

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 July 2012

ARB Case Nos.: 10-090
10-093

ALJ Case No.: 2009-LCA-00026

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,

Prosecuting Party,

and

GABRIELE WIRTH, M.D.,

Prosecuting Party,

v.

UNIVERSITY OF MIAMI, MILLER SCHOOL OF MEDICINE,

Respondent.

DECISION AND ORDER ON REMAND

This case arises under the H-1B visa program of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C.A. § 1101, et seq, as amended, and its implementing regulations found at 20 CFR Part 655, Subparts H and I.

By correspondence dated May 28, 2009, and filed with the Office of Administrative Law Judges on June 2, 2009, the Administrator for the Wage and Hour Division, Employment Standards Administration, (Administrator), notified Respondent that an investigation under the H-1B provisions of the Act was completed and Respondent had committed two violations of the INA by (1) failing to pay wages for the periods September 1, 2006 through October 15, 2006 and September 1, 2007 through December 11, 2007, as required by 20 CFR § 655.731 and (2) failing to provide notice of the filing of the Labor Condition Applications (LCA) in violation of 20 CFR

§ 655.734. The Respondent was directed to pay \$32,312.00 in back wages to one specific non-immigrant H-1B worker and was directed to comply with the provisions of 20 CFR § 655.734 in the future. No civil penalties were levied against the Respondent.

On June 12, 2009, the Respondent filed a request for formal hearing with the Office of Administrative Law Judges on both alleged violation issues. On June 10, 2009, the non-immigrant H-1B worker filed a request for formal hearing with the Office of Administrative Law Judges. A formal hearing was held in Ft. Lauderdale, Florida, December 15 and 16, 2009, with all Parties present. At the hearing the Administrator withdrew the allegation the Respondent failed to provide notice of the filing of the Labor Condition Applications (LCA) in violation of 20 CFR § 655.734 (TR 19-24). On March 31, 2010, this Administrative Law Judge issued the “Decision and Order – Awarding Accrued Wages and Denying Return Transportation Expense” in this case.

On April 28, 2010 the Administrator filed an appeal with the Administrative Review Board which was assigned ARB Case No. 2010-090. On April 30, 2010, the non-immigrant H-1B worker filed an appeal with the Administrative Review Board which was assigned ARB Case No. 2010-093. The Respondent filed a response brief on December 1, 2010.

By “Decision and Order Affirming in Part, Modifying in Part, and Remanding” of December 20, 2011, the Administrative Review Board took action to “affirm the ALJ’s Decision and Order, with modifications, and remand for the limited purpose of recalculating the award of pre-judgment interest to [the non-immigrant H-1B worker] as compound interest.¹” The Administrative Review Board remanded the case for the limited purpose of determining the pre-judgment interest on back pay and the post-judgment interest payable to the Complainant as a result of the Board’s affirmations and modifications. The case file was received from the Administrative Review Board on May 1, 2012.

By Order of May 15, 2012, the record was reopened for the limited purpose of receiving supplemental evidence and supplemental briefs on the computation of pre-judgment and post-judgment interest payable to the Complainant as a result of the December 20, 2011, Decision and Order of the Administrative Review Board. The Administrator and the non-immigrant H-1B worker, as the named prosecuting parties, and the named Respondent were each directed to file with the Court their respective supplemental evidence and supplemental brief, if any, by June 11, 2012 and to file, with any additional supplemental evidence, their respective response, if any, to any opposing Party’s supplemental evidence and brief by June 27, 2012. On June 11, 2012, the Respondent filed a “Supplemental Brief” without any additional supplemental evidence. Neither named Prosecuting Party filed supplemental evidence, supplemental brief or a response to the Respondent’s timely filing.

DISCUSSION

The sole issue on remand is the recalculation of the award of compound interest due and payable under the INA as a result of the Administrative Review Board’s action of December 20, 2011.

