for intermittent loans he had made to Mr. Taank. TR. 23. When Ms. Shaw requested that Respondent produce documentary proof of those loans, he did not. TR. 24. Ms. Shaw testified that even if Respondent had used the \$1,500 for some other deduction, such use would not be permissible under H1-B rules because an employer is only entitled to deduct payment when it is primarily for the H1-B employee, in writing, and not for the benefit of the business. TR. 25.

Based on Mr. Taank’s W-2, Wage and Tax statement from 2007, the total gross pay that Mr. Taank received from Siliconlinks in 2007 was \$3,432. Based on the wage rate listed on the LCA, Ms. Shaw determined that the amount on Mr. Taank’s W-2 would have corresponded with wages for “about four weeks” of work. TR. 26. When Ms. Shaw completed her investigation, she recommended to her supervisors that Siliconlinks be cited for requiring the H1-B employee pay the \$1,500 fee. Ms. Shaw also testified that she had received the documents marked as JX-11 from Mr. Thatikonda. TR. 32.

Mr. Thatikonda testified that he is the president of Siliconlinks, Incorporated. TR. 34. Respondent denied that he lured Mr. Taank to the job as he alleged in his complaint; rather, one of Respondent’s colleagues from the university he attended introduced him to Mr. Taank because Mr. Taank had expressed interest in Siliconlinks after Mr. Thatikonda started the company. TR. 35. After speaking with Mr. Taank, Mr. Thatikonda determined that although Mr. Taank was weak in some of the skills he sought in an employee, he would hire Mr. Taank if he promised to learn the skills for his employment. TR. 35-36. Respondent filed the H-1B application in March. TR. 36.

Mr. Taank communicated to Mr. Thatikonda “on 4-3” that Mr. Taank had to pay \$2,500 for the required training and that he could not afford that much money. Mr. Thatikonda agreed to pay the expense of the training for the month of April out-of-pocket for the amount of \$1,000 and Mr. Taank paid Mr. Thatikonda the remaining \$1,500 cost of the training. TR. 36. Mr. Thatikonda contends that the \$1,500 at issue went toward the training and not toward the cost of the LCA, and pointed out that the emails show he requested Mr. Taank to drop the \$1,500 into

his bank account after Siliconlinks had paid the H-1B failing fee, the costs of recruitment and attorney's fees. TR. 36. Mr. Thatikonda said that if he had made Mr. Taank pay the \$1,500 filing fee, he would have waited for the money before paying it to USCIS. TR. 36.

Mr. Thatikonda also claimed that while Siliconlinks paid Mr. Taank over \$3,000 in wages, this payment was in excess of the amount of work Mr. Taank actually performed for the company. TR. 37. He noted that Mr. Taank asked to begin work October 1st, but then Mr. Thatikonda did not hear from him for three months. Then one day Mr. Thatikonda received a phone call from Mr. Taank's girlfriend informing him that Mr. Taank wanted to work. In a series of phone calls over the course of the following weekend, Mr. Taank convinced Mr. Thatikonda three times to purchase a plane ticket for him to visit a client of Siliconlinks, each time changing his mind within a day and refusing to go, which resulted in Mr. Thatikonda taking the action of cancelling each plane ticket. The third time Mr. Taank convinced Mr. Thatikonda he would go was a Sunday night; then Mr. Thatikonda heard from the client on Monday that Mr. Taank was a no-show. TR. 37.

Mr. Thatikonda stated that he did not withhold any W-2 forms from Mr. Taank because he sent them to Mr. Taank on three occasions but was absent from his business at a client's location during January and February 2008, so he did not know that Mr. Taank did not receive the documents. TR. 38. Mr. Thatikonda argued with Mr. Taank and scolded him about the H1-B approval, which is why Mr. Taank was upset with him and filed the complaint. TR. 38.

Mr. Thatikonda alleged that over the course of his dealings with Mr. Taank, he actually lent him over \$3,000 by paying for the training and paying \$1,100 in rent for 2 out of the 5 months that Mr. Taank stayed in an apartment in Mr. Thatikonda's brother's house.² TR. 39. He specifically alleged that the rent money was paid on company checks. TR. 40. However, Mr. Thatikonda did not have proof of those payments and was unable to get proof for the investigators because the checks were over two years old and he could not retrieve a record. TR. 41. Mr. Thatkinonda had similar trouble producing proof of his \$800 payment to the law office for the investigators. TR. 42. He reiterated that the \$1,500 that Mr. Taank paid him on May 9 was for the training. TR. 44. The training was in Connecticut and conducted by Mr.

