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Issue Date: 04 August 2014

Case No.: 2012-LCA-00057

In the Matter of:

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

and

HELGA STEFANS INGVARSDOTTIR
Complainant

v.

**VICKRAM BEDI, PRESIDENT, and
DATALINK COMPUTER PRODUCTS, INC.**
Respondents

DECISION AND ORDER

Background

The above-captioned matter arises under the Immigration and Nationality Act H-1B visa program, 8 U.S.C. § 1101(a)(15)(H)(i)(B) (the “Act” or “INA”), and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I.¹

Procedural History

Helga Stefans Ingvarsdottir (“Complainant”) filed a complaint against her former employer, Datalink Computer Products, Inc. (“Datalink”) and its President, Vickram Bedi (jointly referred to as “Respondents”). On August 6, 2012, after an investigation, the Administrator, Wage and Hour Division (“Administrator” or “Prosecuting Party”), issued a Determination Letter, in which the Administrator found that Datalink and Vickram Bedi, individually, had failed to pay Complainant required wages, totaling \$237,066.06, in violation of

¹ Unless otherwise specified, the regulatory citations herein are to Title 20, Code of Federal Regulations.

20 C.F.R. §§ 655.731 and 655.805(a)(2). The Administrator did not impose any civil money penalties against the Respondents.

By letter dated August 17, 2012, Complainant filed a request for a hearing with the Office of Administrative Law Judges (“OALJ”). By letter dated August 18, 2012, Respondents separately filed a request for a hearing with the OALJ. The case was initially assigned to ALJ Ralph Romano on August 22, 2012 but reassigned to me in November 2012 due to ALJ Romano’s retirement.

By Notice of Hearing And Pre-Hearing Order issued November 16, 2012, I scheduled a hearing to be held on May 16, 2013, in New York, New York. Respondents submitted a request for postponement of the scheduled hearing until September 2013 to which Complainant objected. By Notice Rescheduling Hearing And Pre-Hearing Order issued April 10, 2013, I did reschedule the hearing but denied Respondents’ request to reschedule the hearing for September 2013, instead rescheduling the hearing for July 25, 2013.

I conducted the hearing on July 25, 2013 and September 17, 2013 in New York, New York. At the hearing, sworn testimony was taken from four witnesses: Alex F. