



Issue Date: 12 October 2011

CASE No: 2009-LCA-00016

In the Matter of:

**ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S.
DEPARTMENT OF LABOR**
Prosecuting Party,

v.

DEL MAR PHOTONICS, INC.,
Respondent/Employer

Appearances: Isabella M. Finneman, Esq.,
For the Prosecuting Party

Sergey Egorov
For the Respondent

Decision and Order

I. Summary

This case claims a month's wages are owed to Andrey Zamyatin, a Russian chemist admitted to the United States on an H-1B visa to work for a company that imported specialty lasers. The evidence tangentially involves joint projects with Russian corporations, accusations of corporate double-timing, and a hit-and-run car accident. No one's testimony on those peripheral issues was particularly credible or persuasive. But under the governing regulations, Del Mar owes Zamyatin his month's pay for May 2007.

II. Background and Facts Drawn from the Proof

A. Procedural history

Andrey Zamyatin complained to the Department that Del Mar hadn't paid him for the period from May 1, 2007 until May 28, 2007.

The Administrator determined that Del Mar should pay Zamyatin \$3,052.00 in back wages for the month of May, 2007.¹ Del Mar refused, claiming Zamyatin was nonproductive during May 2007 for reasons unrelated to his employment. The Administrator became the prosecuting party when Del Mar requested a hearing.² Del Mar was represented at the hearing by sole owner, Sergey Egorov. Zamyatin, Egorov and Wage & Hour Investigator Evelyn Sanchez testified.³ The parties submitted post-trial briefs⁴ and exhibits.⁵ I conclude the Administrator correctly determined that Del Mar must pay Zamyatin \$3,052.00 in back wages for the month of May 2007.⁶

B. Del Mar's 2007 H-1B Petition Promises to Pay Wages

Zamyatin wasn't a lawful permanent resident alien. A citizen of Russia studying in the United States,⁷ he eventually was authorized to be present in the United States at Del Mar's behest.⁸ It attested⁹ that there was a sophisticated job of the type the H-1B statute and

¹ Administrator's Determination Pursuant to Regulations at 20 C.F.R. Parts 655 H-1B Specialty Occupations under the Immigration and Nationality Act (INA) administered by the Department of Labor (DOL) Case ID: 1472157.

² The procedural rules published at 29 C.F.R. Part 18, Subpart A govern this review proceeding. 20 C.F.R. § 655.825(a) (2011). Its request for hearing was timely, and the Administrator does not contend otherwise. 20 C.F.R. § 655.820(b)(1), (d) (2011).

³ Tr. at 14–99, 179–189 (Zamyatin); Tr. at 100–147 (Sanchez); Tr. at 147–179 (Egorov).

⁴ Post-Hearing Brief of Administrator, Wage and Hour Division, U.S. Department of Labor (“Administrator’s Posttrial Brief”); Letter of Sergey Egorov, Sept. 18, 2009 (“Employer’s Posttrial Brief”).

⁵ A. Ex.-1–10; E. Ex.-1–13. This Decision and Order cites to the record this way: citations to the trial transcript are abbreviated as Tr. at [page number]; citations to the Administrator’s exhibits are abbreviated as A. Ex- [exhibit number] at [page number]; and citations to Del Mar’s exhibits are abbreviated as E. Ex- [exhibit number] at [page number].

⁶ A judge “may affirm, deny, reverse, or modify, in whole or in part,” the Administrator’s determination. 20 C.F.R. § 655.840(b) (2011).

⁷ A. Ex.-3 at 22.

⁸ A. Ex.-4 at 34.

⁹ Promises the employer makes that arise from required statements embedded in its labor condition application are what the regulations sometimes call “attestations.” 20 C.F.R. § 655.730(c)(2) (2008). The Secretary of Labor enforces those promises. *Administrator, Wage and Hour Division v. Integrated Informatics, Inc.*, ARB No. 08-127, ALJ No. 2007-LCA-00026, slip op. at 13–14 (Jan. 31, 2011). Attestation topics are detailed at 20 C.F.R. §§ 655.731 to 655.734 (2008). All further citations to the Code of Federal Regulations are to its 2008 edition.

regulations describe for Zamyatin as a chemist,¹⁰ which Del Mar wanted him to do in the United States.¹¹ Zamyatin’s compensation package was equivalent to what U.S. citizens and lawful residents earned for similar work as chemists in San Diego, California.¹² He was authorized to be here from November 13, 2006 to September 30, 2009¹³ because of that specific job—hence the statute classifies those with H-1B visas like Zamyatin as “nonimmigrants.”