¹ ARB D&O at page 2

As approved by the Administrative Review Board on appeal, the Complainant is entitled to unpaid wages for the following times and wage rate indicated –

1. September 5, 2006 through September 20, 2006, inclusive² at the rate of \$48,000.00 per year³
2. October 12, 2006 through October 15, 2006, inclusive⁴ at the rate of \$48,000.00 per year
3. September 1, 2007 through December 12, 2007, inclusive⁵ at the rate of \$96,000.00 per year

Additionally, the Complainant was found entitled to transportation cost for return to the last foreign country of residence prior to employment under the H-1B program with the Respondent. The Administrative Review Board ordered the Respondent to pay \$1,445.00 for the return transportation costs and “to pay pre-judgment and post-judgment compound interest on the back pay award and post-judgment compound interest until the University satisfies its payment obligations.”⁶ The Board directed that the pre-judgment and post-judgment compound interest paid be calculated in the manner set forth in *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012 (ARB May 17, 2000)⁷, *rev'd on other grounds sub. nom., Doyle v. U.S. Secretary of Labor*, 285 F.3d 243 (3rd Cir. 2002), *cert denied*, 537 US 1066 (2003). [The case was reversed on the finding that the complainant had not engaged in protected activity and that the respondent's actions were not related to alleged protected activity. Additionally, the complainant's petition on the issue of damage award was dismissed as moot. The computation of pre-judgment and post-judgment interest became moot on the finding that the complainant had failed to establish a violation of the Energy Reorganization Act of 1974.]

Under the Administrative Review Board's decision in *Doyle*, computation of compound interest requires applying the average monthly applicable federal rate (AFR) of interest for each quarter set forth under 26 USC §6621(b)(3) plus 3%, to the accrued principal and interest owed each separate quarter to the Complainant. The average monthly AFR is determined by averaging the monthly Federal short-term interest rate published by the Internal Revenue Service in their monthly Revenue Rulings.⁸ Judicial notice is taken of monthly Federal short-term interest rates published for the period from January 2006 through July 2012 as set forth in the attached ALJ RX-1⁹.

As noted by the Administrative Review Board, this Administrative Law Judge found that unusual circumstances surrounding the current economic turndown were such that the Complainant would receive an unwarranted monetary windfall if the pre-judgment and post-judgment interest was compounded on a quarterly basis that provided for an increase of 3.0% to Federal short-term interest rates, and that interest as provided by 28 U.S.C. §1961 was more reflective of lost investment interest that a member of the public would realize for the loss of use

² ARB D&O at pages 7, 8 and 13

³ ARB D&O at pages 9 and 10 affirming ALJ decision on rate payable prior to May 2007

⁴ ARB D&O at pages 4 and 13

⁵ ARB D&O at page 10 and 13

⁶ ARB D&O at page 11 and 14

⁷ ARB D&O at page 13

⁸ www.irs.gov/app/picklist/list/federalRates.html

⁹ ALJ RX 1 was provided to all the Parties as part of the May 15, 2012 Order (less the July 2012 AFR).

of the adjudged funds during the economic period of time appropriate in this case, as permitted by *Doyle*, i.d. at page 18. In its decision the Board agreed with the position of the Administrator and Complainant that the “current state of the economy (which is reflected in the interest rates charged, whether simple or compound) should not affect the consistent application of relevant Board decisions in this case” and that “based on Board precedent and policies underlying the H-1B statutes and regulations, [Complainant] is entitled to pre-judgment and post-judgment compound interest on the pay award until the University satisfies the debt.”¹⁰

In its supplemental brief, Respondent reports that payment of back wages and simple interest ordered by the initial March 31, 2010 Recommended Decision and Order was timely tendered to the Complainant on April 30, 2010, in the amount of \$21,263.47, less all applicable deductions. The Respondent argues that it should not be liable for any interest for the period from when the Complainant filed her appeal of the Recommended Decision and Order on April 30, 2010 and when the Administrative Review Board issued the December 20, 2011 Decision and Order because it is “inequitable to allow an award of prejudgment interest when the delay between the injury and judgment is the fault of the prevailing party ... The weight of equitable considerations may foreclose any award of prejudgment of interest at all.” *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286, 1297, 1298 (11th Cir. 2002). Respondent submits there is no reason to tender to the Complainant more than what was set forth in the Recommended Decision and Order and that it would be a “misinterpretation of the law ... to award quarterly compound interest on an amount the Respondent was never given the opportunity to tender. Such an award would result in the unjustified enrichment of the Complainant by almost \$10,000.00 in addition to post-judgment interest solely because the Complainant appealed the D&O.” Additionally, Respondent argues that the Administrative Review Board subsequently awarded approximately \$9,367.37 in additional monies to the Complainant solely after the Complainant appealed the initial Recommended Decision and Order on April 30, 2010. Respondent seeks to have the compound quarterly interest deferred during the period from April 30, 2010 through December 20, 2011, inclusive.