² Mr. Thatikonda also alleged that part of what he paid Mr. Taank was out of kindness because Mr. Taank wanted to purchase a car for his girlfriend. In response to this request for help, Respondent states that he paid Mr. Taank \$2,000 "from [his] pocket." TR. 38. It is unclear whether this money was paid from company wages or by Mr. Thatikonda personally, as Mr. Thatikonda does not consistently distinguish between himself and the company.

Thatikonda's friend, Kiran. TR. 45. Though the training was 35 days long, Mr. Taank attended only 15 of those days. Mr. Thatikonda paid Kiran the \$1,500 by check but he did not have a record of that either; he later stated that "actually [the payment was] a wire transfer." TR. 45-46. Mr. Thatikonda stated that the training payment came out of his personal account, but he did not keep a receipt because he was making a payment to a friend and was not worried about the possibility of legal implications at a future time. TR. 48.

Mr. Thatikonda testified that he formed Siliconlinks at the end of October, 2006. It was his first business. TR. 49. Mr. Thatikonda explained that he did not keep a record of the training payment as a business record because it came out of his pocket and was a personal favor rather than a payment made in connection with his business. TR. 50. However, his intention in paying for the training was so that Mr. Taank would be able to do the job for his company. TR. 50. While Mr. Thatikonda is president of Siliconlinks, the check that Mr. Taank paid to him that listed "misc" on the payment description line was made out to Hari Thatikonda, personally.³ TR. 51-52.

Siliconlinks did not deduct any money from Mr. Taank's pay stubs; rather, Mr. Thatikonda had asked the payroll person to start Mr. Taank's payroll when Mr. Taank contacted him about starting work in November 2007. TR. 54. Although Mr. Taank never actually "went to work," he was paid for four weeks while he waffled about whether to join the company or not. TR. 55. The only "work" that Mr. Taank performed at that time was to attend a couple of client interviews, which did not result in any payment from the client companies. TR. 56.

Mr. Thatikonda terminated Mr. Taank in January 2008 and informed the Department of Homeland Security of the Termination within the month. TR. 57. At the conclusion of the hearing, the undersigned confirmed that Mr. Thatikonda could provide no documents from Mr. Taank documenting that he owed a debt to Mr. Thatikonda, no documents from Mr. Kiran in Connecticut concerning training payments, and no bank records to support the various payments Mr. Thatikonda alleged he made. TR. 58.

DOCUMENTARY EVIDENCE

JX-1: *H1-B Worker's Complaint with Attachments*

³ Based on Mr. Thatikonda's testimony, the Prosecuting Party moved to amend its Notice and Determination to allege in the alternative that the \$1,500 that Mr. Taank paid him was used to pay for an unauthorized deduction that would result in failure to pay wages when due under the H1-B regulations. TR. 53.

This is a copy of ESA Form WH-4 filled out by Vikas K. Taank, a self-described current H-1B nonimmigrant employee of Siliconlinks. The form itself is not dated. Mr. Taank alleged that Siliconlinks failed to provide him fringe benefits, required him to pay a filing fee, and withheld his W-2 and pay stubs.

In an attached statement, Mr. Taank alleged that while finishing up his masters in Molecular Biology in 2007, he was “allured” by Siliconlinks, which offered him “nice pay and work in [the] IT field.” He started his H1-B processing sometime in mid-March 2007 and received approval. In October 2007 Siliconlinks asked Mr. Taank to learn some software, which took him until mid-March 2008 to learn. Although Siliconlinks promised Mr. Taank health insurance during this time, it did not provide health insurance. Mr. Taank alleged that he was once paid, but some of the money was withdrawn to cover the training fee. He further alleged that Siliconlinks asked him to pay the \$1,500 H1-B processing fee and told him that it would be returned once he got the job with Siliconlinks. Mr. Taank did not state that he paid the \$1,500 processing fee, but intimated that he did by alleging that it was never returned to him.

Mr. Taank also alleged that he asked repeatedly for pay stubs and his W-2 for the purposes of initiating a transfer to another employer. Siliconlinks was going to revoke his H1-B because it did not need any more people who were trained on that software. He believed that Siliconlinks was not being truthful when it stated that it did not have copies of the documents or Mr. Taank’s U.S. address because he was staying at the time in accommodations provided by Siliconlinks in Newark, Delaware. He claimed that Siliconlinks was harassing him in the H1-B process.