When Del Mar signed and submitted its labor condition application to the Department of Labor¹⁴ as part of its H-1B petition, it represented that the statements in it were accurate and acknowledged that it had to comply with its obligations under the H-1B program regulations.¹⁵ It reaffirmed those obligations when it petitioned the immigration authorities in the Department of Homeland Security to approve its H-1B petition.¹⁶ Paying the wages stated in the application at least monthly is one of those obligations.

¹⁰ Congress created the H-1B visa program to temporarily employ nonimmigrants in the United States in “specialty occupations” or as “fashion models of distinguished merit and ability” by amendments to the Immigration and Nationality Act in the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, codified at 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) and 1182(n). “Specialty occupations” require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor’s or more advanced academic degree in the specific specialty as a minimum requirement for entry into the occupation. 8 U.S.C. § 1184(i)(1). *See* A. Ex.-2 at 30–31 for Del Mar’s description of the skills and knowledge required for this position.

¹¹ *Id.* at 28; A. Ex.-1 at 18.

¹² A. Ex.-2 at 33. The wage must be the higher of the prevailing wage for the occupation in the area where the nonimmigrant will be employed, or the actual wage the employer pays individuals of similar experience and qualification. 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(b)(2), (3). Additionally “health, life, disability, and other insurance plans” as well as “retirement and savings plans, and cash bonuses and non-cash compensation, such as stock options (whether or not based on performance)” must be offered on the same basis, and according to the same criteria, as the employer offers them to United States workers. 8 U.S.C. § 1182(n)(2)(C)(viii); 20 C.F.R. § 655.731(c)(3)(i).

¹³ A. Ex.-4 at 34.

¹⁴ A. Ex.-1 at 20, which Del Mar filed on May 1, 2006. To employ an H-1B nonimmigrant, the employer must obtain a certification from the Department of Labor by filing a labor condition application. 8 U.S.C. § 1182(n). The program regulations and application (the Department’s Form ETA 9035E) are discussed comprehensively at 65 Fed. Reg. at 80,110 to 80,208 (Dec. 20, 2000).

¹⁵ A. Ex.-1 at 20; *see also* 20 C.F.R. § 655.805(d).

¹⁶ A. Ex.-3 at 27, the form I-129 Del Mar filed with USCIS, coupled with the legal standard established in 20 C.F.R. § 655.805(d).

Zamyatin began working for Del Mar in January 2006¹⁷ through an optional practical training program he was authorized to participate in based on his F-1 student visa.¹⁸ A student present in the United States on an F-1 nonimmigrant visa may receive a change of status to that of an H-1B nonimmigrant worker. An employer petitions the USCIS to grant the student H-1B status as its employee. USCIS granted Del Mar's May 2006 Petition for Nonimmigrant Worker and associated labor condition application on November 13, 2006 for the three-year period from November 13, 2006 to September 30, 2009.¹⁹

The Immigration and Nationality Act, its regulations,²⁰ and the Secretary of Labor's labor condition application regulations²¹ share the premise that as the beneficiary of Del Mar's H-1B application, Zamyatin would remain in the United States only so long as Del Mar employed him. In return for Zamyatin's admission to the United States, Del Mar agreed to pay a salary at or above the prevailing wage for chemists in the San Diego area.²² Because it continued to employ Zamyatin during the month of May, those wages are due.