Respondent also submits that it should not be liable for any interest that would accrue between December 20, 2011 and May 15, 2012, the day the record was reopened for supplemental evidence and briefs. Respondent submits that it has been willing and able to comply with the judgments of the Court but the delay during that period was due to constraints outside the control of the Respondents and increased liability by approximately \$3,445.29 in interest during that period. Respondent submits that the weight of equitable considerations set forth by the 11th Circuit Court of Appeals should be applied during that period to ensure an equitable and fair determination of post-judgment interest.

On the issue of compound quarterly interest on the \$1,445.00 transportation costs ordered paid by the Administrative Review Board, Respondent submits that the Respondent had proffered return transportation to the Complainant and her children when her work with the University was stopped and that the Complainant could not have benefitted from the \$1,445.00 for transportation in 2009 since it would be expended on transportation at that time and could not have been retained for investment.

¹⁰ ARB D&O at pages 12 and 13

The Administrator did not file supplemental evidence, initial brief or a response to that filed by the Respondent. The Administrator did not file notice or refer to any published Departmental policy. In its initial “Petition for Review of the Deputy Administrator” filed with the Administrative Review Board on April 28, 2010, the Administrator urged that “the current state of the economy . . . should not affect the consistent application of relevant Board decisions in this case” and referred to *Mao v. Nasser*, ARB No. 06-121 (Nov. 26, 2008); *Amtel Group of Florida v. Rungvichit Yongmahapakorn*, ARB No. 04-087 (Sept. 29, 2006); and *Iawalli v. American Info. Tech. Corp.*, ARB No. 04-165 (Sept. 29, 2006).

The Complainant did not file supplemental evidence, initial brief or a response to that filed by the Respondent. In her “Opening Brief in Support of a Petition for Review” filed with the Administrative Review Board on August 27, 2010, the Complainant addressed the issue of interest in two paragraphs by stating her agreement with the Administrator’s brief and adding the citation to the administrative law judge decision in *Administrator [Baiju] v. Business Outreach CenterNetwork, Inc.*, OALJ Case No. 2009-LCA-00046 (ALJ, Apr. 20, 2010). She urges application of 26 USC §6621 for both pre-judgment and post-judgment interest.

DECISIONAL FRAMEWORK

The purpose of applying interest to pre-judgment and post-judgment monetary awards is to make the recipient whole again. The rationale is based on the perception that the party responsible for payment of accrued monies had the use of those funds during the interim period and that the recipient had been denied use of those funds during the period, such that one party gained an investment opportunity and the other was denied the investment opportunity and had to make up monetary shortfalls during the interim period by use of other personal funds that could have been managed in other ways beneficial to the individual.

In the employee protection provision under the Energy Reorganization Act of 1974 case of *Doyle v. Hydro Nuclear Services*, supra, the Administrative Review Board endorsed the remedial nature of compound interest to make a party whole by stating –

“we hold that the prejudgment interest on back pay ordinarily shall be compound interest. . . . Absent any unusual circumstance, we will award compound interest on back pay in cases arising under all of these employee protection provisions. . . . We provide guidance on the calculation of the total amount of prejudgment interest on back pay . . . the interest rate is that charged on the underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 USC §6621(b)(3) plus three percentage points. . . . The Federal short-term interest rate to be used is the so-called ‘applicable federal rate (AFR) for a quarterly period of compounding.

To determine the interest for the first quarter of back pay, the parties shall multiply the back pay principal owed for that quarter by the sum of the quarterly average AFR plus three percentage points. To determine the quarterly average interest rate, the parties shall calculate the arithmetic average for the AFR for each of the three months of the calendar quarter, rounded to the nearest whole percentage point. We rounded to the whole number because the parties did so in their evidentiary submissions to the ALJ.

To determine the interest for the second quarter of back pay owed, the parties shall add the first quarter principal, the first quarter interest, and the second quarter principal. The resulting sum is multiplied by the second quarter’s interest rate as calculated according to the preceding paragraph.

This multiplication yields the second quarter of interest. This process shall continue for computing the interest owed on the back pay through the issuance of this decision. ...

In whistleblower cases, we award the same rate of interest on back pay awards, both pre- and post-judgment. ... Consequently, we order payment of post-judgment interest at the same rate as the pre-judgment interest rate. Further, we order that the post-judgment interest shall be compounded and posted quarterly, in the same fashion as the prejudgment interest.”

Even though *Doyle* was overruled by the U.S. Court of Appeals for the Third Circuit on the grounds that there was no basis for relief, and the U.S. Supreme Court denied cert to the complainant, the remedial nature and “make whole” goal of back pay and the method of computing interest owed on back pay remained the same in subsequent cases arising under the Immigration and Nationality Act and decided by the Administrative Review Board in *Mao v. Nasser*, supra at page 11; *Amtel Group of Florida v. Yongmahapakorn*, supra at page 12¹¹; and *Iawalli v. American Info. Tech. Corp.*, supra at page 8 citing *Amtel Group*. The Complainant’s reference to *Administrator [Baiju] v. Business Outreach Center Network, Inc.*, supra, is of no precedential value since it is merely another Judge’s trial level decision in an unrelated case.

While the INA does not specifically provide for the award of pre-judgment interest or post-judgment interest on back pay by statute or regulation and the Administrator has failed to provide specific Department of Labor policy guidance on this issue, related Department of Labor programs involving employer discrimination and payment of back pay in enforcement of the discrimination provisions of Federal contracts is addressed by Federal regulations at 41 CFR §60-1.26(a)(2), 41 CFR §60-250.65(a)(1), 41 CFR §60-300.65(a)(1) and 41 CFR §60-741.65(a)(1) which provide –

“OFCCP¹² may seek back pay and other make whole relief for [aggrieved individuals / victims of discrimination] identified during a complaint investigation or compliance investigation. ... Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the under-payment of taxes.¹³”

OFCCP’s Federal Contract Compliance Manual, Chapter 7, “Identification & Remedy of Employment Discrimination,” sets forth Departmental policy related to remedies to “make whole” the identified aggrieved individuals. “Make whole relief means simply that the [aggrieved individual / victim of discrimination] is restored to the position, both economically and in terms of status, that he/she would have occupied had the [underlying event] never taken place. ... This would normally include things such as back pay with interest ... and any other employment benefits denied the victim. In construing what constitutes make whole relief, OFCCP has followed Title VII principals.” *Ibid*, at 7F03. “The purpose of interest on back pay awards is to compensate the discriminatee for the loss of use of his/her money. OFCCP’s policy is that interest on back pay be calculated at the same percentage rate as the Internal Revenue

¹¹ Amtel argued that the Act did not provide for the award of interest on back pay and the ALJ erred in relying on *Doyle v. Hydro Nuclear Services*. The ARB held that “as Amtel has not offered any contrary authority, we order Amtel to also pay prejudgment compound interest on the back pay it owes and post judgment interest until satisfaction in accordance with the procedures to be followed in computing interest due on back pay awards outlined in *Doyle*.”

¹² Office of Federal Contract Compliance Programs

¹³ 26 USC §6621(a)(2), see also §6621(c) when a large corporation is involved.

Service's underpayment formula. Simple interest is to be calculated from the first date that is covered by the back pay award. ... The IRS may adjust its rate quarterly. The interest rate applicable to various periods are set out in Appendix A to this Chapter." Ibid, at 7F07.e. Appendix A explains that interest on back pay is calculated separately for each quarter that back pay is owed and the resulting quarterly interest is added together over the period covered to determine the amount of pre-judgment interest owed. The Appendix indicates that the quarterly "average back pay" amount to which the appropriate quarterly interest is applied is composed of the total back pay owed at the beginning of the quarter plus one-half of back pay due for the quarter itself. It provides that partial quarters are calculated the same way as full quarters. The total money due is the sum of the back pay owed for the period and the sum of the quarterly interests computed individually.

