



**Issue Date: 01 February 2012**

Case No.: 2011-LCA-00045

In the Matter of

**ARVIND GUPTA,**  
Prosecuting Party

v.

**COMPUNNEL SOFTWARE GROUP, INC.**  
Respondent

### **DECISION AND ORDER**

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.* The Prosecuting Party is not represented by counsel.

## **I. INTRODUCTION**

### **A. Statutory Background**

The Immigration and Nationality Act’s (INA) H-1B visa program permits American employers to temporarily employ non-immigrant aliens to perform specialized<sup>1</sup> jobs in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). In order to protect U.S. workers and their wages from an influx of foreign workers, an employer must file a Labor Condition Application (LCA) with the Department of Labor (DOL or the “Department”) before an alien will be admitted to the United States as an H-1B non-immigrant worker. 8 U.S.C. § 1182(n)(1). As part of that LCA, the employer must attest that it:

- (i) Is offering and will offer during the period of authorized employment to [H-1B employees] wages that are at least –
  - (I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or
  - (II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application . . . .

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<sup>1</sup> “Specialized occupation” is defined within the Act 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).

*Id.* at §§ 1182(n)(1)(A)(i)(I)-(II). This wage requirement restricts American employers from paying foreign workers less than their American counterparts. The requirement thus acts as a disincentive to hiring non-immigrant workers over American workers.

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

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

The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid; debarment of the employer from future employment of aliens; and civil money penalties. 20 C.F.R. §§ 655.810, 655.855. Under the regulation, back wages due to H-1B workers are defined as the difference between the amount that they should have been paid and the amount that they were actually paid. § 655.810(a).

Under the regulation, a civil money penalty up to \$1,000 per violation may be assessed for early termination penalties paid by employees and for violations of the requirements pertaining to public access (§ 655.760). § 655.810(b)(1). Penalties up to \$5,000 per violation may be assessed for willful failures pertaining to wages or working conditions, or willful misrepresentation of material fact on an LCA. § 655.810(b)(2). Willful failure is defined as "a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sections 212(n)(1)(A)(i) or (ii), or 212(t)(1)(A)(i), or (ii) of the INA, or §§ 655.731 or 655.732." § 655.805(c); *see also* *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133-35 (1988). In determining the amount of a civil money penalty to be imposed, the Administrator shall consider

the type of violation and other relevant factors and may apply, among other things, the factors listed in § 655.810(c), which include the employer's previous history; the number of workers affected; the gravity of the violations; the employer's explanations and efforts at compliance; and the extent to which the employer achieved financial gain due to the violation.

Under 20 C.F.R. § 655.840(b), an Administrative Law Judge has the authority to affirm, deny, reverse, or modify (in whole or in part) the determination of the Administrator.

## **B. Procedural History**

The Respondent filed an LCA with the Department of Labor in order to a secure H-1B visa for the Prosecuting Party in 2006. Respondent's Exhibit (RX) C. The prevailing wage rate attested to in this LCA was \$20 per hour. RX C. The LCA was certified and the H-1B visa was approved; the Prosecuting Party began working for Respondent in 2007. RX H. Additional LCAs were submitted by the Respondent when the Prosecuting Party's working conditions temporarily changed in February and June 2007.<sup>2</sup> See RX C2, C3. A Labor Certification for Permanent Resident was filed<sup>3</sup> by the Respondent for the Prosecuting Party in April 2008 and was certified in July 2008. RX F. In May, August, and September 2008, the Respondent purportedly sent letters to the USCIS requesting the cancellation of the Respondent's April 2008 petition, citing a lack of available work for the Prosecuting Party. RX G. Acknowledgement of the petition withdrawal was given by USCIS in a letter dated, February 19, 2009. *Id.* An additional application for Labor Certification for Permanent Resident was filed by the Respondent, one month earlier, on January 7, 2009 and was approved in October 2009. RX K. The Prosecuting Party, however, left the United States in April 2009 and never again worked for the Respondent.

Subsequently, the Deputy Administrator of the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (the "Administrator") conducted an investigation of Respondent, concerning possible violations under the H-1B provisions of the INA. The Administrator's investigator, Mr. Ronald Rehl, was the principal official who conducted the investigation. Among other things, he gathered documentary evidence relating to the Prosecuting Party's complaint, held a conference with Respondent in March 2011, and made the following determinations:

- The Respondent is a covered firm under the Act;
- The Respondent was found in compliance with posting, displacement, recruitment, and public access to files;
- The Respondent violated the Act for failure to pay wages as required;
- There was no retaliation by the Respondent against the Prosecuting Party ("[Respondent] did not renew the H-1B visa for [the Prosecuting Party] not as retaliation, but due to [the Prosecuting Party's] lack of availability.");
- No violations were found because of lack of pay for holidays or bonuses; and
- Debarment was not recommended. RX N.