C. Zamyatin's Work for Del Mar as an H-1B Employee

The parties do not dispute Zamyatin worked for and was paid by Del Mar as an H-1B employee from November 2006 until the end of April 2007. At Del Mar, Zamyatin spent most of his time in activities related to the procurement and assembly of parts for the sophisticated lasers Del Mar sells.²³ He would prepare price quotes which he confirmed with Egorov,²⁴ and if they were approved and a customer decided to buy from Del Mar he would assemble the parts when they

¹⁷ Tr. at 14–15. The letter Del Mar wrote in support of Zamyatin's H-1B visa application says that Zamyatin was employed from March 1, 2006. A. Ex.-2 at 32. The reason for this discrepancy is unclear.

¹⁸ A. Ex.-2 at 1; Tr. at 15. *See* 8 C.F.R. § 214.2(f)(5) (defining the period of a student's F-1 status as the time the student pursues a full course of study at a certified school or engages in authorized optional practical training after completing the course of study). Zamyatin was one of what the Department of Homeland Security estimated in April 2008 were "approximately 70,000 F-1 students" engaged in optional practical training in the United States. 73 Fed. Reg. at 18,950 (April 8, 2008).

¹⁹ A. Ex.-5 at 34; A. Ex.-3 at 21; A. Ex.-2 at 21.

²⁰ 8 C.F.R. 214.2(h)(11)(i)(A) ("If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition [at USCIS]").

²¹ 20 C.F.R. § 655.750(b).

²² 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(b)(2), (3).

²³ Tr. at 15–16.

²⁴ Tr. at 20.

came in the mail, sometimes at a laser laboratory Del Mar rented for that purpose.²⁵ Zamyatin normally worked at home because Del Mar did not provide facilities for him to work in.²⁶

On April 11, Egorov sent Zamyatin an e-mail informing him that Del Mar was transferring its operations to the East Coast.²⁷ Egorov also asked Zamyatin “when you will be ready to go to Russia for 2–3 months of training. Your transfer to the East Coast facilities can be done only after you get training on all lasers at Avesta.”²⁸ Avesta is a Russian company Del Mar was planning on partnering with to develop a new laser product for sale.²⁹

D. May 2007

Things get murky in the beginning of May. As described in more detail below in the section on credibility determinations, neither Zamyatin nor Egorov’s stories are entirely credible. Nonetheless, I can determine a few facts that I am confident are accurate.

First, the parties eventually agreed that Zamyatin remained in the United States until May 29, 2007.³⁰ Del Mar employed Zamyatin during this period.³¹ Egorov and customers of Del Mar sent work-related e-mail messages to Zamyatin’s account during this period, and Zamyatin sent at least a few e-mails back.³²

Besides this undisputed e-mail exchange, Zamyatin testified to other work he did during May. He claimed to have been involved in three projects: (1) testing clinical lenses with the “Exicon” test station; (2) working on the “Beacon” product’s fluorescent up-conversion spectrometer; and (3) assembling the “Jibe” white light continuum generator.³³ He testified he devoted time to reading on the internet to build knowledge about the products he was dealing with.³⁴ He also testified that the e-mails he produced to Wage & Hour that were

²⁵ Tr. at 21.

²⁶ Tr. at 17.

²⁷ A. Ex.-5 at 42.

²⁸ *Id.*

²⁹ Tr. at 150.

³⁰ Tr. at 105. Del Mar originally told Wage & Hour Investigator Evelyn Sanchez that Zamyatin left the United States in early May. Tr. at 104. When presented contrary evidence, including Zamyatin’s passport showing he departed on May 29, Del Mar acknowledged Zamyatin remained in the United States until that date. Tr. at 106.

³¹ Administrator’s Posttrial Brief at 2–3 (relating stipulation of the parties at the time of the hearing).

³² A. Ex.-6 through Ex.-9.

³³ Tr. at 20-21.

³⁴ Tr. at 22.

entered into evidence represented only about 5% of his total work during May.³⁵

Del Mar painted a very different picture of Zamyatin's work during that period. During cross-examination Zamyatin admitted that he did not do any assembly on the "Beacon" product during May, because the parts had already been ordered but had not yet arrived.³⁶ Moreover, Egorov asserted that the "Jibe" product could not have been built in May because it was already built and sold long before May.³⁷ Egorov claimed that Zamyatin was "putting all his jobs that he ever done in Del Mar photonics in the month of May" and that "he's lying."³⁸ Egorov would have provided documentary evidence to support his assertion if he had known what Zamyatin was going to testify to.³⁹ In its posttrial brief, Del Mar asserted that Zamyatin did not test any clinical lenses either during May 2007.⁴⁰ But Del Mar never proved, or claimed, it had fired Zamyatin so that he wasn't its employee that month.

