

U.S. Department of Labor

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Issue Date: 13 September 2012

Case No.: 2011-LCA-00025

In the Matter of

**ADMINISTRATOR,
WAGE AND HOUR DIVISION**
Prosecuting Party

v.

**BARCLAYS CAPITAL
BARCLAYS GROUP US INC.**
Respondent

APPEARANCES: KUANYSH BATYRBEKOV, pro se
Complainant

WM. LEE KINNALLY, JR., Esq.
For the Employer

BEFORE: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER

Background

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(n) (2005) (“INA” or “the Act”), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I, C.F.R. § 655.700 et seq.¹

Procedural History

The case involves a complaint filed by Kuanysh Batyrbekov, (Batyrbekov or “Complainant”) against his former employer, Barclays Capital (Barclays Group US Inc.), (Respondent) in April 2009. After an investigation, on April 4, 2011, the Administrator, Wage and Hour Division (“Administrator”), issued a Determination Letter, in which the Administrator

¹ Unless otherwise specified, citations to federal regulations are to Title 20, Code of Federal Regulations.

found the Respondent owed \$9,707.24 in back wages to Complainant.² The Administrator did not impose any civil money penalties.

By letter dated April 15, 2011, Complainant timely appealed. In his appeal, the Complainant asserted that the Administrator's determination letter did not address many of the allegations in his complaint. By Orders dated July 11 and 13, 2011, I informed the parties that all of the matters the Complainant raised in his initial complaint would be addressed at the hearing. As my Orders indicated, I came to this conclusion based on the Administrator's admission that all of the Complainant's assertions had been investigated.³ See, e.g., Order of July 13, 2011, at 3.

As set forth in my Order of July 13, 2011, the allegations to be addressed at the hearing are as follows (citations are to the section of the Complaint (Form WH-4) the Complainant submitted):

- Section 4(a): Employer supplied incorrect or false information on the Labor Condition Application (LCA);
- Section 4(b): Employer failed to pay the higher of the prevailing or actual wage;
- Section 4(e): Employer failed to provide fringe benefits equivalent to U.S. workers;
- Section 4(h): Employer failed to provide employees with notice of its intent to hire nonimmigrant workers, or failed to provide to nonimmigrant worker(s) a copy of the LCA;
- Section 4(l): Employer failed to maintain and make available for public examination the LCA and other required documents at the place of business or worksite;
- Section 4(q)(Other): The Complainant wrote in the following: "Employer failed to pay for my return trip home and transportation of my belongings. Employer also claimed it never filed an H1-B application/amendment on my behalf."

See Order of July 13, 2011, at 2.

The hearing was held before me on July 26, 2011, in New York City. The Complainant participated by telephone from Kazakhstan.

After the hearing, by Order dated October 27, 2011, I granted Complainant's Motion to Admit Post-Hearing Evidence, and admitted Complainant's Exhibits (CX) 27 through 29.

Both the Complainant and the Respondent submitted post-hearing briefs. The Administrator did not submit a brief.

² Shortly after receipt of the Determination Letter, the Respondent paid the Complainant this amount. See AX-7.

³ Under the regulation, a Complainant has a right to a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violations. § 655.820(b)(1).

The Parties' Motions

On July 6, 2011, the Complainant, who is not represented by counsel, submitted a Motion for Summary Decision. In sum, the Complainant asserted that the Respondent did not effect a bona fide termination of his employment. On July 15, 2011, through counsel, the Respondent filed an answer in opposition to the Complainant's Motion, and filed a Cross-Motion for Summary Decision. In the Cross-Motion for Summary Decision, the Respondent asserted that it had effected a bona fide termination of the Complainant's employment by notifying appropriate immigration officials ("USCIS") and by paying \$1,155, which the Respondent stated constituted the reasonable costs of return transportation.

By Order dated July 20, 2011, I denied the Complainant's Motion for Summary Decision, based on my determination that there were material facts in issue as to the Complainant's termination from employment. I took under advisement the Respondent's Cross-Motion for Summary Decision, because it had been filed less than 14 days prior to the hearing. See Order of April 27, 2011, at 4. At the hearing, I informed the parties that, based on the Respondent's submissions in support of its Cross-Motion, I found that the Respondent notified USCIS in writing, on approximately September 29, 2009, that it had terminated the Complainant's employment. I also found the Respondent had sent a check in the amount of \$1,055 to the Complainant on or about October 1, 2009, and this check was intended to pay the Complainant his transportation expenses. However, I declined to make a finding concerning the adequacy of the Respondent's payment, and stated this was a matter to be determined at the hearing. Hearing transcript at 7-9.

Issues

Based on the assertions the parties made at the hearing and the parties' filings, including their post-hearing briefs, I find the issues to be determined are as follows:

- Did the Respondent violate the Act and the regulations by failing to provide adequate notice of its intent to hire nonimmigrant workers, or failing to maintain public records relating to the Complainant's LCA, or failing to provide the Complainant with a copy of his LCA, or failing to amend the Complainant's LCA?⁴
- Did the Respondent supply incorrect or false information on the Complainant's LCA?⁵
- Did the Respondent fail to pay the Complainant the higher of the prevailing wage or actual wage, as required?⁶
- Did the Respondent fail to provide fringe benefits to the Complainant equivalent to those provided to U.S. workers?⁷

⁴ These allegations are covered in Paragraph 4(h) of the Form WH-4.

⁵ See Paragraph 4(a) of the Form WH-4.

⁶ See Paragraph 4(b) of the Form WH-4.

- Did the Respondent effect a bona fide termination of the Complainant's employment?⁸
- Was the Respondent's proffer of \$1,155, intended to cover the cost of the Complainant's trip back to his home country, sufficient to fulfill its obligation, if any, under the Act and the regulations?⁹

Testimonial Evidence

Jacqueline Petricevic

Ms. Petricevic, an investigator in the Wage-Hour division, testified on behalf of the Administrator. She stated the investigation of the Respondent was prompted by the Complainant's complaint (identified as Exhibit AX-1). She stated she initially spoke with the Complainant in August 2009, via telephone, and that the Complainant was in Kazakhstan at that time. Ms. Petricevic stated that at that time the Complainant indicated there were two issues involving whether the Respondent had effected a bona fide termination of this employment: the Respondent had not notified USCIS of his termination, and had not provided for his return transportation. She identified Exhibit AX-2 as the narrative she had drafted pertaining to her investigation, and Exhibit AX-3 as a copy of the applicable LCA, which she received from the Complainant. Ms. Petricevic stated she received various pay stubs from the Respondent, and identified them as AX-4. T. at 59-62.

The witness testified that she determined that the Respondent had violated the H-1B regulations, because it had not effected a bona fide termination of the Complainant's employment by notifying USCIS of the Complainant's termination, and had not paid for the Complainant's return transportation. However, Ms. Petricevic stated, the Respondent later satisfied the regulatory requirement by notifying USCIS on September 29, 2009, and by offering a check for return transportation. Ms. Petricevic stated she made back wage calculations, and identified the document containing the calculations as Exhibit AX-6. She stated that she computed back wages based on an employment period from October 15, 2008 to March 31, 2009, and she determined that the Respondent owed the Complainant an additional \$9,707.24. She stated she did not compute the airfare due the Complainant, because the USCIS, and not the Department of Labor, enforces that requirement. Ms. Petricevic stated that she ended the back wage calculation period in March 2009 because the Complainant indicated, in a telephone conversation in March 2011, that he had entered into new employment sometime in April 2009. T. at 62-71.

Ms. Petricevic stated the Respondent has paid the \$9,707.24 that she found to be owed to the Complainant, and identified A-7 as a document containing her summary of unpaid wages and a copy of the Respondent's check. T. at 71.

⁷ See Paragraph 4(c) of the Form WH-4.

⁸ See Paragraphs 4(q) and 8 of the Form WH-4.

⁹ See Paragraph 4(q) and 8 of the Form WH-4.

As to other violations of the regulations the Complainant had listed in his complaint, Ms. Petricevic testified that she investigated all of them and her determinations were as follows:

- Inaccurate information on LCA: no violation. Specifically, a review of the LCA indicates the information regarding the prevailing wage was accurate, based on the wage source used; the Respondent was a successor in interest to Lehman Brothers (the company that had initially filed the H-1B petition on the Complainant's behalf), and so it was not necessary to change the identity of the employer in the LCA.
- Failed to provide fringe benefits: no violation. Specifically, the Respondent stated that all bonuses are discretionary.
- Failed to maintain LCA; to make it available for public examination; and to post a copy: no violation. Specifically, the public access files were ready and available to Ms. Petricevic for review, and she remarked she did not see any indication these items would not be available when she was on the premises. Ms. Petricevic stated copies of LCAs were posted at the worksite.
- Failed to provide copy of LCA to nonimmigrant worker: no violation. The Complainant was provided a copy of his LCA.
- Failed to provide return transportation and transportation of belongings. The Respondent had not paid or offered to pay for transportation for the Complainant. Ms. Petricevic stated she is not aware of any requirement to pay for transportation of belongings.
- Failed to file an amended LCA: Not required.¹⁰

T. at 71-78.

On cross-examination from Respondent's counsel, Ms. Petricevic stated that in her conversations with the Complainant, he did not inform her of the business he was in or what position he held. She stated she recalled a conversation with the Complainant about the Respondent providing him with a return check for transportation but did not recall when that conversation took place. She confirmed the Complainant told her he was unsatisfied with the amount the Respondent had provided, and stated she told him to raise this complaint "with immigration" because she had no enforcement power over that issue. T. at 78-80.