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<sup>2</sup> This wage rate changed to \$22.75/hour and \$25.27/hour when the Prosecuting Party worked for the Respondent in San Francisco and New York City, respectively. See RX C2, C3.

<sup>3</sup> This application process is commonly known as filing for a "green card."

Regarding the violation for failure to pay wages, Investigator Rehl found that the Respondent did not always pay the Prosecuting Party for full-time, 40-hours-per-week productive time when he was assigned a client project. Investigator Rehl wrote, "Where records indicated [the Prosecuting Party] was paid less than the required 40 hours per week, back wages were computed." He determined that the total back wages due were \$6,976.00. RX N. The Respondent was notified by letter dated June 15, 2011, that the Administrator had determined that the Respondent had failed to pay wages as required in violation of 20 C.F.R. § 655.731(c) and owed back wages in the amount of \$6,976.00. RX A. The Respondent agreed while meeting with Investigator Rehl in March 2011 that \$6,976.00 was due to the Prosecuting Party and paid the amount due (after taxes) in April 2011. RX A, N.

By letter dated June 13, 2011, the Prosecuting Party disputed the determination and requested a formal hearing before the Department's Office of Administrative Law Judges. The case was subsequently assigned to me. By Notice of Hearing issued June 24, 2011, I scheduled a hearing to be held in Philadelphia, Pennsylvania. By Order dated July 20, 2011, and in response to a request made by the Prosecuting Party, I cancelled the hearing and informed the parties that a decision would be made on the record.

The Prosecuting Party in this matter, the original Complainant, has submitted 33 Exhibits, which he denominated "Complainant's Exhibits 1-33"; I adopt this nomenclature and subsequently admit "Complainant's Exhibits" (CX) 1-33 into evidence. The Respondent has entered 14 Exhibits, which I admit into evidence as RX A-N. The record is closed and all discovery issues are now resolved.<sup>4</sup> The Prosecuting Party and the Respondent submitted Closing Briefs. This Decision and Order is based upon the evidence of record, the arguments of the parties, and an analysis of law.

## **C. Contentions of the Parties**

### **1. Prosecuting Party**

The Prosecuting Party in this matter contends that the Respondent: (1) owes additional back wages due during authorized employment; (2) owes wages and benefits, based on a theory of retaliation, for the time the Prosecuting Party returned to India; (3) should pay for fringe benefits owed, including vacation days; (4) should be deemed to have violated the Act for failing to provide a copy of the LCA filed with the DOL in December 2006 to the Prosecuting Party; (5) should pay for the Prosecuting Party's return transportation to India; and (6) is liable for damages and equitable relief in conjunction with the Prosecuting Party's complaint.

### **2. Respondent**

The Respondent contends that the Administrator's determination of May 31, 2011 should be upheld, and that any liabilities were discharged when the Prosecuting Party accepted payment from the Respondent for wages due as determined by the Administration's findings.

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<sup>4</sup> The last two discovery disputes included the Prosecuting Party's request to strike the affidavit of Lalitha Reddy and the Respondent's request that the Prosecuting Party's Exhibits 29-31 not be admitted into evidence. By admitting all submitted evidence, it follows that both requests are DENIED.

**D. Issues**

The issues presented in this case for resolution are:

- Was the Department's assessment of back wages owed to the Prosecuting Party, based on the documentary evidence available, in accordance with the regulatory requirements and standards?
- Is the Respondent liable for any additional damages or costs due to the Prosecuting Party, including payment for fringe benefits or for damages resulting from any retaliation against the Prosecuting Party by the Respondent?
- Whether any violations are willful, warranting civil penalties?

**E. Relevant Evidence**

As mentioned above, the parties submitted numerous Exhibits in support of their respective positions.

The Prosecuting Party submitted the following of pertinent importance:

- The Administrator's determination letter, dated May 31, 2011. CX 1.
- Various e-mails discussing project opportunities from December 2006 and January 2007. CX 4.
- Financial records including wage and earnings documents. CX 6, 7, 8.
- Respondent's withdrawal letter, dated May 2008, stamped received on February 17, 2009 by USCIS. CX 14.
- Copies of certain e-mails after May 2009. CX 16.
- Prosecuting Party's "Declaration" regarding statements made by Ms. Lalitha Reddy, dated April 2008. CX 18.
- Various tax returns. CX 19.
- The Prosecuting Party's WH-4 form used to request an investigation of the Respondent in 2008. CX 20.
- A second WH-4, submitted in May 2009, alleging retaliation. CX 21.
- E-mail communications between the Prosecuting Party and the Administrator's investigator. CX 23.
- The Respondent's paid-leave policy. CX 26.
- Documents related to the Prosecuting Party's former employment with Headstrong, Inc. CX 27.
- An e-mail discussing "sick leave," dated February 2008. CX 29.

Most notably, the Respondent submitted the following:

- The Administrator's determination letter and proof of payment of back wages due, dated June 15, 2011. RX A.

- The LCA certified for New Jersey for February 2007 until April 2009; the LCA certified for San Francisco for February 2007 until February 2010; the LCA certified for New York City for June 2007 until June 2010. RX C, C2, C3.
- The Labor Certification for Permanent Employment Certification dated July 2, 2008, stating the “Date of Acceptance for Processing: April 23, 2008.” RX F.
- HB-1 cancellation letters dated May 2008; shipping charge receipts for August and September 2008 for items sent to the USCIS; a “Notice of Decision” from USCIS dated February 19, 2009, stating that the petition filed for the Prosecuting Party has been revoked pursuant to a written request for withdrawal from the Respondent. RX G.
- Employment documents signed by the Prosecuting Party in January 2007. RX H.
- The Labor Certification for Permanent Employment Certification, dated October 2009, stating the “Date of Acceptance for Processing: January 07, 2009.” RX K.
- The Prosecuting Party’s complaint against former employer, Wipro Limited. RX L.
- The Prosecuting Party’s complaint against former employer, Headstrong Inc. RX M.
- Report of the Administrator’s assigned-investigator, Ronald Rehl, dated May 2011. RX N.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. Factual Background**

Based on the documentary evidence, I find the following undisputed facts:

1. The Respondent submitted an LCA for the Prosecuting Party on December 1, 2006. RX C.
2. The Prosecuting Party claimed to be available for work at both Headstrong Inc. and at the Respondent during the same period of December 1, 2006 until February 6, 2007. RX M, N; CX 4, 20.
3. The Respondent filed LCAs for the Prosecuting Party to work in San Francisco (RX C2) and in New York City (RX C3).
4. The Prosecuting Party worked for Respondent in productive status from February 7, 2007 until July 16, 2007.<sup>5</sup> CX 6-8; Prosecuting Party’s Brief at 8-9.
5. The Prosecuting Party claimed to be available for work for both Respondent and Headstrong Inc. from July 2007 until November 8, 2007. CX 20; RX M, N.
6. The Respondent presented multiple employment opportunities to the Prosecuting Party between July and November 2007. CX 9.
7. The Prosecuting Party responded to Respondent’s project availability notice on November 26, 2007 and began working on this project on December 11, 2007. CX 6-9; RX N.

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<sup>5</sup> The San Francisco project ended on June 6, 2007. The Prosecuting Party was in nonproductive status on June 7 and 8, before beginning a new project in New York City on June 11, 2007.

8. The Prosecuting Party's last project (in Jersey City, New Jersey) for the Respondent ended in March 2008, and he subsequently entered nonproductive status. RX N; Prosecuting Party's Brief at 12, 26.
9. Representatives of the Respondent requested that the Prosecuting Party return to the Respondent's Monmouth Junction, New Jersey office to avoid cancellation due to "no show." RX E.
10. The Respondent filed an Application for Permanent Employment Certification for the Prosecuting Party on April 23, 2008, which was certified on July 2, 2008. RX F.
11. The Prosecuting Party filed his complainant against the Respondent in November 2008. CX 20; Prosecuting Party's Brief at 12.
12. An additional Application for Permanent Employment Certification for the Prosecuting Party was filed by the Respondent on January 7, 2009 and certified on October 26, 2009. RX K.
13. In late 2008 or early 2009, the Respondent instructed the Prosecuting Party to return to India and wait for necessary approval to come back to the United States for employment. Prosecuting Party's Brief at 13; Respondent's Brief at 5.
14. On January 21, 2009, the Prosecuting Party received from the Respondent an e-mailed airline ticket for travel to India on February 1, 2009, and a return ticket from Mumbai, to Newark, New Jersey on April 17, 2009. RX I; Prosecuting Party's Brief at 14.
15. USCIS notified the Respondent by letter dated February 19, 2009, that the first petition filed for the Prosecuting Party had been revoked, based on the Respondent's withdrawal of the petition. RX G.
16. On April 30, 2009, the Prosecuting Party left the United States and travelled to Mumbai, India. Prosecuting Party's Brief at 16.
17. In May 2009, the Prosecuting Party filed an additional complaint with the DOL. CX 21; Prosecuting Party's Brief at 17.