Email correspondence between “Vikas Taank” and “Hari – Siliconlinks” are also attached to the application:

On April 4, 2008, Mr. Tank wrote to Respondent, “As per our conversation on the phone, I understand that H1b approved on my name is siliconlinks property. But you can’t hold my paystubs and W-2. Please make efforts to send all of my paystubs and W-2.”

On April 9, 2008, Respondent wrote indicating that Mr. Taank was not responding to his phone calls so he was unable to know where he was, and had sent the W-2 and pay stubs to his address in India. He also informed Mr. Taank that he was cancelling the H1-B visa on April 25 because the company no longer needed “prpc skilled labor.” Respondent acknowledged his obligation under the regulations to pay for Mr. Taank’s journey home and told him to send

copies of the paper ticket and that his company would reimburse him for it. In conclusion, Respondent thanked Mr. Taank for his services to the company.

On the same day, Mr. Taank responded requesting that Respondent send copies of the documents to an apartment address in Topeka, Kansas, offering to pay for the postage if the company was unable. Respondent wrote back the same day in response, stating “we do not have the copies.”

JX-2: *Approved Copy of Respondent’s ETA Form 9035E (LCA)*

The LCA form indicates that “Silicon Links, Inc.” applied for the H-1B visa for two workers to fulfill the position “programmer,” beginning on October 1, 2007 and ending October 1, 2010. Respondent offered a wage rate of \$43,534.00 per year, which was identical to the prevailing wage for the position at the time. Respondent certified that it was not H1-B dependent or a willful violator, and that all public disclosure information would be kept at its principal place of business. The form was signed “[illegible] Reddy” by “Venkat Reddy Yerredla, President” on March or April 23, 2007.⁴

JX-3: *Email Correspondence, April 2007*⁵

On April 3, 2007, Mr. Taank wrote to Mr. Thatikonda notifying him that “training with Kiran is going fine. But I have one question about H1, that when you will be applying H1 for me, and what else (Papers, Transcripts etc) you need from my side.”

On April 6, 2007, Mr. Taank wrote to Respondent again, indicating “please send me the check list for H1 application. I want to go for masters quota as soon as possible. Please also tell me how much I need to pay.”

On April 27, 2007, Respondent wrote to Mr. Taank giving him his routing and account numbers, and requested “drop the check for 1500 \$ as soon as possible.”

JX-4: *Check to USCIS*

On April 19, 2007 Siliconlinks, Inc. issued a check to USCIS for \$1,440.00 for “H1-B Processing for Vikas.” The check was signed with the same signature on the LCA, “Reddy.”

JX-5: *USCIS I-797-A, Notice of Action*

⁴ Ms. Shaw testified at the hearing she believed the date indicated was March. TR. 17.

⁵ These emails appear most recent to least recent, as if accessed from an email chain, all containing the subject “Re: Vikas Taank Here!!”

This notice was sent to Susheela Verma, Esq., an attorney in Woodbridge, NJ, indicating that an H1-B application had been approved for Vikas Kumar Taank on behalf of the petitioning employer, Silicon Links. It was valid from October 1, 2007 until September 30, 2010.

JX-6: *Receipt of a Deposit from Vikas Kumar Taank to Hari Thatikonda*

This receipt indicates that Mr. Taank paid Mr. Thatikonda \$1,500.00 from his personal account on May 9, 2007 for “Misc.” The receipt acknowledges that the deposit, number 117, was made to “Hari Thatikonda.”

JX-7: *Bank statement for the month beginning 05/09/07*

The Bank Statement is for the account of Vikas Taank and indicates that check number 117 in the amount of \$1,500.00 cleared his account on May 9, 2007.

JX-8: *2007 W-2*

Siliconlinks, Inc. of Herndon, VA is listed as the employer and Vikas K. Taank of Newark, DE is listed as the employee. The employee’s total earnings for 2007 were \$3,432.00.

JX-9: *US DOL Summary of Unpaid Wages*

This is the form that Jessica Shaw issued to Siliconlinks on May 8, 2009, alleging that it owed Vikas Taank \$1,500.00 in back wages for the pay period running from 01/06/07 to 01/05/08.