E. Zamyatin's Travels

On May 29, 2007, Zamyatin travelled to Canada.⁴¹ He went to Canada instead of directly to Russia because he believed he could obtain permission to reenter the United States after his training in Russia more quickly if he reentered from Canada rather than directly from Russia.⁴² He said that the process would take "about 6 or 9 months" from Russia.⁴³

On June 4, 2007, while in Canada, Zamyatin e-mailed Egorov.⁴⁴ He wrote that he went to Canada instead of Moscow.⁴⁵ He said that he would return to San Diego "after I obtain my visa next week."⁴⁶ He also said that "I have hard time to call from Canada and my once my roaming is connected I'll give you a call."⁴⁷

³⁵ Tr. at 77–78.

³⁶ Tr. at 84.

³⁷ Tr. at 87.

³⁸ Tr. at 87.

³⁹ Tr. at 87.

⁴⁰ Employer's Posttrial Brief at 5.

⁴¹ Tr. at 105–106.

⁴² Tr. at 42–44.

⁴³ Tr. at 43.

⁴⁴ E. Ex.-2 at 1.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

Del Mar presented phone records of Zamyatin's phone for the period he was in Canada.⁴⁸ They show that Zamyatin made a number of phone calls to the United States during the period between May 29 and June 4.⁴⁹

Zamyatin travelled to Russia sometime around the beginning of July.⁵⁰ Zamyatin testified that he reported for duty at Avesta and worked there for about a month but that there was a dispute as to whether Avesta or Del Mar should be paying him for his time in Russia.⁵¹ After the second month he stopped going to Avesta.⁵²

Egorov testified that Avesta was supposed to pay Zamyatin while he was in Russia; Del Mar would reimburse Avesta through a corporate account.⁵³ Egorov testified that no one paid Zamyatin because he did not actually work at Avesta once he arrived in Russia.⁵⁴ He claimed that Zamyatin showed up at Avesta once but then he said he was sick and didn't return.⁵⁵ Liability for pay while Zamyatin was in Russia is not an issue in this case.

On October 23, 2007, Del Mar terminated Zamyatin's employment via e-mail.⁵⁶

III. Witness Credibility

A. Zamyatin

Del Mar questions Zamyatin's credibility based on several incidents that it says show Zamyatin's testimony should not be believed. Although I agree that parts of Zamyatin's testimony probably are inaccurate, those discrepancies have little impact on the legal issue: whether Del Mar must pay Zamyatin's wages for May.

The first incident Del Mar points to is an alleged auto accident Zamyatin was involved in in August 2006, before he became its H-1B employee. According to a letter written by Egorov,⁵⁷ on the evening of August 11, 2006, while sitting in his home office, he witnessed a dark car pull up to the house of Sedrak Melkumian, Egorov's Armenian-

⁴⁸ E. Ex.-6 at 67-70.

⁴⁹ *Id.*

⁵⁰ Tr. at 97.

⁵¹ Tr. at 180.

⁵² Tr. at 181.

⁵³ Tr. at 164.

⁵⁴ Tr. at 164-165.

⁵⁵ Tr. at 165.

⁵⁶ Tr. at 161.

⁵⁷ *See* E. Ex.-8 at 1-10. The document appears to be an undated letter authored by Egorov, along with several diagrams and print outs.