**B. Legal Analysis**

**1. Whether Respondent Is Liable For Back Wages under the Act**

The Prosecuting Party alleges that Respondent has failed to pay wages to him in violation of 8 U.S.C. § 1182(n)(1)(A) and 20 C.F.R. § 655.731 for various times between December 1, 2006 and April 30, 2009.

As previously stated, an employer seeking to employ H-1B non-immigrants in a specialty occupation must attest in a labor condition application (LCA) that they will pay the H-1B non-immigrants a required wage rate.<sup>6</sup> 8 U.S.C. § 1182(n)(1)(A). The regulations provide that "[t]he required wage must be paid to the employee, cash in hand, free and clear, when due . . . ." 20 C.F.R. § 655.731(c)(1). The regulations then authorize the Administrator, through investigation, to determine whether an H-1B employer has failed to pay the required wage. § 655.805(a)(2).

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<sup>6</sup> The required wage rate is the greater of the "actual wage" or the "prevailing wage," as those terms are defined by the Act. 8 U.S.C. § 1182(n)(1)(A)(I) and (II).

In this case, the Respondent attested to locale-dependent, prevailing wage rates of \$20.00, \$22.75, and \$25.75 per hour in the LCAs it relied upon to obtain H-1B visas for the Prosecuting Party. Respondent's Brief at 3; RX C, C2, C3. Those figures were deemed the required wage rates by the Administrator, who used these rates to determine the back wages due for the weeks that the Prosecuting Party was in productive status, but not paid for a full 40-hour workweek. RX A, N.

I review the record before me *de novo*. The Prosecuting Party's contention that additional back wages are due centers on the time periods during which he was in nonproductive status with the Respondent; there appears to be no argument from the Prosecuting Party at this stage in the proceedings that wages were inadequately paid while in productive status. Prosecuting Party's Brief 19-23. The Administrator found that the only wages due were for pay periods that the Prosecuting Party was in productive status, but the Respondent paid him for less than the required 40-hour work week. *See* CX 1; RX N. Additionally, as the Prosecuting Party has accepted payment for the back wages calculated by the Administrator (RX A), I find the Prosecuting Party's request for additional back wages only involves certain periods when he was in nonproductive status. As this is *de novo* review, however, I still determine whether the Prosecuting Party is due. Based on my review of the available wage records, I uphold the Administrator's findings with regard to the back wages awarded to the Prosecuting Party for the periods he was in productive status with the Respondent. It follows, however, that this liability was discharged by the Prosecuting Party's acceptance of payment.

The nonproductive time periods, and my determination as to whether additional wages are due, are as follows:

a) Back wages for the period of December 1, 2006 until February 3, 2007

The Prosecuting Party contends back wages are due from the date the Respondent first filed an LCA in 2006 until the Prosecuting Party began to work for the Respondent in February 2007. As mentioned, the Administrator found no back wages were due for this period. RX A, N.

I uphold the Administrator's determination, finding no wages are due for this period. It is the Prosecuting Party's burden to establish that wages were inadequately paid. The Prosecuting Party has filed complaints with the Department stating that he was available for work during this time at two different H1-B employers: the Respondent and Headstrong Inc. *See* CX 20; RX M. Although the Prosecuting Party argues that he was terminated from Headstrong Inc. in November 2006 (*see* Prosecuting Party's Brief at 20), he also has stated that he was only "benched" by Headstrong Inc. and contended he was due wages from that company up until November 2007. RX N. Because of this conflicting information regarding the Prosecuting Party's availability to work during this time period, I find that the Prosecuting Party is not entitled to back wages during this period.