JX-10: *Request for Review by US DOL*

This is a letter written on behalf of “Siliconlinks, Inc. [sic]” to request a hearing.⁶ It is signed by “President, Hari Thatikonda.” Mr. Thatikonda cited the following grounds for review:

- (1) Siliconlinks Inc. never received a check or money from the H1B petitioner Vikas Taank.
- (2) Siliconlinks provided evidence that Siliconlinks is the entity that made payments to INS and paid legal fees to Susheela Verma Law Office.
- (3) Mr. Taank’s allegations were the result of a “personal vendetta.”
- (4) The “2-year” time period between the alleged violation (forcing Mr. Taank to pay the \$1,500 fee) and the report of the violation was evidence that the report was made based on the intervening event of Mr. Taank trying to obtain his W-2 and getting angry, and not in response to the alleged violation, which did not occur.

⁶ Although there was no mention of any other corporate head of Siliconlinks at the hearing, I note that Mr. Thatikonda referred to the corporation as “we” in his request.

(5) The Administrator's findings were not correct.

JX-11: *Flights Booked by Mr. Thatikonda*

This exhibit consists of three photocopied pages of computer screens. The page marked D-115 is a printout of a computer screen showing a viewed document entitled "Statement_Feb2008(2).pdf (SECURED)." It appears to be a record of account activity on an American Express account "prepared for HARI THATIKONDA SILICONLINKS INC." The relevant items circled are a charge on 01/11/08 to "ORBITZ.COM CHICAGO IL" and a charge on 01/22/08 to "SOUTHWEST AIRLINES DALLAS TX, Ticket Number 52623589452639." The latter charge contains additional information showing that the ticket was purchased for Vikas Taank to fly from Baltimore, MD to Los Angeles, CA. An additional entry references a baggage insurance transaction processed toward a second ticket number, 03715685612634.⁷ Because of the way the page was copied, the amounts of the transactions are cut off of the page.

The pages marked D-116 and D-117 show a message forwarded from the account of "harirthatikonda@yahoo.com" to "hari@siliconlinks.com" on August 13, 2008. The subject line reads "Fwd: Ticketless Confirmation – TAANK/VIKAS – KIGEG2." The original email was sent on January 22, 2008 and confirms that Mr. Thatikonda purchased a ticket on Southwestern Airlines with an American Express card for a flight from Baltimore to Los Angeles, ticket number 52623589452639.

ANALYSIS

***Whether Respondent required or accepted payment
of Mr. Taank's H1-B filing fee***

20 C.F.R. § 655.731(c)(10)(ii) prohibits an employer to make an unauthorized deduction from an H-1B employee's wages by recouping the filing fee an employer must pay under Section 214(c) of the INA. This Section provides in relevant part:

The employer may not receive, and the H-1B non-immigrant may not pay, any part of the . . . \$500 additional filing fee (for a petition filed prior to December 18, 2000) or \$1,000 additional filing fee (for a petition filed prior to December 18, 2000), whether directly or indirectly, voluntarily or involuntarily. Thus, no deduction from or reduction in wages for purposes of a rebate of any part of this fee is permitted . . .

Id. at § 655.731(c)(10)(ii).

⁷ Handwritten notes on the printout allege that these two tickets are only two of 4 tickets that were booked for Mr. Taank "in one day."

The parties agree that on April 19, 2007, Siliconlinks, Inc. issued a check to USCIS in the amount of \$1,440.00 for the cost of processing Vikas Taank's H-1B application. The parties also agree that on May 9, 2007, Vikas Taank wrote a check to Hari Thatikonda for "Misc." The parties disagree over whether the second amount was applied toward a "debt" that Siliconlinks had incurred by previously paying the costs of processing the H1-B application.

Under the regulations, the employer is charged with the responsibility of developing and maintaining "sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its [LCA] and the accuracy of information provided in the event that such statement or information is challenged." 20 C.F.R. § 655.710(c)(4). "DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. The burden of proof is on the employer to establish the truthfulness of the information contained in the [LCA]." 20 C.F.R. § 655.740(c). Because the burden of proof is on the employer to establish the truthfulness of the information, the burden is one of production rather than persuasion. *See also Administrator, Wage and Hour Division v. The Lambents Group*, ALJ. No. 2008-LCA-00036, slip op. at 33 (Jan. 27, 2010). I find that Respondent has met its initial burden of production by producing the check that Siliconlinks made out to USCIS in the amount of \$1,440.00 for "H-1B Processing for Vikas."