American neighbor.⁵⁸ Melkumian left his house and got into the car, which “drove in reverse at rather high speed, and hit the car of our other neighbor, Dequn Wang.”⁵⁹ The driver of the car got out, and Egorov saw it was Zamyatin. Zamyatin got back into the car and the car drove off, without leaving any identifying information on the car he had struck.⁶⁰ Until he saw them drive off together, Egorov hadn’t known that Zamyatin knew Melkumian.⁶¹ When Egorov asked Zamyatin about the accident Zamyatin said it was not him and he knew nothing about it.⁶² When Egorov looked at cell phone records for Zamyatin’s company phone, he saw that the day after the crash, Zamyatin called several auto repair-related shops.⁶³ Zamyatin drove a dark colored car at that time.⁶⁴

This is not the proper forum to resolve liability for auto accidents that had nothing to do with Del Mar, and the incident says little about Zamyatin’s credibility as a witness. Egorov was apparently not particularly troubled by the incident at the time. It occurred before Zamyatin’s H-1B application was approved, and Del Mar could have abandoned its plan to hire Zamyatin, but did not. Egorov seemed less upset about the hit-and-run accident itself, and more suspicious about Zamyatin’s relationship with Melkumian, which figures prominently in Del Mar’s theories about Zamyatin’s loyalties and lack of interest in his work at Del Mar.

Del Mar posits that while Zamyatin was nominally its employee, he engaged in business with Melkumian instead. Most of Del Mar’s exhibits address this claim in some form or another. First, Del Mar submitted phone records showing Zamyatin repeatedly called Melkumian while Zamyatin was in Canada in June 2007.⁶⁵ Some of these calls were made before June 4, when Zamyatin wrote an e-mail to Egorov claiming it was hard to call the United States because his roaming service wasn’t yet connected.⁶⁶

Zamyatin testified that Melkumian was just a friend of his and said that he was having trouble calling the U.S. and that the phone

⁵⁸ E. Ex.-8 at 1.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1–2, 6.

⁶⁴ *Id.* at 10.

⁶⁵ E. Ex.-1 at 67–70.

⁶⁶ *Id.* at 69.

calls lasted only a minute.⁶⁷ The records show that one phone call to Melkumian before June 4 lasted 1 minute, and one call lasted 6 minutes.⁶⁸ Zamyatin said he was testifying about things that happened three years ago and didn't completely remember.⁶⁹

Del Mar also presented evidence that Zamyatin was involved in some capacity in a variety of business ventures that bore some connection to Melkumian, but had nothing to do with Del Mar.⁷⁰ The only one of those records that pertains to the time Zamyatin was working for Del Mar is a "Whois" record for the website "mweg.net" showing Zamyatin as the registrant, and administrative and technical contact.⁷¹ Zamyatin's registered address on that form is the same as the registered address of Harmony Medical Group, a business for which "Sedrak Melkeemian"⁷² was the Agent for Service of Process.

Most of Del Mar's exhibits relate to events after May 2007. What Zamyatin did after May 2007 sheds only the faintest of light on what he may have been doing in May, when he was Del Mar's employee. At best, Del Mar's evidence shows that Zamyatin was not being entirely honest in his June 4, 2007 e-mail when he claimed he wasn't able to call the United States, and that his relationship to Melkumian may be more extensive than he let on. None of this bears on the substantive question of Del Mar's liability for wages, or diminishes Zamyatin's credibility on relevant facts.

Finally, Del Mar also argues that much of what Zamyatin claimed to have been doing during May 2007 was in fact accomplished before that time and that Zamyatin was lying when he testified otherwise. Zamyatin did initially claim to have been engaged in the "Beacon" project during May, but admitted under cross-examination and prompting from Egorov that he did very little if anything related to that project in May. Egorov also asserted that he could have provided documentary proof showing that the "Jibe" project Zamyatin also claimed to have been doing in May was in fact completed many months earlier. Even assuming this is true, Zamyatin was testifying two years after the fact, and he plausibly could have simply been confused (as he claimed), rather than lying (as Del Mar contends). I am convinced that Zamyatin's recollection of what he did in May 2007 is imperfect and probably somewhat inaccurate; I am not convinced he

⁶⁷ Tr. at 53–56.

⁶⁸ E. Ex.-1 at 69.

⁶⁹ Tr. at 56.

⁷⁰ E. Ex.-9 at 1–9.

⁷¹ *Id.* at 6.

⁷² It is unclear whether the different spelling has any significance.

was deliberately fabricating testimony. However, as described below, Del Mar owes Zamyatin his wages for reasons largely unrelated to the credibility of Zamyatin's testimony at trial, and I do not rely primarily on that testimony to reach my determination.