b) Back wages for the period of June 7, 2007 to June 9, 2007

The Prosecuting Party claims the Respondent owes him wages for two nonproductive days due to lack of work on June 7 and June 8, 2007 in between the San Francisco and New York City projects. Prosecuting Party's Brief at 22. Wage records (CX 7) show that the Prosecuting Party was paid for two weeks of work for a total of 72 hours. This total indicates that the Prosecuting Party was not paid for eight hours due; however, it appears that the additional eight hours was included in the Administrator's calculation of back wages due, even if this short time in between projects is in fact "nonproductive" time. Regardless, Prosecuting Party's contention that he is due two days of wages is incorrect. I therefore find that the Respondent is not liable for additional back wages during this time period.

c) Back wages for the period of July 23, 2007 to December 10, 2007<sup>7</sup>

As previously mentioned, I find the Prosecuting Party entered nonproductive status between July and December 2007. The Prosecuting Party has produced numerous e-mails highlighting discussions between representatives of the Respondent and him during this time, suggesting projects were available. *See* CX 9. These e-mails, however, do not indicate that the Prosecuting Party was interested in taking assignments until late October 2007. Additionally, the Prosecuting Party stated he was benched at Headstrong Inc. until early November 2007. RX M.

Based on the documentary evidence, I find the Prosecuting Party has not established that he was available to work for the Respondent during this time period. Accordingly, no back wages are awarded.

d) Back wages for the period of March 31, 2008 until April 30, 2009

The Prosecuting Party finished his last project for the Respondent on March 31, 2008. The Prosecuting Party claims that the Respondent never required him to work from the Monmouth Junction, New Jersey office, and that the Respondent only offered him three projects in the course of his employment: San Francisco in 2007; New York City in 2007; and Jersey City in 2007-08. E-mails submitted by the Prosecuting Party during this time indicate that the Respondent continued to try to get the Prosecuting Party on new projects into 2009. CX 11, 12. These e-mails also indicate that the Prosecuting Party raised wage discrepancies with the legal department of the Respondent in 2008 and that the USCIS confirms reopening the Prosecuting Party's green card petition in February 2009. CX 12. Lastly, a request for the Prosecuting Party to return a "Termination Verification Form" to the Respondent is included. CX 12.

The Respondent states that it requested the Prosecuting Party come to the Monmouth Junction, New Jersey office, but he failed to do so. Also, the Respondent states it filed petitions for green cards for the Prosecuting Party, twice, but withdrew these petitions after determining that the Prosecuting Party was unavailable for work. *See* RX N. The Respondent also issued the

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<sup>7</sup> The Prosecuting Party lists the final two periods for which he requests back wages a "July 23, 2007 to December 10, 2008; and . . . March 31, 2008 to April 30, 2009." Prosecuting Party's Brief at 1, 23. It appears these dates are in error, as they are overlapping. Upon further review, the Brief reads as if the date, when corrected, should be "December 10, 2007," as December 11, 2007 was the first day the Prosecuting Party re-entered productive status.

Prosecuting Party an airline ticket to return to India on February 1, 2009. RX I; Prosecuting Party's Brief at 14.

The Administrator found that the Prosecuting Party did not establish that he was available for work and accordingly did not compute back wages for this period.

I uphold the Administrator's determination and find that no additional back wages are due to the Prosecuting Party. I also find that the Prosecuting Party has not established that he was available to work for the Respondent during this time period. In his Brief, the Prosecuting Party argues that the Administrative Review Board's case *Rajan v. International Business*, ARB No. 03-104, ALJ No. 2003-LCA-00012, slip op. at 6 (ARB Aug. 31, 2004), supports his contention that it is unbelievable that an H1-B visa recipient would "desire[] to live without an income during the time period relevant here, and would jeopardize [his] nonimmigrant status by not being able and ready for employment . . . ." I decline to apply this reasoning to the case at hand. The Prosecuting Party appears to have opportunities to work with several different employers between the years of 2006 and 2010, and has attempted to collect from additional H-1B employers, beside the Respondent. Additionally, the Respondent supplied the Prosecuting Party with an airline ticket that he did not use on the original return-to-India date of February 1, 2009, that he stated was given to him with instructions to wait for future U.S. employment opportunities. The Prosecuting Party's theory that one would not jeopardize his ability for future employment flies in the face of him clearly not abiding by Respondent's instructions. The Prosecuting Party has failed to explain why he waited until April 30, 2009 to leave the United States. While it may be possible that the Prosecuting Party was available for work during this time period, I do not find his contentions credible, based on his request for back wages from multiple H1-B employers during overlapping time periods, and against the Respondent's insistence that the Prosecuting Party repeatedly did not follow specific instructions (i.e. to report to the office in Monmouth Junction; to return to India on February 1, 2009). Consequently, I find the Prosecuting Party has not established his entitlement to back wages for this time period.

Lastly, I note the Prosecuting Party in his Brief requests wages and benefits for the time period after he left the United States. Prosecuting Party's Brief at 32. The Administrator, noting the USCIS revocation of the green card application, only investigated the Prosecuting Party's complaint until February 17, 2009 (the date of the revocation). RX N; *see also* RX G. The Respondent admitted to discussing future employment opportunities with the Prosecuting Party, but no H-1B visa was granted past the expiration date of the original LCA (April 30, 2009). *See* RX C. Based on the original LCA filed by the Respondent, I find that the latest possible date wages could be awarded to the Prosecuting Party would be until April 30, 2009. I therefore decline to discuss the Prosecuting Party's entitlement to wages and benefits beyond that date.

In sum, I find the Prosecuting Party has failed to establish his entitlement to any additional back wages, based on my determination that he has not proven he was available for work for the time periods indicated above.

## **2. Whether the Respondent Is Required To Pay for Additional Fringe Benefits**

The Prosecuting Party alleges compensation for certain fringe benefits.

The Prosecuting Party argues that the Respondent offered the Prosecuting Party a cash bonus after he joined the New York City project in July 2007. Prosecuting Party's Brief at 38. The Respondent insists that it does not have policy of paying cash bonuses. RX N. The Administrator found, however, that the payment the Prosecuting Party characterized as a "cash bonus" is itemized as an expense on the Prosecuting Party's wage records and that the Prosecuting Party never paid taxes on these "bonuses." RX N; *see* CX 6-8, 19. As no taxes were deducted from these payments, however, I find that they are appropriately categorized as reimbursement for expenses, and therefore have no bearing on amount of "back" fringe benefits due.

Additionally, the Prosecuting Party argues that the Respondent did not offer vacation, sick leave, paid holidays, health insurance, and other benefits received by Respondent's permanent employees. Prosecuting Party's Brief 36-44. The Administrator stated that these benefits are not at issue for the time periods for which the Prosecuting Party's availability for work could not be verified. I agree with this disposition, considering that if I previously found the Prosecuting Party was ineligible to receive wages during this time period, it follows that fringe benefits therefore cannot be awarded. Accordingly, I will only consider whether the Prosecuting Party is entitled to be compensated for benefits during times he was in productive status (February – July 2007; December 2007-March 2008).

The Prosecuting Party has cited a document which indicates Respondent's employees receive 12 personal leave days and three sick days each year. *See* CX 26. He argues that he was never offered "personal days," and now wishes to be compensated at a rate of \$64/hour for a total of 488 hours (from December 2006 through 2011). Prosecuting Party's Brief at 40. In support of this argument, the Prosecuting Party cites one case from the Administrative Review Board, under the Energy Reorganization Act of 1974, which has no precedential bearing on this issue. *Id.* The Respondent did not address this issue explicitly in its Brief. I therefore determine that any personal days to which the Prosecuting Party was entitled were already calculated into the Administrator's award.

Similarly, the Prosecuting Party asserts he should be paid for holidays during his employment. I reiterate that I uphold the Administrator's determination that either: 1) during productive status holidays are "by default included in the face of the records violation for the period of productive time"; or 2) "Holiday pay is not an issue for periods when it could not be verified that [the Prosecuting Party] was available for work." RX N. Accordingly, I find the Prosecuting Party is not entitled to compensation for holidays.

He also states Respondent owes him for one "sick day" on February 25, 2008. The Prosecuting Party was compensated for this sick day, however, when the Administrator calculated for which weeks the Prosecuting Party was paid for less than 40 hours. *See* RX N. I therefore find the Prosecuting Party is not entitled for payment for a sick day.

Regarding the Prosecuting Party's request for insurance coverage, I find the Respondent is not liable. The Prosecuting Party stated that at the time he entered into employment with the Respondent, he elected to keep health insurance coverage provided by a previous employer.

That insurance coverage expired in April 2008. As the time frames relevant to this analysis are the dates in which the Prosecuting Party was in productive status with the Respondent (February – July 2007; December 2007-March 2008), I find that the issue of health insurance due to the Prosecuting Party after April 2008 is moot. As for life insurance and disability insurance, the Prosecuting Party stated that “he did not receive further communication [after March 25, 2009] whether or not [the Respondent’s] officials restored his life insurance and other plans including long term and short term disability insurance.” Prosecuting Party’s Brief at 43. From this statement, it appears that the Prosecuting Party is not asserting that the Respondent failed to provide him with such insurance coverage, but failed to inform him about whether it was continued past this date. I find this allegation inadequate to establish that the Respondent failed to provide the Prosecuting Party with certain fringe benefits due. Consequently, I find the Respondent is not liable for any lack of insurance coverage.