Within the 11th Circuit, "an award of prejudgment interest adjusts the back pay for inflation and reflects the present day value of income that should have been paid to the claimant in the past." *Armstrong v. Charlotte County Bd. of Comm.*, 273 F. Supp. 2d 1312, *2 (M.D. Fla. 2003) citing to *EEOC v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1379 (S.D. Fla. 1978). Prejudgment interest is applied to back pay to make the aggrieved individual whole, compensate the individual for the true cost of money damages incurred, and prevent the offending party from attempting to enjoy an interest-free loan for as long as it can delay paying out back wages, and to avoid a windfall to either party. *Richardson v. Tricom Pictures & Productions, Inc.*, 334 F. Supp. 2d 1303 (S.D. Fla. 2004) and the cases cited therein. The U.S. Court of Appeals for the Eleventh Circuit directed that prejudgment interest in Title VII employment discrimination cases is to be calculated in accordance with 26 USC §6621. *McKelvy v. Metal Container Corp*, 854 F.2d 448 (11th Cir. 1988) citing *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507 (11th Cir. 1987). On remand to calculate the amount of prejudgment interest owed McKelvy, the District Court found that for periods after the 1986 amendment to 26 USC §6621, the underpayment rate set forth in 26 USC §6621(a)(2) should be applied. *McKelvy v. Metal Container Corp*, 125 F.R.D. 179 (M.D. Fla. 1989). However, the District Court later found "that the over-payment rate, which is effectively the rate at which one lends money to the government to be a more accurate approximation of the return one would have likely achieved over the back-pay period through reasonably safe market investment" and went on to "average the quarterly over-payment rate for 2008, 2009, 2010 and 2011 and compound the interest annually." *Soliday v. 7-Eleven, Inc.*, 2011 WL 4949652 (M.D. Fla. 2011). It is specifically noted that 26 USC §6621 currently provides –

(a)(1) Overpayment rate The overpayment rate established under this section shall be the sum of -

- (A) the Federal short-term rate determined under subparagraph (b), plus
- (B) 3 percentage points (2 percentage points in the case of a corporation). ...

(a)(2) Underpayment rate The underpayment rate established under this section shall be the sum of -

- (A) the Federal short-term rate determined under subparagraph (b), plus
- (B) 3 percentage points.

The Respondent argues that even if prejudgment interest is owed, various periods of time are attributable to delay in the judgment caused by the Complainant. It submits that the factors set out in *Blasland*, surpa, at pages 1297-1298, must be considered in this case. The factors set forth include delay between injury and judgment that is the fault of the prevailing party; it is

inequitable to award prejudgment interest to a party who could have, but failed to, mitigate damages; restricting the time for computing prejudgment interest to the time from which demand for payment was first made; and it is not equitable to put the payment of interest on the public. The Court held that by promptly paying a judgment against it, a party is not doing anything more than it was legally required to do and does not receive “bonus points” to decrease prejudgment interest. *Blasland* is a contract law case and not directly on point in an employment discrimination case. Respondent has failed to introduce evidence that would support governmental immunity to protect the “innocent public” from paying prejudgment interest in this case. The complaint was timely filed and does not support beginning prejudgment interest from that point instead of from the point where back pay was actually due. Additionally, the Respondent is entitled to credit for payments promptly made following the initial Recommended Decision and Order but does not receive additional credit against prejudgment interest because of those payments. However, factors of delay in proceedings by the Complainant and the duty to mitigate by the prevailing party are applicable to the issue of appropriate prejudgment interest in this case.

RECALCULATION OF THE AWARD OF INTEREST

I. Factors considered in determining the pre-judgment interest payable to Complainant by Respondent

a. Delay in the proceedings attributable to the Complainant.

Review of the record before this Administrative Law Judge and before the Administrative Review Board¹⁴ reveals that the Complainant was unable to be located for the initial prehearing scheduling telephone conference call on June 19, 2009 because of her return to Germany. The Complainant did participate in an August 17, 2009 prehearing telephone conference call in which the scheduled October 6 and 7, 2009 formal hearing was moved to commence December 15, 2009. Even though the Complainant filed the first request for hearing with the Office of Administrative Law Judges¹⁵ and failed to maintain a point of contact with the Office of Administrative Law Judges, the delay from October 6, 2009 to November 24, 2009 was for the mutual benefit of all the Parties and not due to delay caused by the Complainant.

At the close of the formal hearing the date for submission of post-hearing written briefs on specific issues was set. Subsequently, Administrator and Respondent filed a joint request for an extension in time to file post-hearing briefs. This was granted. Any delay in time was not due to delay caused by the Complainant.

Review of the administrative file before the Administrative Review Board reveals several requests for extensions in time to file briefs and/or replies by all Parties. The overlapping times involved failed to establish that a particular period of time is attributable solely to the

¹⁴ The record of delays, if any, before the Administrator from the November 7, 2007 date of complaint through the May 28, 2009 date of the Administrator’s findings are not available for consideration in this case.

¹⁵ The Respondent filed a request for formal hearing on June 12, 2009, two days after the Complainant had filed her request for formal hearing.

actions of the Complainant. Accordingly, any delay in time was not due to delay caused by the Complainant.

In view of the foregoing, this Administrative Law Judge finds that no periods of time in the proceedings are excludable as time periods of delay caused by the Complainant.

b. Failure of Complainant to mitigate damages.

The record established that the Respondent tendered to the Complainant \$5,000.00 for use in transporting her household goods back to Germany after her work at the University of Miami, Miller School of Medicine was stopped by directly depositing \$5,000.00 into the Complainant's bank account on September 28, 2007. The Respondents also requested that the Complainant make airplane flight reservations and advise the Respondent of the cost of the flight from Miami to Germany for Complainant and her two daughters. The Complainant returned the \$5,000.00 directly deposited into her bank account and willfully failed to advise the Respondent of the cost of transportation back to Germany. The Complainant stated she left the United States for a short period in July 14, 2008 and a later period in September 2008 to care for ailing parents. She reported the last time her children left the United States was in 2009. At the hearing the Parties accepted the judicial notice that \$1,445.00 was the reasonable value of individual coach airfare from Miami to Germany. This same figure was set by the Administrative Review Board as the cost of transportation to be paid to the Complainant following a finding that her employment had been terminated by Respondent vice the initial Court finding that the Complainant had resigned from her position.

This Administrative Law Judge finds that the Complainant failed to properly mitigate damages involving her transportation from Miami to Germany and is not entitled to prejudgment interest on the \$1,445.00 transportation amount.

Filings with the Administrative Review Board include a "Motion to Resolve the Issue of an Uncashed Check that was Issued Pursuant to the Decision and Order Which is in Review" filed by the Complainant. This filing indicates that the Respondent issued and delivered a check dated April 30, 2010 to the Complainant in the total amount \$14,860.92. Attached documents report that Medicare taxes in the amount of \$306.87, FICA taxes in the amount of \$1,312.14, and Federal withholding taxes in the amount of \$4,683.54 were deducted from a gross amount of \$21,263.47. Of the \$21,263.47 gross total, Respondent attributed \$18,945.04 to back wages and \$2,218.43 to interest. The Complainant indicated that the original check was still in her possession, uncashed, and expired. The copy of the issued check filed by the Complainant does not indicate an expiration date. The Complainant indicated that "The original check is in my possession for the following reasons: I wished to avoid the appearance of accepting any part of the ALJ D&O [and] I waited for an ARB Hearing Panel to be in place before filing a motion notifying the ARB of the issue." While the Complainant stated her reason for not redeeming the \$14,860.92 check, her reasons do not counter the Respondent's action of tendering to her payment of the proceeds of back wages and simple interest of \$21,263.47 on April 30, 2010, less required tax deductions that were ordered by this Administrative Law Judge in the initial Recommended Decision and Order. Accordingly, the Complainant is not entitled to additional compound interest on the

gross \$21,263.47 after April 30, 2010, but, if the check is truly “expired” and uncashed, she is entitled to having the check reissued in the net amount of \$14,860.92 upon her delivery to the Respondent of the original uncashed check.

c. Considerations in calculating prejudgment interest.