On cross-examination from the Complainant, Ms. Petricevic stated she found a "benching" violation by the Respondent and indicated this was encompassed in the Complainant's allegation that the Respondent failed to pay him adequately (Section 4(b) of the complaint form). As to the findings regarding fringe benefits, the Complainant asked if benefits other than bonuses (such as health benefits, stock options, etc.) were investigated. Ms. Petricevic responded that she investigated the cash bonus issue and determined that cash bonuses were discretionary, and so "there was no need to look at it." Ms. Petricevic admitted she did not investigate the issue of health benefits. Regarding the back wage determination, Ms. Petricevic

¹⁰ Ms. Petricevic did not elaborate on this statement. I find, however, that Ms. Petricevic testified that because the Respondent was a successor in interest to Lehman Brothers, it was not required to amend the Complainant's LCA. See T. at 73-74.

stated that the prevailing wage was used as a basis for the employer's obligation for periods when an individual is in a "non-productive" status. She stated that the Complainant's allegation that he was wrongly terminated equates to an allegation that he was not paid during a non-productive period. As to why the wages that the Complainant earned at Lehman Brothers were not considered, Ms. Petricevic testified that his complaint related to his employment with the Respondent. She stated that she considered only the amounts paid after his employment was terminated in October 2008. She stated she did not use the wages Lehman Brothers paid, because these wages were not part of the violation period, which was only after the Complainant's employment was terminated. Ms. Petricevic stated that she did not investigate any payments Lehman made, because the Complainant did not indicate there was any violation prior to October 2008. T. at 80-96.

Regarding the Complainant's 2008 tax return (CX-17), Ms. Petricevic stated she had no knowledge of whether the wages the Complainant earned in that year, \$108,097, was all paid by Lehman and the Respondent, or not. Ms. Petricevic reiterated that the Department does not enforce issues related to discretionary bonuses; she conceded she did not look at whether there was a distinction between cash bonuses received by U.S. workers and those received by H-1B workers, and she reiterated that her investigation was limited to the Complainant's complaint. T. at 96-99.

Regarding the Complainant's termination from employment, Ms. Petricevic explained that she found one violation – that there had been no bona fide termination. The back wages due, she stated, were due because the Respondent had not effected a bona fide termination. Regarding the requirements for a bona fide termination, Ms. Petricevic stated three things must occur: the employee must be notified of the termination; there must be an offer to pay for a return trip to the home country; and USCIS must be notified of the termination, so the visa can be cancelled. She stated the enforcement aspect of payment for return transportation is overseen by USCIS, but acknowledged that this issue is investigated, to determine if a bona fide termination of employment has occurred. As to what occurred in the Complainant's case, Mr. Petricevic stated she does not assess whether the offer of payment was reasonable, but rather investigates whether an offer of payment was made. She stated that in order to determine if any offer was made, she checks with the employer. The witness reiterated that the Complainant asserted in his complaint that the Respondent failed to pay for his transportation home; she stated that she had found that the Respondent had not done that, but did correct it. She also reiterated that the Administrator does not enforce the requirement that an employer make an offer to pay for return transportation. T. at 100-104.

On re-direct examination, Ms. Petricevic stated that an employer who lays off an H-1B employee remains liable to pay the employee until the two remaining requirements of a bona fide termination (notification of USCIS and offer of return transportation) have been made. She stated she computed back wages for a vacation for the Complainant and also indicated the Complainant did not produce tax documents during the investigation. She cited the regulation, at § 655.171(c)(2)(v), that bonuses and other compensation may be credited toward payment of the required wage obligation if their payment is assured, meaning that payment is not conditional or contingent on some event. T. at 104-106.

In response to my questions, the witness clarified that the determination that the Respondent underpaid the Complainant on vacation and severance payments was based on actual wages, and the determination that the Respondent owed the Complainant for the period of time for which he was not paid at all was based on the applicable prevailing wage. She also clarified that the Respondent paid the Complainant's back wages and proffered money for the Complainant's return transportation after she contacted the Respondent. T. at 106-108. In response to additional questions from the Respondent, Ms. Petricevic stated that she first contacted the Respondent regarding the Complainant's allegations on September 28, 2009. She stated that the Respondent notified USCIS of the Complainant's termination from Employment on September 29, 2009 and on October 1, 2009 the Respondent issued a check to the Complainant for his return transportation. Additionally, she clarified that the Complainant did not provide any information regarding his health benefits from the Respondent, but also indicated she had not requested such information. In response to additional questions from the Administrator's representative, Ms. Petricevic stated that after January 15, 2009, the Complainant's actual wages were zero, and his prevailing wage was higher than that. T. at 106-113.

In response to additional questions from the Complainant, Ms. Petricevic stated she asked him a direct question about whether he entered new employment, and also asked the date. She stated such a question is relevant to determine an employer's obligations, because an employer's wage obligation terminates if the employee enters into other employment. She stated she made this conclusion based on her Field Operations Handbook, and not the regulation itself. She cited the regulation, at § 655.731(c)(7)(ii) for stating that wages not be paid when an employee is away from work at his own voluntary request and convenience. She reiterated that she used the cutoff date of March 31, 2009 for the Respondent's wage obligation because the Complainant had stated he entered into other employment sometime in April 2009, and she also stated that it is immaterial whether the other employment is paid or unpaid. T. at 113-121.

Jennifer McGraw.¹¹

Jennifer McGraw, a Regional Immigration Coordinator in the Department of Labor Wage and Hour Division, testified on behalf of the Complainant. She stated that Ms. Petricevic found that there was no bona fide termination of the Complainant's employment as of late 2008 or early 2009. Based on this, the Complainant's status was considered "terminal benching" meaning that an employer still owes wages if the employee is not working due to a decision made by the employer, and this obligation continues up until the point either a bona fide termination is effected or the employee is no longer available for work. She stated there is no separate violation for failure to complete a bona fide termination, and that the applicable violation is that the employee is in a nonproductive status ("benched") but is not being paid. As to the issue of return transportation, Ms. McGraw stated that the issue of payment of transportation expenses is governed by USCIS and if the concern was the amount of money paid, then a complaint should be lodged with USCIS. T. at 123-26.

¹¹ Ms. McGraw's testimony was taken out of order. T. at 121-122.

Mark Kurman.

Mark Kurman, who was a Human Resources Director for the Respondent in 2008, testified on behalf of the Respondent. He stated that he had a primary role in overseeing the integration of over 10,000 employees of the Lehman Brothers organization into the Respondent's organization in September 2008. He identified RX-1 as an e-mail triggering the transfers, that was sent to the Lehman Brothers employees, and he remarked that the challenge was equivalent to starting a company on six hours' notice. Mr. Kurman stated that issues involving H-1B employees and their immigration status were included in the transition. T. at 127-132.

On cross-examination by the Complainant, Mr. Kurman stated that he, along with 10,000+ others, was extended a voluntary offer to transfer from Lehman Brothers to the Respondent's employ. He also stated that the Respondent's decision to terminate the Complainant's employment in October 2008 was the Respondent's business decision. In response to a question from me, Mr. Kurman stated that all of the Lehman Brothers employees who were employed in the portion of Lehman Brothers that the Respondent acquired were offered the opportunity to transfer to the Respondent's employ. T. at 132-135.

Allison Kramer Deeb.

Ms. Kramer Deeb, who in September 2008 was a vice president for human resources for employee relations for the Respondent, testified on behalf of the Respondent. She stated that at that time, approximately 550 H-1B employees were absorbed from Lehman Brothers into the Respondent's company. She stated that in September 2008 she was on maternity leave and returned in November 2008. Ms. Kramer Deeb stated that in September or October 2009 she became aware that the Complainant alleged he had not received return transportation, when she was informed that the Complainant had filed a complaint with the Department of Labor. She stated that when she became aware of the Complainant's complaint, she directed her staff to research the cost of a flight to his home country (Kazakhstan), and instructed them to "gross that amount up, so that there was no tax treatment on that amount for him" and to send the payment as quickly as possible to the Complainant. She stated that based on her instructions, one of her staff went to KAYAK, an online travel website, and obtained the cost of a one way flight to Kazakhstan, and notified payroll to issue a check for this as the net amount. This was done and a check was sent via FedEx to the Complainant. Ms. Kramer Deeb stated that the Respondent's standard procedure was to "gross up" the amount so an employee receives the actual cost of the flight in pocket. She stated that there was no record of the online searches done in the Complainant's case. T. at 135-41.