Lastly, the Prosecuting Party contends, “Once [the Respondent] is [o]rdered to pay back wages for all pay periods beginning December 2006, [the Prosecuting Party] should be allowed, if he so decides, to make employee contributions to 401K plan for past years of employment with [the Respondent].” Prosecuting Party’s Brief at 44. He cites *Talukdar v. U.S. Department of Veteran Affairs*, 2002-LCA-00025, slip op. at 25 (ALJ Apr. 24, 2004), to support his decision. That case suggested that if a complainant accepted reinstatement, he should be allowed to make contributions and receive the corresponding employer contributions for the time the complainant was not employed by the violating employer. I note that this case is not dispositive and no other authority is cited to support the Prosecuting Party’s argument. Moreover, I find the Prosecuting Party’s assertion that “if he so decides” to contribute too tentative and my ability to grant such a request is limited. Accordingly, I deny the Prosecuting Party’s request.

In sum, I decline to award any additional relief to the Prosecuting Party on the basis that the Respondent failed to pay certain fringe benefits.

### **3. Whether the Respondent Is Liable for Damages Based on a Retaliation Theory**

The Prosecuting Party asserts that he provided to the Department details of “retaliation or discrimination” by the Employer in letters dated May 12, 2009 and March 5, 2010. Prosecuting Party’s Brief at 48. Pertinent to this claim, the INA provides:

(iv) it is a violation of this clause for an employer who filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer’s compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

8 U.S.C. § 1182(n)(2)(C)(iv). The regulations echo that language. 20 CFR § 655.801(a)(2003). As the language and intent of this provision are similar to the employee-protection provisions contained in the nuclear and environmental whistleblower statutes administered by DOL, the same analysis applies. 65 Fed. Reg. 80178 (2000) (“The Department is of the view that Congress intended that the Department, in interpreting and applying this

provision, should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (see 29 CFR Part 24).”); see *Administrator v. IHS Inc.*, ALJ No. 93-ARN-1 at 74 (ALJ Mar. 18, 1996).

In order to prevail on his discrimination claim, the Prosecuting Party must establish by a preponderance of the evidence that the Employer took adverse employment action against him because he engaged in protected activity. See *Carroll v. U.S. Dep’t of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec’y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and other anti-discrimination statutes. See *Overall v. Tenn. Valley Auth.*, ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001), *citing, inter alia, McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Tex. Dep’t of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary’s Honor Center v. Hicks*, 450 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000). Where there is direct evidence of discrimination, then the complainant prevails unless the respondent can establish an affirmative defense. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 997 (2002) (Title VII case); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-122 (1985) (Age Discrimination in Employment Act case). In this case, the Prosecuting Party has introduced no direct evidence of discrimination.

When direct evidence of discrimination is not available, prosecuting parties first must create an inference of unlawful discrimination by establishing a *prima facie* case of discrimination, by showing that the respondent is subject to the Act; that the prosecuting party engaged in protected activity; that he suffered adverse employment action; and that a nexus exists between the protected activity and adverse action. The prosecuting party must show that the respondent had knowledge of the protected activity to establish a *prima facie* case. See *Bartlik v. U.S. Dep’t of Labor*, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); *Carroll v. U.S. Dep’t of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F. 2d 793, 796 (9th Cir. 1982); 29 CFR § 24.5(a)(2). The burden then shifts to the respondent to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. Under the traditional Title VII analysis, the burden of persuasion remains at all times with the prosecuting party, who must prove by a preponderance of the evidence that the respondent’s proffered reasons were not the true reasons and constitute a pretext for discrimination. *Burdine*, 450 U.S. at 253.

The Prosecuting Party claims he engaged in protected activity in December 2008 when he alerted the Employer, as evidenced by e-mails, to inadequacies in his wage payments under the H-1B visa program. See Prosecuting Party’s Brief at 49; CX 12. I find, however, that the Prosecuting Party is unable to establish that the Employer took adverse actions against him, and therefore the Prosecuting Party is unable to establish a *prima facie* case of retaliation under the Act.