In view of the matters set forth in the “Decisional Framework” paragraph, above, the following factors are considered in calculating prejudgment interest –

- (i) Prejudgment interest in partial calendar quarters are computed in the same manner as full calendar quarters.
- (ii) Interest will be compounded quarterly, based on the respective calendar quarterly average of the underpayment interest rate set forth in 26 USC §6621(a)(2). The respective “quarterly interest to be applied” is the mathematical average of the Federal short-term interest rate published by the Internal Revenue Service for each month of a respective calendar quarter, rounded to the nearest whole percent, with 3 percentage points added to that whole percentage number.
- (iii) The “quarterly average back pay” subject to the respective “quarterly interest to be applied” is the sum of the “accrued principal and interest” at the end of the preceding calendar quarter plus ½ of the back pay payable during the respective calendar quarter. If a payment of back pay and/or interest is made, it is reflected as a negative value in the quarter paid.
- (iv) The respective “quarterly interest payable” is the product of the respective “quarterly interest to be applied” to the respective “quarterly average back pay”
- (v) The “accrued principal and interest” at the end of a respective calendar quarter is the sum of that respective calendar quarter’s full back pay owed/paid, plus the “accrued principal and interest” at the end of the previous quarter, plus the newly calculated “quarterly interest payable”

II. Calculation of compound interest on back wages.

The Administrative Review Board has determined that the Complainant is entitled to unpaid wages for September 5, 2006 through September 20, 2006, inclusive at the rate of \$48,000.00 per year; October 12, 2006 through October 15, 2006, inclusive at the rate of \$48,000.00 per year; and September 1, 2007 through December 12, 2007, inclusive at the rate of \$96,000.00 per year.

The hearing record established that the Complainant was paid wages on a monthly basis at the end of the month. Thus the back wages payable for September 5, 2006 through September 20, 2006, inclusive, were payable on September 30, 2006. Since the applicable wage rate for these 16 days was \$48,000.00 per year (the equivalent wage rate of \$4,000.00 per month or \$923.08 per week), the Complainant was owed a back wage of \$2,109.90¹⁶ on September 30, 2006. Similarly, the Complainant was owed a back wage of \$527.47¹⁷ on October 31, 2006 for the four days of October 12, 2006 through October 15, 2006. Finally for the period of September 1, 2007

¹⁶ (16 days / 7 days per week)(\$923.08 per week)

¹⁷ (4 days / 7 days per week)(\$923.08 per week)

through December 12, 2007, inclusive, the Complainant was owed \$8,000.00¹⁸ on September 30, 2007; \$8,000.00 on October 31, 2007; \$8,000.00 on November 30, 2007; and \$3,164.84 on December 12, 2007.¹⁹ This is a total of back wages in the amount of \$29,799.21. The actual wage payment to the Complainant is required to be reduced by all federal, state and local income, social security and Medicare taxes required to be withheld, 20 CFR §655.731(c).

In order to calculate the prejudgment interest payable to the Complainant, as ordered by the Administrative Review Board, the considerations set forth in paragraph I, above, were applied. This included consideration of the April 30, 2010 payment when made by the Respondent.

Attached exhibit ALJ RX-2 sets forth the calculation of compound quarterly interest payable in this case in view of the Administrative Review Board Decision and Order and the matters set forth above.

As indicated in ALJ RX-2, the back wage owed totaled \$29,802.21; the Respondent received credit for gross payment of \$18,945.04 in back wages tendered Complainant on April 30, 2010; and the Respondent received credit for gross payment of \$2,218.43 in accrued interest tendered Complainant on April 30, 2010. Accordingly, as of June 30, 2012, the Respondent owes the Complainant \$10,857.17²⁰ in accrued back wages and \$26,646.34²¹ in accrued quarterly compound interest, less applicable Federal, state and local income, social security and Medicare taxes applicable to back wages and interest.²²

III. Calculation of compound interest on transportation expenses.

The Administrative Review Board determined that the Complainant was fired by Respondent, did not voluntarily resign in July 2006, and ended her H-1B non-immigrant employment on December 12, 2007. Accordingly, the Board ordered that the Respondent pay \$1,445.00 to the Complainant for her return transportation costs based on termination of employment by the Respondent.