Ms. Kramer Deeb stated that she personally had contact with the Complainant, after he received the check. She related that the Complainant had not cashed the check, and it had expired, and he needed assistance to get a new check issued. At that time, she stated, the Complainant did not indicate dissatisfaction with the amount of the check. She stated that had he raised the issue of the adequacy of the amount of the check, \$1,155, the matter would have been investigated: that is, another search of travel websites would have been done, to determine if the amount tendered was appropriate. T. at 141-43.

Regarding bonuses, Ms. Kramer Deeb testified that only employees who are in an active and working status as of the date that payment of the award is made, are eligible for bonuses. For calendar year 2009, she stated, bonuses were paid in February 2010, and for calendar year 2008, bonuses were paid in February 2009. So, she testified, the Complainant would need to be employed by the Respondent in February 2009 to qualify for a bonus for the year 2008. She stated that discretionary incentive awards are awards made at the discretion of management, and these are based on both company and individual performance. Ms. Kramer Deeb also testified that H-1B employees are treated the same as other employees in connection with receiving bonuses and other compensation. T. at 143-47.

On cross-examination from the Complainant, Ms. Kramer Deeb stated that her staff member used a travel website with which she was familiar, and indicated she was aware that the Complainant was already out of the country. As to why the staff did not contact the Complainant about this issue, she stated that it was not her understanding that the employer is required to pay for the cost of the flight taken, but rather was responsible for paying the “reasonable cost” of a flight. She stated that her definition of “reasonable” was the cost of an available flight. She reiterated that the amount is “grossed up” because the cost is paid through payroll, and “any payment that goes through payroll is required to be taxed.” She stated that the Respondent takes the responsibility for paying a larger gross amount so that the amount received is equivalent to the cost of the flight. Ms. Kramer Deeb conceded that the payment is treated as earned wages by the Respondent. She stated she is not familiar with the regulatory requirements. As to bonuses, she stated she was not aware of what the eligibility would be, were an employee to be reinstated. T. at 147-155.

On further cross-examination, Ms. Kramer Deeb testified regarding the asset purchase agreement between Lehman Brothers and the Respondent (Exhibit CX-30).¹² She agreed that the Complainant fell within the definition of transferred employee. She stated that the Complainant was terminated from employment without cause, because his job was eliminated. She stated that employees who were terminated before the date for which they would become eligible for bonuses were tendered a special payment of \$3,000, in addition to their severance, and she stated the Complainant received this payment. She also stated that this payment was given to both H-1B employees and U.S. employees. T. at 159-72.

The Complainant.

The Respondent called the Complainant as an adverse witness.¹³ The Complainant stated he had never been employed by RESMI Finance and Investment House, and had never seen the document identified as RX-30, a RESMI “Weekly Market Review” dated March 4, 2009, which listed “Kuanish Batirbekov” as a member of the “Department of Investment Analysis and

¹² At the hearing, I admitted this exhibit as CX-27. T. at 175-76. However, post-hearing I admitted several additional exhibits from the Complainant, and designated these exhibits as CX 27 through CX 29. See Order of Oct. 27, 2011. Consequently, I will re-designate the exhibit used at the hearing as CX-30.

¹³ The Complainant indicated he did not intend to testify in his own behalf. T. at 178.

Transaction Structuring.”¹⁴ The Complainant stated that the “Kuanish Batirbekov” whose name is on the document is not him. The Complainant stated he was not working in April 2009 and was not interning anywhere, either. As to what he has been doing since returning to Kazakhstan in December 2008, the Complainant stated he has been a student at the Kazakh National Technical University, pursuing an undergraduate degree in “oil and engineering.” He stated he began these studies in 2002, and suspended them in 2003 when he was at Harvard University. He stated he returned to Kazakhstan in December 2008, then went back to the United States, and then came back to Kazakhstan. The Complainant stated he came back to the U.S., approximately February 15, 2009, because he was pursuing employment with “Advantage Human Resource,” travelling from Almaty, Kazakhstan to New York. He stated that he had purchased a round trip ticket, and his trip from Almaty to New York was the completion of the trip. The Complainant stated he is seeking reimbursement of the one way portion of the ticket he used to travel from New York to Almaty, Kazakhstan, in December 2008. T. at 178-87.

The Complainant stated that his family purchased the ticket for him, and conceded that he had not provided any documentation about the cost of the airline ticket. He stated he could not find any documentation. He stated he checked with the airline but the airline told him the ticket was so old the data could not be retrieved. T. at 187-88.

The Complainant examined documents RX 31, 32, and 33, and stated he had not seen those documents before.¹⁵ These documents are similar to RX 30 (RESMI Finance and Investment House Weekly Market Reviews) but are dated as follows: March 11, 2009; June 5, 2009; June 12, 2009. He stated there was a name on the documents that is similar to his, but that is not his name. T. at 189-91.

Respondent’s counsel directed the Complainant to the Complainant’s 2009 Federal Tax Return (Form 1040) (RX 34).¹⁶ He confirmed that line 61 indicated that \$1,431 in taxes had been withheld, and indicated this was on income from the Respondent. Complainant also confirmed he had paid \$1,831 in taxes, and received a refund in that amount. The Complainant testified that moving expenses of \$800 he had deducted (on Form 3903), was in connection with travelling from New Jersey to New York to look for work. The Complainant indicated he shipped some personal belongings, such as books and clothing, back to Kazakhstan, and he stated he started going to school in Kazakhstan in June 2009. Regarding his New York State tax return, the Complainant stated he designated himself as a non-resident, because there is no status for part-year residents. He confirmed that \$525 in taxes was withheld by the Respondent, and that this amount was refunded to him. T. at 191-199.

Regarding his 2008 Federal Tax Return (RX 35), the Complainant stated that \$2,840 in moving expense travel he claimed on Form 3903 related to his move from Massachusetts to New York. The Complainant stated he began working at Lehman Brothers in about June 2007, but he

¹⁴ This document was translated from the Russian and the translator’s certification is appended. Respondent’s counsel showed the document to the Complainant by sending the document to him via e-mail. T. at 180-81.

¹⁵ As with RX 30, Respondent’s counsel showed the documents to the Complainant by sending them via e-mail. T. at 189-90.

¹⁶ Respondent’s counsel stated the Complainant had provided this document in discovery. T. at 191.

did not close up his residence in Massachusetts until he was certain he would not be returning there. He stated that none of the amount claimed on that return had anything to do with his return to Kazakhstan. T. at 199-205.

Documentary Evidence

At the hearing, I admitted the following documents:

Administrator's Exhibits (AX) 1-7; T. at 12.

Complainant's Exhibits (CX) 1, 3, 4, 6, 7, 8, 10, 11, 16, 17, 19, 21, 22, 23, 24, 25, 26, and CX 30.^{17, 18} T. at 55, 176, 211.

Respondent's Exhibits (RX) 1-15, 16-20, 22-35.¹⁹ T. at 34, 175, 208-211.

As noted above, after the hearing I admitted Complainant's Exhibits 27 through 29. See Order of Oct. 27, 2011, at 3.

Administrator's Evidence

The Administrator's Exhibits are summarized as follows:

- AX-1: Complainant's Form WH-4 (undated), with an attached unsigned copy of separation agreement from the Respondent, dated Oct. 14, 2008. The items enumerated by the Complainant in his complaint are listed above.
- AX-2: Ms. Petricevic's narrative report of investigation, dated March 21, 2011, containing (among other things) calculation of back wages due the Complainant. Portions of this document were redacted by the Administrator prior to submission.
- AX-3: LCA relating to the Complainant, submitted by Lehman Brothers, covering the time period from Aug. 20, 2007 to Aug. 20, 2010, and listing a prevailing wage of \$52,125.00 for an "analyst."
- AX-4: Payroll stubs for the Complainant, covering the time period from Oct. 4, 2008 to Dec. 27, 2008.
- AX-5: Administrator's Determination Letter, dated April 4, 2011.
- AX-6: Back wage calculations for the Complainant, reflecting wages and severance pay paid pursuant to separation agreement, and showing calculation of \$9,707.24 in back wages due for the period from Oct. 14, 2008 to March 31, 2009.²⁰
- AX-7: Documents reflecting the Respondent paid the full amount of back wages the Administrator determined to be due, on April 26, 2011.

¹⁷ See n. 12, above regarding the redesignation of CX-30.

¹⁸ Prior to the hearing, the Complainant withdrew Exhibits 2, 5, 9, 12-15, 18, and 20.

¹⁹ I sustained the Complainant's objections to RX-16 and RX-21. T. at 24-27, 210.

²⁰ This calculation is consistent with Ms. Petricevic's testimony that she determined that the Complainant entered into new employment in April 2009, and therefore the Respondent's pay obligation terminated in March.