In LCA cases, the ARB has adopted the burden-shifting framework for wage and hour claims brought under the Fair Labor Standards Act announced in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). *See Administrator, Wage and Hour Division v. Ken Technologies, Inc.*, 2004 WL 2205233 (Adm. Rev. Bd. 2004). In *Mt. Clemens*, the Court held that where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, an employee simply needs to (1) prove that he has performed work for which he was improperly compensated; and (2) produce sufficient evidence to show that amount and extent of work as a matter of just and reasonable inference. 328 U.S. at 687. The burden then shifts to the employer to produce evidence of the precise amount of work performed or evidence that negates the reasonableness of the inference to be drawn from the employee's evidence. *Id.* at 687-88. This framework imposes the initial burden of proof on the prosecuting party.

Though the issue here is a deduction rather than nonpayment of wages, the burden-shifting framework is also appropriately applied to the instant case. The Prosecuting Party has

submitted Mr. Taank's allegation⁸ that "[Siliconlinks] asked him to pay the filing fee" and evidence that Mr. Taank paid Mr. Thatikonda \$1,500 for "misc." The receipt of payment indicated that it was made to Mr. Thatikonda personally and Mr. Thatikonda has offered the undisputed assertion that the account into which the money was deposited was his personal account. The Prosecuting Party has submitted no proof tending to show otherwise. The extent to which Mr. Thatikonda commingled his personal funds with the funds of his business is not evident in the record before me. The Prosecuting Party has tried to show that, by nature of Mr. Thatikonda's self-described position as [former] "president" of Siliconlinks, Inc., that payment to Mr. Thatikonda is tantamount to payment to Siliconlinks, Inc. I find that this argument is unconvincing because it fails to address the fact that even corporate presidents retain the ability to enter into contracts in their own private capacity. Furthermore, I find it somewhat alarming that no one has addressed the notable discrepancy in the documentary record, which lists a different person – "Venkat Reddy Yerredla" – as President of the company. Mr. Yerredla is the person who both signed the LCA as "President," and signed the \$1,440 check for "H-1B processing for Vikas." The precise reason for why Mr. Thatikonda has continued to hold himself out as president of the company eludes me. However, these discrepancies in the record do not mean that when "Hari Thatikonda" accepted a \$1,500 check from Vikas Taank that "Siliconlinks, Inc." automatically accepted the check through Mr. Thatikonda as payment of the H-1B filing fee. The Prosecuting Party has failed to offer sufficient evidence to connect the two transactions, and has therefore failed to sustain its burden of proving that Mr. Taank paid the H-1B filing fee.

***Whether Respondent otherwise made an unauthorized deduction
from Mr. Taank's wages***

The regulations specify the types of wage deductions that employers are permitted to make with respect to H-1B workers. 20 C.F.R. § 655.731(c)(9). Any unauthorized deductions taken from an H-1B worker's wages will be considered as non-payment of that amount of wages and result in a back wage assessment. 20 C.F.R. § 655.731(c)(11). Notably, Section 655.731(c)(12) prohibits an employer from depressing an employee's wages below the required

⁸ Mr. Taank's allegations have given me pause. Although hearsay is allowed in hearings before OALJ, I have had no opportunity to assess Mr. Taank's credibility. I note that some of Mr. Taank's statements are hearsay within hearsay, such as those contained in the testimony of Ms. Shaw, who also likely had a limited ability to assess Mr. Taank's credibility because she corresponded with him primarily by email. In contrast, I find Mr. Thatikonda to be a very credible witness, and I therefore give his testimony substantial weight.

wage by imposing on the Employee any of Employer's business expenses, regardless of whether the matter is shown in Employer's payroll records as a deduction. However, some types of deductions are specifically authorized under § 655.731(c)(9).

On this issue, the prosecuting party has produced evidence that Siliconlinks, Inc. paid Vikas Taank \$3,432 in wages for the year 2007. Ms. Shaw testified that this amount was consistent with payment for about four weeks of work at the prevailing wage rate for the occupation specified on the LCA. Mr. Thatikonda testified that Mr. Taank was effectively hired sometime in November 2007 and that he was paid for four weeks once he "started," although Mr. Thatikonda disputed that Mr. Taank ever did any meaningful work with the company. Mr. Thatikonda also testified that Mr. Taank was terminated January 2008, which is consistent with the fact that there are no payroll records showing that Siliconlinks, Inc. paid Mr. Taank for any work performed in 2008.