B. Egorov

There are also reasons to question the accuracy of some of Egorov's testimony. When Wage & Hour Investigator Sanchez first spoke with Egorov, he said he didn't have to pay Zamyatin because Zamyatin left for Canada early in May.⁷³ When Sanchez said she thought that was not the case, Egorov said Zamyatin left in the middle of May.⁷⁴ Finally, after being confronted with Zamyatin's passport, stamped May 29, 2007, Egorov acknowledged Zamyatin was in the United States until then.⁷⁵ He only began arguing Del Mar didn't have to pay because Zamyatin was nonproductive after this concession.⁷⁶

Two inferences can be drawn from Egorov's behavior in these exchanges. One is that Egorov fabricated the story that Zamyatin was nonproductive after he was forced to acknowledge that Zamyatin hadn't left the country. If Egorov was looking for an excuse not to pay Zamyatin, his testimony about Zamyatin's nonproductivity isn't credible. The second possibility, however, is that Egorov assumed Zamyatin had left the country earlier because he was so nonproductive during May, and that he was honestly surprised to learn Zamyatin had been in the United States until May 29 but had done so little. Based on the evidence presented, I'm not sure which possibility is more likely.

I am inclined to give his testimony limited weight in any case because his supervision of Zamyatin was so minimal. It suggests he little knew or cared what Zamyatin was doing. If Egorov didn't know that Zamyatin was in the United States until May 29, he can't claim to be an expert on what Zamyatin was doing during May. After Zamyatin went to work with Avesta, Egorov apparently never even communicated with Zamyatin until October, months later, when he terminated Zamyatin's employment by e-mail, in response to a request from Zamyatin for wages. Egorov claims he was in daily communication with Avesta, and that Zamyatin showed up for work at Avesta but once. He apparently never asked Zamyatin why he wasn't at work. Egorov certainly doesn't seem to have cared much about what Zamyatin was doing at the time.

⁷³ Tr. at 104

⁷⁴ Tr. at 105.

⁷⁵ Tr. at 105–106.

⁷⁶ Tr. at 106.

C. Conclusion

I am not convinced that either Zamyatin or Egorov provided accurate, reliable testimony during the hearing. Accordingly, I base my decision that Del Mar owes Zamyatin his wages chiefly on the points upon which both agree, and on the e-mail exhibits they both agree are authentic.

IV. Analysis

The Administrator argues that Del Mar has a responsibility to pay Zamyatin wages for the period from May 1 to May 28, 2007 because Zamyatin was available to work during that entire period.⁷⁷ Del Mar argues it should not have to pay because Zamyatin was nonproductive for reasons outside of its control.⁷⁸ As described below, I agree with the Administrator and order Del Mar to pay.

The H-1B visa program, by design, deprives employers of economic incentives to prefer nonimmigrant professional employees, because their wages and benefits must equal those that would be paid to American workers. Amendments to the INA enacted in the American Competitiveness and Workforce Improvement Act of 1998⁷⁹ (the Competitiveness Amendments) created some of these disincentives. The employer attests in the LCA that it will pay the H-1B non-immigrant professional the greater of the job's actual wage rate or the prevailing wage rate throughout the entire period of authorized employment, and will pay for nonproductive time which occurred due to a decision of the employer.⁸⁰

Employers violate the INA if they place full-time H-1B workers on "nonproductive status due to a decision by the employer (based on factors such as lack of work) or . . . fail to pay the nonimmigrant full-

⁷⁷ Administrator's Posttrial Brief at 9.

⁷⁸ Employer's Posttrial Brief at 1.

⁷⁹ Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. 105-277, 112 Stat. 2681.