Complainant's Evidence

The Complainant's Exhibits are summarized as follows:

- CX-1: Letter from Lehman Brothers to USCIS, dated Feb. 20, 2007, in support of LCA application for Complainant.
- CX-3: E-mail exchanges between Jennifer McGraw (U.S. Dept. of Labor) and Michael Taylor (U.S. Dept. of Homeland Security), August 19, 2009 to Sept. 24, 2009, regarding Complainant's complaint.
- CX-4: Extracts from Complainant's passport, showing visa effective Jan. 17, 2008.
- CX-6: E-mail from Daniel Sabba, dated Sept. 16, 2008, indicating H-1B employees of Lehman Brothers are authorized to accept employment with Respondent.²¹
- CX-7: Immigration Q&A's for Employees of Lehman Brothers.
- CX-8: Separation Agreement, dated Oct. 14, 2008 and signed by Complainant Oct. 27, 2008.
- CX-10: Letter from Respondent's Human Resources Department (Jamie Lipkin) to Complainant, dated Oct. 1, 2009, tendering check for \$1,155 to cover "one way air flight expenses for the trip from New York to Almaty."
- CX-11: Notice from Complainant to Respondent's Human Resources Department (James Amato) dated Aug. 17, 2010, advising check was not cashed "before New York WHD figured out the status of my complaint." Complainant requested replacement check be issued.
- CX-16: Extract from Respondent's Employee Handbook (p. 17). Subjects: Timing of Salary Increases; Discretionary Incentive Awards (bonuses).
- CX-17: Complainant's 2008 Federal Tax Return (Form 1040), unsigned, without attached schedules.
- CX-19: E-mail to Jamie Lipkin (Respondent's Human Resources Dept.) dated Sept. 29, 2009, regarding payment of one-way travel costs from New York to Almaty to Complainant.²²
- CX-21: Letter from Margaret Pecorara (Respondent's Vice President, Human Resources) to Jacqueline Petricevic regarding Administrator's investigation of Complainant's complaint.
- CX-22: E-mail from Stephen Maltby (Attorney for Respondent) to Ms. Petricevic, dated Mar. 8, 2010, setting out Respondent's position as to Complainant's complaint.
- CX-23: Ms. Petricevic's narrative report of investigation, dated March 21, 2011. This is a copy of AX-2.

²¹ Mr. Sabba's affiliation is not indicated in this Exhibit.

²² The e-mail is signed "Margaret." The author of the e-mail is identified as Margaret Pecorara in the Complainant's Index of Exhibits.

- CX-24: COBRA premium rate listing.
- CX-25: E-ticket receipt for KLM flight from New York to Almaty (via Amsterdam), on Feb. 27-28, 2009. Price of ticket is \$2,324.35, plus \$424.35 in taxes/surcharges.
- CX-26: Blank Exhibit.²³
- CX 27: Letter from TD Bank to Complainant, dated Oct. 5, 2011, informing him that Respondent's check for \$1,155, deposited on Aug. 16, 2011, had been debited from Complainant's account because it was a "stale check."
- CX-28: Letter from W.L. Kinnally, Jr. (Respondent's counsel) to Complainant, dated Oct. 17, 2011, forwarding a new check for \$1,155, and informing Complainant that check is dated Sept. 19, 2011, and is void after 90 days.
- CX-29: Copy of Check from Respondent to Complainant, dated Sept. 19, 2011, in amount of \$1,155. Attached is statement reflecting withholdings from gross amount of \$2,050.78 totaling \$895.78.
- CX-30: Extract from Asset Purchase Agreement between Lehman Brothers and Respondent, dated Sept. 16, 2008 (Table of Contents and Article IX (Employees and Employee Benefits)); Article, New York Law Journal, dated Aug. 25, 2010, "The Duty of Good Faith in Mediation Proceedings."

Respondent's Evidence

The Respondent's Exhibits that I admitted into evidence are summarized as follows:

- RX-1: E-mail from Lori Hirsch (Respondent's Human Resources Department), dated Sept. 22, 2008, regarding offer of employment from Respondent.
- RX-2: Extract from Respondent's Employee Handbook (Table of Contents, pp. 16-17), subjects: Total Compensation Program, Salary Increases, Timing of Salary Increases, Discretionary Incentive Awards (Bonuses).²⁴
- RX-3: Extract from Lehman Brothers Employee Handbook. Subjects: Introduction, Bonuses, Stock Award Program, Direct Deposit.
- RX-4: Receipt and Approval, LCA for Complainant, for period from Oct. 1, 2007 to Aug. 20, 2010.
- RX-5: Separation Agreement, dated Oct. 14, 2008 and signed by Complainant Oct. 27, 2008; Waiver and Release, signed by Complainant on Oct. 27, 2008.²⁵
- RX-6: Letter from Ellen Poreda (attorney for Respondent) to USCIS, dated Sept. 29, 2008, withdrawing Complainant's H-1B petition, with copy of delivery receipt reflecting delivery on Sept. 30, 2008. Also in this Exhibit is a copy of a news release, dated Sept.

²³ The Complainant notes it is "outstanding from Respondent and awaiting Judge's Orders."

²⁴ A portion of this document is at CX-16.

²⁵ The Separation Agreement (but not the Waiver and Release) is at CX-8.

22, 2008, stating that Lehman Brothers has re-opened under the ownership of the Respondent.

- RX-7: Letter from Respondent's Human Resources Department (Jamie Lipkin) to Complainant, dated Oct. 1, 2009, tendering check for \$1,155 to cover air flight expenses; copy of FedEx slip showing transmittal to Complainant; copy of check with attached statement reflecting deductions from gross amount of \$2,050.78 totaling \$895.78.²⁶
- RX-8: Notice from Complainant to Respondent's Human Resources Department (James Amato) dated Aug. 17, 2010, advising check was not cashed "before New York WHD figured out the status of my complaint." Complainant requested replacement check be issued.²⁷
- RX-9: Copy of Check issued to Complainant by Respondent, dated Nov. 30, 2010, in amount of \$1,155. Attached statement shows deductions from gross amount of \$2050.78, totaling \$895.78.
- RX-10: LCA application by Lehman Brothers, dated Feb. 21, 2007 and approved Aug. 20, 2007, for analyst. Prevailing wage listed at \$52,125. Salary listed at \$60,000. Attached is extract showing prevailing wages for "financial analyst" in New York City area.
- RX-11: USCIS Form I-129 (Petition for a Nonimmigrant Worker), dated Feb. 21, 2007, submitted by Lehman Brothers, pertaining to Complainant; letter to USCIS dated Feb. 20, 2007 regarding Complainant and position offered.²⁸
- RX-12: E-mails between Stephen Maltby (attorney for Respondent) and Arman Seisebayev (RESMI Finance and Investment House), dated July 13, 2011, in which Mr. Seisebayev confirms that the Complainant (identified as "Kuanysh Batyrbekov" and listing his date of birth) worked for RESMI in a paid position from March to June 2009.
- RS-13: Internet Extract, "Kazakhstan Financial Forum," in Almaty, Kazakhstan, March 17, 2011, listing participants, including Complainant (who is listed as representing Eurasian Development Bank, Kazakhstan).
- RX-14: Linked-In Profile pertaining to Complainant (stating he is a "portfolio manager at Eurasian Development Bank") and has held that position since June 2009.
- RX-15: Additional information pertaining to Complainant's Linked-In Profile.
- RX-17: Article, Interfax Central Asia and Caucasus Business Weekly, dated Apr. 14, 2009, quoting Complainant and identifying him as a "senior investment analyst from Investment Financial House Resmi JSC."
- RX-18: E-mail from Complainant to Ms. Petricevic, dated Apr. 28, 2010, referring to "leaving work yesterday."

²⁶ The letter, but not the other items in this Exhibit, is at CX-10.

²⁷ A copy of this document is at CX-11.

²⁸ A copy of the letter is at CX-1.

- RX-19: E-mails to and from Jennifer McGraw, dated Aug. 19, 2009 to Sept. 24, 2009, reflecting discussion on whether the Respondent needed to file a new LCA for Complainant when it purchased Lehman Brothers.
- RX-20: Ms. Petricevic's narrative report of investigation, dated March 21, 2011;²⁹ unsigned copy of notice to Complainant from James Amato, Human Resources Director, dated Apr. 27, 2010, regarding outstanding check dated Oct. 1, 2009 in amount of \$1,155.
- RX-22: Letter from USCIS, dated Feb. 19, 2009, to Advantage Human Resourcing, Inc., revoking LCA for Complainant (which had been approved Jan. 21, 2009), at addressee's request.
- RX-23: Letter from Stephen Hader (attorney), dated May 23, 2011, addressed "To Whom it May Concern" stating that an H-1B petition for the Complainant was withdrawn by Standard Chartered Bank and USCIS revoked it on Feb. 19, 2009.
- RX-24: Extracts from Complainant's passport, and visas.³⁰
- RX-25: Extract from KAYAK (online travel website), showing one-way fares from New York to Almaty, Kazakhstan, on July, 27, 2011. Fares range from \$800 to \$1773.³¹
- RX-26: Extract from KAYAK, listing "cheap flights" from New York to Almaty, Kazakhstan. Prices range from \$1,109 to \$1,440 and are for various dates and with various airlines.
- RX-27: Extract from KAYAK, listing flights from New York to Almaty, Kazakhstan, on Sept. 23, 2011. Prices range from \$585 to \$1,027.³²
- RX-28: Extract from KAYAK, listing flights from New York to Almaty, Kazakhstan, on Dec. 25, 2011. Prices range from \$617 to \$1,111.³³
- RX-29: Signed Asset Purchase Agreement between Lehman Brothers and Respondent, dated Sept. 16, 2008.³⁴
- RX-30: RESMI Finance and Investment House (Kazakhstan) Weekly Market Review, dated Mar. 4, 2009, with certificate of translation of page indicating "Kuanish Batirbekov" is in "Finance" in Department of Investment Analysis and Transaction Structuring.
- RX-31: RESMI Finance and Investment House (Kazakhstan) Weekly Market Review, dated Mar. 11, 2009, with certificate of translation of page indicating "Kuanish

²⁹ Copies of this document are at AX-2 and CX-23.

³⁰ Some of this Exhibit is duplicated at CX-4. The copy at CX-4 is more legible.

³¹ I note the search result indicated 519 one-way trips. The Exhibit lists 15 one-way trips, in ascending order by price.

³² I note the search result indicated 743 one-way trips. The Exhibit lists 15 one-way trips, in ascending order by price.

³³ I note the search result indicated 615 one-way trips. The Exhibit lists 50 one-way trips, in ascending order by price.

³⁴ An extract from this document is at CX-30.

Batirbekov” is in “Finance” in Department of Investment Analysis and Transaction Structuring.

- RX-32: RESMI Finance and Investment House (Kazakhstan) Weekly Market Review, dated June 5, 2009, with certificate of translation of page indicating “Kuanish Batirbekov” is in “Finance” in Department of Investment Analysis and Transaction Structuring.
- RX-33: RESMI Finance and Investment House (Kazakhstan) Weekly Market Review, dated June 12, 2009, with certificate of translation of page indicating “Kuanish Batirbekov” is in “Finance” in Department of Investment Analysis and Transaction Structuring.
- RX-34: Complainant’s 2009 Federal Tax Return (Form 1040), with attached schedules and worksheets; W-2 form and Form 1099-R from Respondent; New York state nonresident Tax Return; and e-file W-2 and earnings summary.
- RX-35: Complainant’s 2008 Federal Tax Return (Form 1040), with attached schedules and worksheets; New Jersey state Tax Return; New York state nonresident Tax Return; and New York state summary of W-2 forms (from Lehman Brothers and Respondent).

In this Decision, I have considered all the evidence of record, including the documentary evidence, whether or not I have specifically discussed the item of documentary evidence at issue. I also have considered the testimonial evidence, and the post-hearing arguments of the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statutory and Regulatory Framework

The Act’s H-1B visa program permits American employers to temporarily employ nonimmigrant aliens to perform specialized occupations in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Act defines a “specialty occupation” as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor’s degree or higher. 8 U.S.C. § 1184(i)(1). To hire an H-1B nonimmigrant alien, the employer must first receive permission from the U.S. Department of Labor. To receive permission from the DOL, the Act requires an employer to submit a Labor Condition Application (“LCA”) to the Department. § 8 U.S.C 1182(n)(1).

The Department has promulgated detailed regulations setting forth requirements implementing the statutory provisions. These requirements include provisions covering the determination, payment, and documentation of required wages. 20 C.F.R. Part 655, subpart H. Under the regulation, an employer’s LCA must include, among other things, the occupational classification for the proposed employee; the actual wage rate; the prevailing wage rate and the source of such wage data; and the period of employment. §§ 655.730-734.

The regulation requires that an employer pay H-1B nonimmigrants at the “required wage rate.” This rate is defined as the greater of: (1) the “actual wage rate,” defined as the rate paid by the employer to all other individuals with similar experience and qualifications for the specific

employment in question; or (2) the “prevailing wage,” defined as the wage rate for the occupational classification in the area of employment, at the time the LCA is filed. § 655.731(a). If there are other employees with the same qualifications and experience as the H-1B workers, the actual wage is the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage is the wage paid to the H-1B nonimmigrant worker by the employer. § 655.731(a)(1).

Once the employment period begins, the employer is required to pay an H-1B employee the required wage at the full time rate for any time that is non-productive, due to a decision by the employer.³⁵ However, an employer need not pay wages for H-1B workers in nonproductive status due to conditions unrelated to employment which take them away from work at their own convenience or request (e.g., touring), or which render them unable to work (e.g., temporary incapacitation due to accidental injury). § 655.731(c)(7)(ii).

The regulation requires that an employer of H-1B nonimmigrants must provide notice of the filing of an LCA. The employer is to post notice of filings in two or more conspicuous locations in the employer’s establishment in the area of intended employment. In addition, an H-1B employer must make available for public examination the actual LCA and other specified documents at the employer’s principal place of business or worksite. § 655.760. This regulatory section also lists the documentation that must be available for public examination.

After the employment has begun, an employer need not pay a nonimmigrant worker, once it has effected a “bona fide termination” of the employment relationship. § 655.731(c)(7)(ii). To terminate the obligation to pay an H-1B employee, the regulation states that the employer must notify the Department of Homeland Security (“DHS”), the successor agency to the Immigration and Naturalization Service (“INS”), that it has terminated the employment relationship so that DHS may revoke approval of the H-1B visa. 8 C.F.R. § 214.2(h)(11); § 655.731(c)(7)(ii).

Under 8 C.F.R. § 214.2(h)(4)(iii)(E), the employer is responsible for “reasonable costs of return transportation” to the employee’s last place of foreign residence, if the alien employee “is dismissed from employment by the employer” before the end of the LCA period. This provision also states that if the employee “voluntarily terminates” employment prior to the end of the period, then the employee has not been dismissed.

The remedies for violations of the statute or regulations include payment of monies due. §655.810(a). Under the regulation, the amount owed is defined as the difference between the amount the employee should have been paid and the amount actually paid. § 655.810(a).

Under § 655.840(b), an Administrative Law Judge has the authority to affirm, deny, reverse, or modify, in whole or in part, the determinations of the Administrator.

³⁵ Employer-determined nonproductive time, or “benching,” can result from factors such as lack of available work or lack of the individual’s license or permit. 8 U.S.C. § 1182(n)(2)(C)(vii); § 655.731(c)(7)(i).

Discussion of the Evidence, and Findings of Fact

In this matter, the Complainant has alleged that the Respondent committed multiple violations of the Act.

LCA filing violations

As to the following allegations, the Administrator investigated them, as Ms. Petricevic testified, and found no violations by the Respondent. T. at 72-78.

- Employer supplied incorrect or false information on the LCA, or failed to file an amended LCA [Section 4(a) of Form WH-4];
- Section 4(h): Employer failed to provide employees with notice of its intent to hire nonimmigrant workers, or failed to provide to nonimmigrant worker(s) a copy of the LCA [Section 4(h)];
- Employer failed to maintain and make available for public examination the LCA and other required documents at the place of business or worksite [Section 4(l)];

The Complainant did not submit any evidence or testimony on these issues. Consequently, I find there is no evidence to support the Complainant's allegations. Thus, I AFFIRM the Administrator's determination that the Respondent did not commit any violations on these discrete issues.

Fringe Benefits

As to the Complainant's allegation that the Respondent failed to provide fringe benefits equivalent to U.S. workers [Section 4(e) of the Form WH-4], the Complainant alleged that the Respondent failed to pay cash bonuses and health care costs, and also failed to provide 401(k) accounts for non-immigrant workers equivalent to those that U.S. workers received. T. at 38. Additionally, the Complainant asserted that the Administrator failed to conduct a full investigation on these allegations. Id.; see also Complainant's Request for Hearing, dated Apr. 15, 2011, at 2.

In her testimony on behalf of the Administrator, the investigator, Ms. Petricevic, stated that the Complainant's allegations about fringe benefits were investigated. T. at 74. She stated that she discussed the issue of bonuses with the Respondent, who stated that all bonuses were discretionary. T. at 75. The Respondent's employee handbook, which explains employee benefits, corroborates the Respondent's assertion. It states that bonuses are "determined at management's sole and exclusive discretion" and are payable only to employees who "are in the employment of Barclays as of the date of payment of the award." RX-2; see also CX-16. As Ms. Kramer Deeb testified, the effective date for payment of bonuses is in February of the following year. T. at 143-47.

Consequently, I find that the Complainant would not have been eligible for any bonus for 2008, because he was terminated from employment in October 2008, well before the effective

date for bonus payments. I also find that there is no evidence that the Complainant, as an H-1B employee, was treated any differently from any other employee with regard to eligibility for and payment of bonuses. In fact, Ms. Kramer Deeb testified there was no distinction in this regard. T. at 146-47. As the regulation indicates, the Act is violated when an employer discriminates as to fringe benefits between H-1B nonimmigrant employees and U.S. employees. § 655.731(c)(3). Contrary to the Complainant's assertion, I find no evidence of any discrimination by the Respondent against H-1B employees as to payment of bonuses.

As to healthcare benefits, the Complainant asserted that the Respondent's practice, requiring former employees to elect COBRA and pay for it, was improper. T. at 52. Complainant alleged such benefits were owed to him by the Respondent and he should not be required to pay them out of his own pocket.³⁶ T. at 52. The Complainant submitted evidence regarding the requirements for COBRA payments. CX-24. However, there was no evidence presented as to whether the COBRA payments that H-1B employees were required to make differed in any way from the payments that U.S. employees who had been terminated from employment with the Respondent must make. In addition, the Complainant alleged that the Administrator failed to investigate this allegation. See T. at 38. Although the testimony of Ms. Petricevic is not entirely clear, it does appear that Ms. Petricevic limited the investigation of "fringe benefits" to the issue of bonuses, and conceded she did not investigate any allegation about health benefits. See T. at 83-88. I find, therefore, that the Administrator did not investigate the Complainant's allegation regarding health benefits.

Under the regulation, the Administrator's determination whether to investigate an allegation is wholly discretionary, and no hearing or appeal is available where the Administrator determines that investigation of a complaint is not warranted. § 655.806(a)(2); see also Gupta v. Headstrong, Inc. ARB Nos. 11-065, 11-068 (ARB, June 29, 2012), recon. denied July 31, 2012. Therefore, I find that I have no jurisdiction to adjudicate the Complainant's allegation about health benefits

In light of the foregoing, I AFFIRM the Administrator's determination that the Respondent did not violate the Act with regard to the Complainant's fringe benefits.

Compensation Rate

In his complaint, the Complainant indicated that the Respondent had not paid him adequately. He did so by checking Section 4(b) of the Form WH-4, which states: "Employer failed to pay the higher of the prevailing or actual wage." See AX-1.

The record reflects that the Administrator investigated this allegation and determined that the Respondent had underpaid the Complainant by \$9,707.24. T. at 66-71; see also AX-2, 6. At the conclusion of the Administrator's investigation, in April 2011, the Respondent was notified of the determination that it owed back pay to the Complainant in the amount of \$9,707.24. AX-5.

³⁶ I acknowledge the Complainant made this assertion when discussing admissibility of exhibits, and not in testimony. However, as Complainant is not represented by counsel, I will consider this as the Complainant's asserted position, had he testified on the subject.

Upon being notified of the underpayment, the Respondent paid the full amount. T. at 71-72; see also AX-2, 7.

In his request for hearing, the Complainant stated that the Administrator failed to provide him with a “copy of the calculations” used in making this determination, so he was unable to ascertain if it was accurate. The Complainant also stated that his actual wage at the time of his termination was \$70,000 per year. Complainant’s Request for Hearing, dated Apr. 15, 2011, at 1.

At the hearing, Ms. Petricevic testified as to the method she used when calculating the Respondent’s pay obligation to the Complainant. T. at 66-70. She stated she determined, based on the Complainant’s pay stubs, that the Complainant’s actual wage was \$64,615.44. T. at 67. The Respondent terminated the Complainant’s employment on October 14, 2008, and provided him a severance package, which paid him through January 10, 2009, and then paid him additional severance. RX-10. Ms. Petricevic stated she used the actual wage to compute the Respondent’s responsibility to pay the Complainant for two weeks’ vacation and two weeks’ severance: specifically, whether the Respondent’s payment of \$3,000 in severance pay was sufficient. T. at 67-68. As to the period during which the Respondent paid the Complainant, from October 31, 2008 to January 2009, Ms. Petricevic stated that she calculated the Respondent’s pay obligation based on the prevailing wage of \$52,125 in the Complainant’s LCA.³⁷ T. at 69.

Ms. Petricevic also testified that, when computing the amount due to the Complainant, she determined that the Respondent’s obligation to pay the Complainant ceased by March 31, 2009, because the Complainant told her he was otherwise employed beginning in April 2009. T. at 71; see also AX-2. The Complainant disputes that the Respondent’s pay obligation ceased at that time, and asserts that the issue of availability does not apply to him, because the Respondent’s pay obligation to him continued until a bona fide termination of his employment had been effected. T. at 37. Indeed, the Complainant stated he did not believe there was any issue regarding “benching.” T. at 37; see also T. at 81-82.

Based on the record before me, I find that the Complainant’s complaint on the Form WH-4 was sufficient for the Administrator to initiate an investigation of the Respondent’s pay obligation throughout the term of the Complainant’s LCA. Putting aside for the moment the issue of whether the Respondent had effected a bona fide termination of the Complainant’s employment, I find that the regulation clearly indicates that an employer is not obligated to pay an H-1B employee during any period when the employee is unavailable for work, based on the employee’s decision or for the employee’s personal convenience. § 655.631(c)(7)(ii).

I note that the regulation does not specifically state that an employee is unavailable for work with an employer if the employee starts working for a different employer. I note that Ms. Petricevic’s testimony, that the Complainant told her he had other employment beginning in April 2009, is corroborated by the Respondent’s evidence that the Complainant was working for RESMI, starting in March 2009. See RX-30-33. I am cognizant that the Complainant has denied

³⁷ Ms. Petricevic did not cite a source for this determination. Respondent states that the Administrator’s “WHD “Field Operations Handbook” at § 71d07(f)(2)(C) provides such authority. See Respondent’s brief at 21.

that the “Kuanish Batirbekov” in the RESMI documents refers to him.³⁸ See T. at 181-83. Notably, the spelling “Kuanish Batirbekov” is not the same as “Kuanysh Batyrbekov,” the spelling that the Complainant uses. See, e.g., Complainant’s Request for Hearing; AX-1. However, the RESMI documents are translated from Russian, which uses the Cyrillic alphabet, and I note that the names in the original RESMI documents are in the Cyrillic alphabet and not in English. Additionally, however, RX-12, an e-mail exchange between an attorney for the Respondent and an official at RESMI, confirms that “Kuanysh Batyrbekov” (using the same spelling the Complainant uses) was employed at RESMI from March to June 2009. Moreover, the e-mail exchange also identifies Batyrbekov by birthdate.³⁹ At the hearing, the Complainant confirmed that was his correct birthdate. T. at 20.

It is certainly possible that there is more than one person in Kazakhstan with the same first name and last name as the Complainant (however rendered using an English spelling). I find it unlikely, however, that there is more than one person in Kazakhstan with the same name and date of birth as the Complainant. I also note that the RESMI documents relate to international finance analysis. Although the specific duties that the Complainant performed at Lehman Brothers and with the Respondent are not of record, the LCA pertaining to the Complainant states that his job was “analyst.” Both Lehman Brothers and the Respondent are well known as international banking/finance companies. I find it highly unlikely that two distinct individuals would have the same name, same date of birth, and same profession. I conclude that the Complainant’s testimony on this point is not credible, in light of the other evidence of record.

Based on the foregoing, I find that the Complainant had other employment, in Kazakhstan, not later than March 4, 2009 (the date of the first RESMI report). See RX-30. Therefore, I find that as of that date, the Complainant was not available for employment with the Respondent. I also find that the RESMI employment continued at least through June 12, 2009 (the date of the last RESMI report). See RX-33.

At the hearing, the Complainant admitted that he resumed his university studies in Kazakhstan in June 2009.⁴⁰ T. at 184. Consequently, even if the Respondent’s proof of the Complainant’s alternate employment is determined to be inadequate, the evidence establishes that the Complainant was not available for work with the Respondent because he was unavailable, based on his own convenience, as of June 2009, because he was enrolled at a

³⁸ When I admitted RX-30 and the other RESMI documents, I noted that the Complainant disputes that these documents refer to him. T. at 207-08.

³⁹ I have taken into consideration that this information is unsworn hearsay, and the declarant is not known to me. Nevertheless, this item is admissible as evidence in an administrative proceeding. See Adm’r v. Ken Technologies, Inc., ARB No. 03-140 (ARB, Sept. 30, 2004), slip op. at 5.

⁴⁰ The Complainant’s testimony on this point is somewhat ambiguous. On careful review, I decline to adopt the Respondent’s assertion that the Complainant enrolled in the university in December 2008. See Respondent’s brief at 18.

university.⁴¹ The evidence also indicates the Complainant may have commenced employment with the Eurasian Development Bank in June 2009.⁴² RX 14.

The Board has held that an employer's pay obligation continues, so long as the employer has not effected a bona fide termination of the employment and the employee remains available for work. Mao v. Nasser, ARB No. 06-121 (ARB Nov. 26, 2008), slip op. at 10. An employer is not required to pay back wages once the H-1B employee absents himself from his duties, for reasons of his own convenience. § 655.731(c)(7)(ii). Vojtisek-Lom v. Clean Air Technologies Int'l, Inc. ARB No. 07-097 (ARB, July 30, 2009). As discussed above, the evidence establishes that the Complainant left the United States and took a job in Kazakhstan, by March 2009, and enrolled in a university, by June 2009. Both circumstances rendered the Complainant unavailable for work. I find the evidence is that the Complainant undertook these opportunities for his own convenience.

Thus, I conclude that the Employer's obligation to pay the Complainant ended by March 4, 2009. This is not inconsistent with the Administrator's determination. The Administrator, however, determined that the Employer's obligation to pay the Complainant terminated by March 31, 2009, based on the Complainant's statement to Ms. Petricevic that he was otherwise employed as of April 2009.

As the Administrator's calculations indicate, the Respondent paid the Complainant twice per month (semi-monthly), and the Respondent's pay obligation for the Complainant each pay period was \$2,171.88, based on the prevailing wage of \$52, 125. AX-2. The period from March 5 to March 15 constitutes 73.3% of a pay period (11 of 15 days), or \$1,592.71. The period from March 16 to March 31 constitutes 100% of a pay period, or \$2,171.88. Thus, I find that the Administrator's calculations of pay obligations through March 31, 2009, resulted in an overstatement of the Respondent's pay obligation to the Complainant by \$3,764.59.

The Respondent has voluntarily paid the Complainant the \$9,707.24 that the Administrator determined to be due. AX-7. I am aware of no mechanism whereby an employer can recoup an overpayment of the amount the employer voluntarily paid, upon notification from the Administrator.⁴³ Consequently, I AFFIRM the Administrator's determination on this issue.

Whether Respondent Effected a Bona Fide Termination of the Complainant's Employment

The Administrator's Determination Letter did not specifically address whether the Respondent effected a bona fide termination of the Complainant's employment. AX-5. The Complainant asserts the Respondent never effected a bona fide termination of his employment and, consequently, contends that the Respondent's obligation to pay him continued until August 20, 2010, the date the Complainant's LCA expired. Complainant's brief at 8; see also AX-3.

⁴¹ The date that the Complainant ceased his university studies is not of record.

⁴² This evidence is a LinkedIn profile, reflecting that the Complainant was an "assistant portfolio manager" at the Eurasian Development Bank, effective June 2009. I remarked at the hearing that LinkedIn profiles can be created by third parties. T. at 209. Consequently, I give very little weight to the LinkedIn profile.

⁴³ Notably, the Respondent did not request a hearing in this matter.

The Respondent, on the other hand, conceding that it did not comply with the regulatory requirements to terminate the Complainant's employment until October 1, 2009, asserts that its obligation to pay the Complainant ended in December 2008, when the Complainant departed for Kazakhstan and (according to the Respondent) engaged in schooling and employment in that country. Respondent's brief at 17-19.

As set forth above, I have found that the Respondent's pay obligation ended by March 4, 2009, when the Complainant became unavailable for work, due to employment and schooling in Kazakhstan. Nevertheless, the issue of whether the Respondent effected a bona fide termination of the Complainant's employment is relevant, because only a bona fide termination permanently curtails an employer's obligations toward an employee. In the absence of a bona fide termination, had the Complainant ended his other employment or withdrawn from the university, the Respondent's pay obligation to him would have continued until the end of the LCA period, in August 2010. As the Board has noted, if an employee is ready and willing to continue to work for the employer, the employer's pay obligation continues. Mao v. Nasser, ARB No. 06-121 (ARB, Nov. 26, 2008), slip op. at 10.

Under the regulation, an employer's pay obligation continues (except for periods when the employee is unavailable for work because of a voluntary action by the employee) until a bona fide termination of the employment relationship has occurred. § 655.731(c)(7)(ii). The employer is required to notify the Department of Homeland Security so that the LCA petition is cancelled. Id; see also 8 C.F.R. § 214.2(h)(11). Additionally, the regulation states an employer must "provide the employee with payment for transportation home under certain circumstances." Id; see also 8 C.F.R. § 214.2(h)(4)(iii)(E). The Department of Homeland Security regulation states that an employer is liable for "reasonable costs of return transportation" if the employee is dismissed by the employer prior to the end of the LCA employment period. 8 C.F.R. § 214.2(h)(4)(iii)(E).

The Board has held that there are three elements to a bona fide termination: first, unequivocal notice to the employee that the employment relationship has been terminated; second, the employer's notice to immigration officials of the terminated employment; and third, payment for transportation back to the employee's home country. Amtel Group of Fla. v. Yongmahapakorn, ARB No. 04-087 (ARB, Sept. 29, 2006), slip op. at 11-12, aff'd on recon, ARB No. 07-104 (Jan. 29, 2008); see also Gupta v. Jain Software Consulting, Inc. ARB No. 05-008 (ARB, Mar. 30, 2007), slip op. at 5-6. The Board also has held that the burden is on the employer to establish each element of the bona fide termination. Gupta, slip op. at 5 n.3.

Notice to the Complainant

In the instant matter, it is clear that the Respondent provided notice to the Complainant of his termination from employment, by written document dated October 14, 2008; the Complainant signed the document, acknowledging receipt, by October 27, 2008. RX-5.

Notice to USCIS

As discussed above, as a result of the Respondent's Motion I determined that, on September 29, 2009, the Respondent gave notice to USCIS of the Complainant's termination from employment. T. at 7-9.

Proffer of "Reasonable Cost" of Transportation

Based on the record before me, I note there is no dispute as to the first two elements of a bona fide termination of the Complainant's employment with the Respondent. As to the last element, the proffer of payment of transportation for the Complainant to return to his home country, there is no dispute that the Respondent proffered the amount of \$1,155 to the Complainant on October 1, 2009.⁴⁴ RX 7. What is disputed is whether the amount the Respondent proffered is "reasonable," as the regulation requires. 8 C.F.R. § 214.2(h)(4)(iii)(E).

Under the applicable regulation, the employer is responsible for paying the "reasonable costs of return transportation" where the employer terminated the employee prior to the end of the LCA period. 8 C.F.R. § 214.2(h)(4)(iii)(E). The place to which the transportation costs must be paid is the employee's "last place of foreign residence." Id. This requirement is excused in circumstances where the employee voluntarily quits the employment. Id.

In this case, there is no dispute that the Respondent terminated the Complainant's employment; consequently, I find the Respondent was obligated to pay the Complainant the reasonable cost of transportation. The record establishes that the Complainant is a citizen of Kazakhstan, and there appears to be no dispute that the applicable place for determining the cost of the Complainant's transportation is to be made is Almaty, the largest city in Kazakhstan.⁴⁵ I note that the regulatory requirement to pay the costs of transportation relates only to the employee, and does not include the employee's belongings, so the Complainant's complaint that the Respondent did not pay for transportation of his personal effects has no merit. See AX-1.

Under the regulation, an employer is not required to pay the actual costs of transportation, but only the "reasonable costs." 8 C.F.R. § 214.2(h)(4)(iii)(E). In the instant matter, the Respondent avers that its payment of \$1,155 fulfills this obligation. Respondent's brief at 13-16; see also RX-7. The Complainant states that the cost is not reasonable, and notes it is far lower than the actual cost of his flight from New York to Almaty, Kazakhstan. Complainant's brief at 9-10; see also CX-25.

The record reflects that the Complainant made two trips from New York to Almaty after his employment with the Respondent had terminated. His first trip was on December 25, 2008,

⁴⁴ The record also reflects that the Complainant failed to cash the check (RX-8) and, in 2010, requested a replacement check (RX-9). In August 2011, the Complainant deposited the check but it was dishonored as it was "stale dated." CX 27. In September 2011, the Respondent sent a second replacement check for \$1,155 to the Complainant. CX 28, 29. The record is silent as to whether the Complainant ever cashed this check.

⁴⁵ See, e.g., www.lonelyplanet.com/kazakhstan/almaty.

and his second trip was on February 27, 2009.⁴⁶ T. at 184-90. The fare for the Complainant's February 2009 trip, on KLM Airlines, was \$2,324.35, plus \$424.35 in fees, for a total cost of \$2,748.70. There is no evidence of record regarding the cost of the Complainant's December 2008 trip. The Respondent asserts that the cost of the December 2008 trip, and not the February 2009 trip, should be the relevant benchmark for assessing whether its proffer of costs was reasonable. Respondent's brief at 14; See also T. at 33.

At the hearing, the Respondent's witness, Ms. Kramer Deeb, testified that the Respondent's practice, when compensating for travel costs, was to reimburse the full price of airfare by "grossing up" the amount, so that the net amount paid (after taxes and other withholdings) would equate to the amount to be compensated. In this way, the employee would not bear the burden of the taxes that were withheld on the payment.⁴⁷ T. at 139-41. At the hearing, the witness testified that the amount that was to be paid to the Complainant was determined by having a human resources employee consult "KAYAK," a travel website that compares different airline fares. T. at 139-41. She also conceded that the results of the search had not been maintained. T. at 141.