Accordingly, this Administrative Law Judge finds that while the Complainant is entitled to payment of \$1,445.00 for travel from Miami, Florida to Germany, for reason set forth above, she is not entitled to prejudgment interest for this transportation cost.

IV. Calculation of post-judgment interest.

Post-judgment interest begins to accrue following a reasonable time after this Decision and Order is issued, since the Respondent must be afforded a reasonable opportunity to promptly comply with the Order issued.

¹⁸ The monthly wage rate of \$96,000.00 per year.

¹⁹ (12 days / 7 days per week)(\$96,000.00 per year / 52 weeks per year)

²⁰ (\$29,802.21 total adjudged accrued back wages) less (\$18,945.04 tendered back wages)

²¹ (\$37,503.51 total accrued non-tendered back wages and non-tendered compound interest owed 2nd quarter 2012) less (\$10,857.17 in non-tendered accrued back wages still owed)

²² See 20 CFR §655.731(c)

Post-judgment interest is calculated in the manner set forth herein for pre-judgment interest. That is the \$37,503.51 in principal and interest accrued at the end of the second quarter of 2012 is to be compounded quarterly until paid by the respective calendar quarterly average of the underpayment interest rate set forth in 26 USC §6621(a)(2) in a manner consistent with paragraph I.c above.

ORDER

In view of all the foregoing, it is hereby **ORDERED**:

1. Respondent is directed to deliver to the Complainant accrued back pay and interest in the amount remaining after tax withholding have been deducted from the total accrued amount of \$37,503.51.
2. Payment of the required remaining amount, after required tax withholdings have been deducted, shall be tendered by appropriate certified mail and/or courier, to the Complainant at her address of record, **Via di Parione, 40, 00186 Rome, Italy**, or such other address or means mutually agreeable to the Complainant and Respondent.
3. The Respondent is directed to tender payment of the required remaining amount, after required tax withholdings have been deducted, on or before Tuesday, July 31, 2012. The date the required remaining amount is placed in certified mail and/or delivered to the courier, or as otherwise mutually agreed in writing by the Complainant and Respondent shall be the date upon which tender of payment occurs.
4. Failure to tender the full required remaining amount, after required tax withholdings have been deducted, to the Complainant on or before July 31, 2012 shall result in additional post-judgment interest at the underpayment rate set forth at 26 USC §6621(a)(2) compounded on a calendar quarterly basis, in the manner set forth herein for prejudgment interest, until paid in full.
5. Upon return to the Respondent of the April 30, 2010, \$14,860.92 check held by the Complainant, the Respondent is directed to expeditiously return to the Complainant an appropriate replacement payment of the \$14, 860.92.²³

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ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

²³ Appropriate forms of payment would include electronic fund transfer, certified check, and wired money order.

**Monthly Federal Short-Term Interest Rates
for use in ARB Quarterly Period Compounding**

The monthly Federal short-term interest rates are found in monthly Revenue Rulings at www.irs.gov/app/picklist/list/federalRates.html

	2006	2007	2008	2009	2010	2011	2012
January	4.29	4.77	3.14	.81	.57	.43	.19
February	4.30	4.82	3.07	.60	.72	.51	.19
March	4.49	4.95	2.23	.72	.64	.54	.19
1st Quarter Average	4.36	4.85	2.81	.71	.64	.49	.19
April	4.66	4.79	1.83	.83	.67	.55	.25
May	4.74	4.74	1.62	.76	.79	.56	.28
June	4.88	4.73	2.06	.75	.74	.46	.23
2nd Quarter Average	4.76	4.75	1.84	.78	.73	.52	.25
July	4.94	4.86	2.40	.82	.61	.37	.24
August	5.13	4.89	2.51	.83	.53	.32	
September	5.02	4.71	2.36	.84	.46	.26	
3rd Quarter Average	5.03	4.82	2.42	.83	.53	.32	
October	4.89	4.11	2.17	.75	.41	.16	
November	4.78	4.04	1.61	.71	.35	.19	
December	4.86	3.81	1.36	.69	.32	.20	
4th Quarter Average	4.84	3.99	1.71	.72	.36	.18	