I find that Mr. Taank was employed by Siliconlinks, Inc. for four weeks, and that Siliconlinks paid Mr. Taank at the prevailing wage for the full four weeks that he was employed. The issues that remain are whether the \$1,500 payment that Mr. Thatikonda alleges went towards "training" expenses that he had fronted for Mr. Taank and whether the "training" would be an authorized or unauthorized deduction under the regulations.

Mr. Taank's DOL complaint against Siliconlinks acknowledged that he had to attend training in connection with the job and the email correspondence in April 2007 shows that the training was "with Kiran," which corroborates Mr. Thatikonda's hearing testimony. That same email correspondence also refers to the H-1B processing and the \$1,500 payment that Mr. Taank made to Mr. Thatikonda. I find that the evidence is sufficient to show that the \$1,500 payment was intended as a payment toward the cost of Mr. Taank's training. The very nature of the training was work-related and Mr. Thatikonda's role as a corporate head of Siliconlinks, Inc. leads me to the conclusion that his acceptance of Mr. Taank's training payment was made in connection with his business. In this case, a requirement that the employee pay an additional \$1,500 would have depressed Mr. Taank's wage below the prevailing wage that he was paid for the four weeks of his employment because he was paid at roughly the exact prevailing wage rate. Therefore, regardless of which account Mr. Thatikonda deposited Mr. Taank's check into, the money was still to be applied toward a cost associated with Mr. Thatikonda's business, Siliconlinks, Inc. and therefore must be evaluated as a deduction under the regulations.

Under 20 C.F.R. § 655.731(c)(9), authorized deductions are limited to deductions that are either required by law, such as income tax, or they must meet the extensive criteria set out in §§ 655.731(c)(9)(ii) or (iii). Under the regulation, these deductions are authorized if:

(ii) [It is a] 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 premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*) except that the deduction may not recoup a business expense(s) of the employer (including attorney's fees and other costs connected to the performance of H1-B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition) the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against the wages of U.S. workers as well as H-1B non-immigrants (where there are U.S. workers); or

(iii) [It is a] 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] Employer must document the cost and value;
- (E) Is an amount that does not exceed the limit set for garnishment of wages in the Consumer Credit Protection Act . . . under which garnishments may not exceed 25 percent of an employee's disposable earnings for a workweek. (parentheses omitted).

Compliance with this regulatory section is somewhat onerous. As in the case of the filing fee, the burden rests with Respondent to maintain the documentation to show that any deduction made to the employee's pay was authorized. *See* 20 C.F.R. § 655.710(c)(4). Where Respondent fails to maintain such documentation, he cannot show that the \$1,500 deduction was authorized. Unfortunately for Mr. Thatikonda, he was unable to produce any documentation of the steps required by Section 655.731(c)(9). He did not have documentary proof of the payment of the training to substantiate its cost or fair market value. He did not have documentary proof of his precise arrangement with Mr. Taank or written authorization that would show that Mr. Taank was told that training would be a necessary prerequisite to his employment to which all employees, H1-B or not, would be subjected. Additionally, I find that the cost of the training

would be hard to characterize as “primarily for the benefit of the employee” because of its close association to performing the specific job function at Siliconlinks, Inc. However sincere were Mr. Thatikonda’s efforts to do Mr. Taank a service by trying to help him become employed at Siliconlinks, Inc., the service was still primarily a benefit to the business. Therefore, I find that the \$1,500 deduction for training expenses was not an authorized deduction, and therefore shall be assessed against Respondent as back wages.

CONCLUSION

In conclusion, I find that the \$1,500 that Mr. Taank paid Mr. Thatikonda was applied toward the expense of job training required for him to work at Siliconlinks, Inc., that the payment depressed his wage below the prevailing wage rate, and that it was not otherwise authorized under the regulations.

ORDER

Respondent Siliconlinks, Inc. shall pay back wages to Mr. Vikas Taank in the amount of \$1,500 to reflect the amount of the unauthorized deduction.

IT IS SO ORDERED.

A

ROBERT B. RAE
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 (“ARB”) 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 address of the ARB is: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the ARB. At the time you file the Petition with the ARB, 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 ARB 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* 20 C.F.R. § 655.840(a).