⁸⁰ The Competitiveness Amendments included this statutory requirement, confirming the position the Department had adopted by regulation in late 1994. The regulation, 29 C.F.R. § 655.731(c)(5)(i) (1995), required that wages begin no later than the first day the H-1B non-immigrant is in the United States, and continue throughout employment, including all periods the worker was non-productive for reasons related to employment, such as for training or for lack of assigned work. *See* the commentary at 65 Fed. Reg. 80,169 (Dec. 20, 2000). Del Mar agreed in the LCA to pay the required wage, to pay for non-productive time, and to offer benefits on the same basis as U.S. workers. A. Ex.-1 at 19.

time wages . . . for all such nonproductive time.”⁸¹ On the other hand, employers need not compensate employees for nonproductive status due to reasons unrelated to the employment – for example, taking time off to tour the U.S., or a traffic accident unrelated to the employment that renders the worker unable to work.⁸²

Here, Del Mar argues that it is not obligated to pay Zamyatin because he was in nonproductive status because he had voluntarily decided to travel to Canada before travelling to Moscow without any instruction to do so from Del Mar, and because the only conclusive proof that Zamyatin worked during the month of May is seven lines of e-mail text he wrote during that period. Both arguments are unconvincing.

First, whether Zamyatin decided to travel to Canada on his own is not relevant to whether Del Mar must pay him before he travelled to Canada.⁸³ Del Mar argues that Zamyatin made the decision to go to Canada at the beginning of May on the advice of his friend and alleged secret business partner Melkumian, and that this somehow absolves Del Mar of all responsibility to pay Zamyatin for the rest of the month. But Zamyatin didn’t actually leave until May 29. For the period from May 1 to May 29, there is no reason why Zamyatin would have been unable to work for Del Mar, and in fact, as the e-mail exhibits demonstrate, he did receive and respond to work-related e-mails during that period. Whether he subjectively planned on doing something nonproductive in the future doesn’t change what he did in May.

Del Mar’s second argument is that Zamyatin didn’t actually do much work in May. This may well be true; as described above,

⁸¹ 8 U.S.C. § 1182(n)(2)(C)(vii)(I).

⁸² 8 U.S.C. § 1182(n)(2)(c)(vii); 20 C.F.R. § 655.731(c)(7). The precise text of the regulation states:

If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which takes the non-immigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or renders the non-immigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the non-immigrant), then the employer shall not be obligated to pay the required wage rate during that period, provided that such period is not subject to payment under the employer’s benefit plan

20 C.F.R. § 655.731(c)(7)(ii).

⁸³ Had the Administrator made a claim for Zamyatin’s wages between June and October, 2007, it might have been able to get them – it is not clear whether an employer must pay an H-1B worker for work performed outside the United States, but it seems at least possible. The Administrator’s case is limited to wages for the month of May, however, so I need not make that determination.

Zamyatin's testimony about what he did during May isn't entirely convincing, and the only documentary evidence any party produced for May was about seven lines worth of e-mails. Zamyatin may have worked much more than those e-mails suggest, but he may not have. I don't have a sound basis for concluding he did, but it doesn't matter.

Even if Zamyatin didn't do much in May, Del Mar still must pay him. Egorov testified that he was unsatisfied with Zamyatin's interest in the job and that Del Mar suffered because Zamyatin bungled his responsibilities on the project with Avesta. I have no reason to doubt that Egorov was being honest when he said he felt this way. But Zamyatin was here, and Del Mar hadn't fired him, so Del Mar owes the wages that it promised to pay in its H-1B application.

The Department interprets the INA to prohibit employers from withholding pay as a form of punishment for employee misconduct.⁸⁴ This is sensible given the aims of the Act: if employers could dock their H-1B employees for what the employers considered to be mistakes, they could easily circumvent the requirement that they pay the prevailing wage rate.

As long as Zamyatin was not voluntarily unavailable to work — and the e-mails show that he was available and expected to be doing work — Del Mar has to pay him.⁸⁵ If Del Mar was dissatisfied with Zamyatin's performance, its remedy was to terminate his employment, not to withhold his pay. The parties agree that Del Mar did not in fact terminate Zamyatin's employment until October of 2007.⁸⁶ Accordingly,

⁸⁴ See the Department's explanation of its 2001 interim rulemaking changes and request for comments, published at 65 Fed. Regis. 80,171.

⁸⁵ Del Mar didn't provide facilities for Zamyatin to work in, so Zamyatin worked from home. Del Mar can't really complain it was hard to verify that Zamyatin was doing the work he was assigned when it didn't bother to adequately supervise him.