The Respondent also proffered, as exhibits, the results of several KAYAK searches made in 2011 for one-way fares from New York to Almaty, with different periods of advance purchase: two days (RX-25); 60 days (RX-27); and flights on Christmas day (approximately five months from the date of the search)(RX-28). In general, the cheapest fares were those with a 60-day advance purchase, and these were as low as \$585. RX-27. Flights with a two-day advance purchase began at \$800.⁴⁸ RX-25. As noted, however, the Respondent's submissions represented the very cheapest flights available and the total range of costs of flights is not of record. Moreover, each exhibit listed only a few of the available flights.⁴⁹

As the evidence establishes, the Complainant flew to Almaty twice. Although the Complainant's testimony is not completely clear, it appears that the Complainant went back to Kazakhstan in December 2008 to visit his family; then flew back to New York to seek work with new employers, then returned to Kazakhstan on February 27, 2009, when an employment opportunity did not materialize. T. at 184-87. The record indicates that an H-1B petition was filed on behalf of the Complainant on January 7, 2009 and was approved on January 21, 2009; however, the prospective employer chose to revoke the petition on February 19, 2009. RX 22, 23. The Complainant's departure for Kazakhstan followed, on February 27, 2009. See CX 25.

⁴⁶ The record reflects that the Complainant was under consideration for employment with a different employer in New York. This employer has submitted an H-1B petition on the Complainant's behalf, but withdrew the petition in February 2009. T. at 184-86; see also RX 21-23.

⁴⁷ The statement accompanying the check indicates that the gross amount paid to the Complainant was \$2,050.78, and then \$895.78 in taxes was withheld. The withheld taxes were listed as follows: federal income tax, \$512.69; New York state income tax, \$226.20; Social Security tax, \$127.15; and Medicare tax, \$29.74. RX-7.

⁴⁸ Several of the two-day advance flights showed a rate of \$1,155, the same amount that the Respondent proffered to the Complainant.

⁴⁹ For example, for the two-day advance purchase flights, there was a listing of 519 one-way trips; the Respondent submitted the first 15, listed from lowest to highest cost. I infer that there were 514 other options, all of higher cost.

As discussed above, the Respondent notified the Complainant that his employment was terminated on October 14, 2008. The severance letter the Respondent issued to the Complainant specified that the Complainant would remain an active employee through November 13, 2008, and was to be paid through January 10, 2009. RX-5. The severance letter also specified that the Complainant was required to notify the Respondent if he were employed by another employer prior to January 10, 2009; under such circumstances, he would be immediately terminated from the payroll. Id.

Under the terms of the Respondent's severance letter, I find that the Complainant knew, as of October 14, 2008, that his responsibilities as an employee of the Respondent would end by November 13, 2008. Therefore, as of the date of the severance letter, the Complainant could reasonably make travel plans to fly to Kazakhstan during the holiday period.⁵⁰ Thus, I find that it is reasonable for the Respondent to infer that it should have paid the costs for the Complainant's first trip to Kazakhstan after that date, which is the trip of December 25, 2008.

Notably, the evidence strongly suggests that the Complainant's later round trip from Kazakhstan to New York and back, which included the February 27, 2009 trip to Kazakhstan, was prompted by the prospect of a new position with a new employer. The timing of the Complainant's return trip to Kazakhstan, which was shortly after the prospective employer revoked the H-1B petition for the Complainant, suggests that the Complainant departed back for Kazakhstan only when this job opportunity failed to materialize. Moreover, the cost of the trip (more than \$2,300, plus an additional \$400+ in fees) suggests the airline ticket was purchased on short notice.⁵¹ Due to such circumstances, I find that it is not appropriate to consider the cost of the Complainant's February 27, 2009 flight as the basis for a determination as to whether the Respondent's proffer of \$1,155 covered the "reasonable costs" of the Complainant's return trip.

There is no evidence of record regarding the cost of travel on Christmas day 2008, booked approximately 60 days in advance (after October 14, 2008, the date of the severance letter to the Complainant). Additionally, there is no evidence of record regarding the relative cost of airline travel in 2008, when the Complainant flew to Kazakhstan, as opposed to the cost in 2011, which forms the basis for the Respondent's exhibits.

As discussed above, the burden to establish the reasonableness of its payment for return travel rests with the employer. Amtel Group of Fla. V. Yongmahapakorn, ARB No. 04-087 (ARB, Sept. 29, 2006), slip op. at 11-12, aff'd on recon., ARB No. 07-104 (Jan. 29, 2008). The Respondent has shown that, in 2011, multiple flights from New York to Almaty were available on a 60-day advance purchase for as low as \$585. Flights with a two-day advance purchase were available for as low as \$800. The Complainant has asserted that flights on Christmas day, December 25, are "notoriously expensive." Complainant's brief at 8. This assertion appears to

⁵⁰ Because the Respondent had not taken steps to revoke the Complainant's LCA, the Complainant remained in the United States on a valid visa; thus, he was not required to depart for Kazakhstan immediately upon notice from the Respondent that his employment had been terminated.

⁵¹ Under 29 C.F.R. § 18.201, I may take official notice of adjudicative facts. It is well known that airline flights purchased well in advance are less expensive than flights purchased shortly before the date of travel. I also note that this conclusion is consistent with the evidence the Respondent submitted regarding flight costs. RX 25-28.

be supported by the evidence; I note that the Respondent's listing of flights available on December 25, 2011, dated July 22, 2011, shows that the costs of these flights are higher than the costs of flights 60 days from the date of purchase. See RX 27, 28. However, the Complainant has not indicated any reason, and I can discern none from the record, to establish why he had to fly to Almaty on December 25, 2008, as opposed to another date.

Based on the foregoing, I find that the Respondent has established that its proffer to the Complainant of \$1,155 on October 1, 2009, for the cost of a flight from New York to Almaty, Kazakhstan, was a payment of the "reasonable costs" of the Complainant's return transportation to his country of origin. Though not a factor in my determination of whether the Respondent paid the "reasonable costs" of the Complainant's transportation, I also note that the testimony establishes that the Complainant ultimately received a refund of the amount withheld in federal taxes (\$512.69) and state taxes (\$226.20). T. at 194-96; 198-99; see also RX-34, 35. Consequently, due to the Respondent's business practice of "grossing up" travel compensation, the Complainant eventually received an additional \$738.89. This brings the total amount the Complainant received, as a direct result of the Respondent's proffer of \$1,155 on October 1, 2009, to \$1,893.89.

Based on the foregoing, I find that the Respondent's proffer of \$1,155 on October 1, 2009, which constituted a proffer of the reasonable costs of transportation for the Complainant from New York to Almaty, Kazakhstan, fulfilled the last of the three elements required for a bona fide termination. See Amtel Group of Fla., slip op at 11-12. Thus, I further find that the Respondent's proffer of these funds effected a bona fide termination of the Complainant's employment, under the regulation. See § 655.731(c)(7)(ii). Because I have found that the Respondent's actions fulfilled its regulatory obligations, I do not address whether the Administrator's determination on this issue was correct.⁵²

Failure to Effect Bona Fide Termination

If an employer has not effected a bona fide termination, the employer remains responsible for its wage obligation under the LCA, up to the date of the end of the LCA period. § 655.731(c)(7)(ii); see also Mao, slip op. at 10. However, as discussed above, an employer has no wage obligation if the employee is unavailable for work, due to the employee's own actions or for the employee's convenience. § 655.731(c)(7)(ii).

In the Complainant's case, as discussed at length earlier, I have found that the Complainant entered into employment with RESMI by March 4, 2009. I also have found that, although the Complainant's employment with RESMI ended in June 2009, in that month the Complainant enrolled in university in Kazakhstan.

I find that the Complainant's employment with another employer and his university enrollment both are circumstances that make him unavailable for further employment with the Respondent. These also are both circumstances that were for the Complainant's convenience,

⁵² The Administrator did not make any determination on the reasonableness of the amount the Respondent proffered for the Complainant's transportation costs. At the hearing, Ms. Petricevic stated that the Administrator "does not enforce" this regulatory requirement. T. at 71, 79.

and not the Respondent's. I find, therefore, that, notwithstanding any failure of the Respondent to effect a bona fide termination of the Complainant's employment, the Respondent's wage obligation to Complainant ceased when the Complainant began his employment with RESMI. I further find there is no evidence of record that the Complainant was ready to resume duties for the Respondent at any time, prior to the bona fide termination of his employment on October 1, 2009. Therefore, I also find that the Respondent's wage obligation did not resume.

Consequently, based on these factual findings, I find that, even in the absence of a bona fide termination of the Complainant's employment, the Respondent's pay obligation to the Complainant ceased by March 4, 2009.

Conclusion

Based on the foregoing, I conclude the following:

1. Whether or not the Respondent effected a bona fide termination of the Complainant's employment, the Respondent has no additional wage obligation to the Complainant, because this obligation to the Complainant ceased by March 4, 2009.
2. The Respondent's proffer of \$1,155 constitutes reasonable payment for transportation costs; therefore, the Respondent is not required to pay any additional amount to the Complainant for transportation.
3. The Respondent's payment of \$9,707.24, based on the Administrator's determination of back wages owed, constituted an overpayment of \$3,764.59. Because this payment was voluntarily made, there is no provision for a refund of the overpayment.
4. Except for the provision as to back wages owed, which is addressed in the paragraph above, I AFFIRM the Administrator's determinations.

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days

of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

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

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 20 C.F.R. § 655.840(a).