The following assertions are what the Prosecuting Party alleges are adverse actions taken against him:

- Failure to pay required wages for when he was “sent” overseas;

- Retaliatory assignment overseas;
- Sending back-dated letters to USCIS to cancel H-1B visas;
- Creation of false employment letters;
- Refusal/failure to place the Prosecuting Party in productive status; and
- Reneging on assurance to sponsor him for employment-based permanent resident status.

Prosecuting Party's Brief at 51-58. The Administrator found no retaliatory actions were taken against the Prosecuting Party. RX N. While all of the alleged adverse actions may be considered adverse on their face, the Prosecuting Party provides no credible evidence to show a retaliatory motive, and thus is unable to establish a nexus between the alleged adverse actions and the Prosecuting Party's protected activity. None of these actions are adverse based on the following findings:

- As a matter of law, I have found that no back wages are due after the Employer sent the Prosecuting Party his return flight to India, set to depart February 2009. *See* the discussion on back wages due, above. Accordingly, if no wages are due, failure to pay such wages cannot be an adverse action.
- There is no proof that the Employer "assigned" the Prosecuting Party to his return to India. While the Employer admits instructing the Prosecuting Party to return to India while new petition documents are filed, the Prosecuting Party has failed to establish the reason for doing so was connected in any way to his protected activity. I find it is more likely, as the Employer asserts, that it urged the Prosecuting Party to return to India as a way for him to avoid violating U.S. immigration laws.
- Regarding sending back-dated letters and falsifying employment documentation, I find the Prosecuting Party lacks sufficient proof. While the USCIS letter in evidence does contain a February 2009 date stamp, I cannot authenticate this date stamp, as the Prosecuting Party has only provided a .pdf copy of the document. *See* CX 14. Additionally, the Prosecuting Party asserts that the April 3, 2008 letter signed by Ms. Lalitha Reddy "is possibly deceitful." *See* Prosecuting Party's Brief at 54; CX 23. I have previously found that the Prosecuting Party is not credible in his competing assertions that he was available for work at separate H-1B employers at the same time. Consequently, I find the Prosecuting Party's assertions against Ms. Reddy's letter can be given no greater weight than involvement in a "he-said, she-said" exchange, at most. I therefore find that there is inadequate evidence to establish that the Employer created or falsified documents to strengthen its

case and thus such actions cannot be deemed “adverse” to the Prosecuting Party.

- Lastly, I find the Prosecuting Party has failed to establish that the Employer refused to place him on productive status and intentionally renege on its promise to support the Prosecuting Party for permanent resident status with a renewed petition. The Prosecuting Party has supplied the record with multiple e-mails from the Employer, into 2009, regarding potential projects that would place the Prosecuting Party in productive status. Additionally, after the alleged retaliation began in December 2008, the Employer filed a new petition for a green card for the Prosecuting Party in January 2009. These e-mails and this renewed petition fly in face of the Prosecuting Party’s argument. Accordingly, I find that these assertions have no merit.

Based on these determinations, I find the Prosecuting Party is unable to establish a *prima facie* case of retaliation by the Employer under the Act. Request for relief in conjunction with the alleged retaliation is therefore denied.

#### **4. Whether Any Violations Are Willful, Warranting Civil Penalties**

Finally, the Prosecuting Party asserts that the Employer’s failure to pay adequate wages is willful. Prosecuting Party’s Brief at 109-11. The Employer denies any willful wrongdoing. The Administrator found no evidence of willful violations on the Employer’s part. RX N. I agree with the Administrator: there is no evidence of record that supports the Prosecuting Party’s assertions that the Employer’s violation stemmed from anything more deviant than miscalculations. Consequently, I find that civil penalties in this case are not warranted.

### **III. CONCLUSION**

For the foregoing reasons, I affirm the Administrator’s determination that the Respondent, failed to pay \$6,976.00 in required wages to the Prosecuting Party in violation of 8 U.S.C. § 1182(n)(1)(A) and 20 C.F.R. § 655.731(c). Accordingly, I find the Respondent’s liability has been discharged by confirmation of payment from the Administrator, dated June 15, 2011. In addition, I affirm the Administrator’s determination that no other payment is due to the Prosecuting Party, based on his complaint.

### **ORDER**

The notice of determination of the Administrator dated May 31, 2011 is AFFIRMED.

**A**

**Ralph A. Romano**  
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-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

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

If no Petition is timely filed, then the administrative law judge’s decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).