⁸⁶ Moreover, it is not clear whether the October termination was enough to constitute a *bona fide* termination under the regulations, which require that an employer not only fire a worker but also report the firing to ICE and pay for the worker's transportation to his home country. If the Administrator had pressed this claim, Del Mar might have been liable for salary payments for a period up to the entire three year period Zamyatin was authorized to work for Del Mar. See 20 C.F.R. § 655.731(c)(7)(ii); *Huang v. Ultimo Software Solutions, Inc.*, ARB No. 09-044, 09-056, ALJ No. 2008-LCA-11, slip op. at 4 (March 31, 2011) (affirming the ALJ's finding that the employer "never effected a bona fide termination under 20 C.F.R. § 655.731(c)(7)(ii), as it must to be relieved of its obligation to pay [the beneficiary's] wages"); *Amtel Group v. Yongmahapakorn (Rung)*, ARB No. 07-104, ALJ No. 04-LCA-006, slip op. at 2 & n. 4 (Jan. 29, 2008) [hereinafter *Amtel II*] (Order Denying Reconsideration); *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5–6 (Mar. 30, 2007); *Amtel Group of Florida, Inc. v. Yongmahapakorn (Rung)*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 9–12 (Sept. 29, 2006) [hereinafter *Amtel I*]; see also 65 Fed. Reg. 80,171 (Dec. 20, 2000) ("The Department agrees that an employer is no longer liable for payments for

Del Mar is still on the hook for Zamyatin's May wages whether or not Zamyatin was performing his duties conscientiously and competently.⁸⁷

V. Damages

I have determined that Del Mar owes Zamyatin his wages from May 1, 2007 until May 28, 2007. The Administrator claims those wages amount to \$3,052.00. It supports its claim with Investigator Sanchez' computations, which it submitted as an exhibit.⁸⁸ Del Mar did not contest the accuracy of these computations and they appear reasonable to me. Accordingly, I find Zamyatin's wages for this period to be \$3052.00.

VI. Order

The Administrator's decision is affirmed. It is ordered that within 30 days:

1. Del Mar must pay the Administrator for distribution to Zamyatin back wages from May 1, 2007 to May 28, 2007 totaling \$3,052.00;
2. Del Mar must pay pre-judgment interest and post-judgment interest on this amount at the Federal Short Term Interest rate plus 3%, as specified in 26 U.S.C. § 6621, compounded quarterly;⁸⁹

nonproductive status if there has been a *bona fide* termination of the employment relationship. The Department would not likely consider it to be a *bona fide* termination for purposes of this provision unless INS has been notified that the employment relationship has been terminated pursuant to 8 CFR 241.2(h)(11)(i)(A) and the petition canceled, and the employee has been provided with payment for transportation home where required by section 214(E)(5)(A) of the INA and INS regulations at 8 CFR 214.2(h)(4)(iii)(E)." (italics in original). *But see, Administrator, Wage & Hour Division v. Ken Technologies, Inc.*, ARB No. 03-140, ALJ No. 2003-LCA-15, slip op. at 4-5 (Sept. 15, 2004) (indicating that failure to notify the immigration authorities is not conclusive on the issue whether the employee was terminated). The Board's more recent decisions such as *Amtel I*, slip op. at 11-12, can't be reconciled with the idea that a bona fide termination can occur without all three elements. Yet the Board hasn't explicitly receded from *Ken Technologies*.

⁸⁷ The situation might be different if Zamyatin had simply disappeared one day without saying anything, but the e-mails show that Egorov maintained contact with Zamyatin during May and that Zamyatin acted on at least some of Egorov's instructions.

⁸⁸ A. Ex.-10 at 1.

⁸⁹ *Amtel I, supra*, slip op. at 12-13.

3. the Administrator of the Wage and Hour Division, DOL, must make any calculations necessary and appropriate to effectuate this Decision and Order; and
4. Del Mar must pay the amounts computed to the Wage and Hour Division, U.S. Department of Labor, 5675 Ruffin Road Room 310, San Diego, CA, 92123.

So Ordered.

A

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

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).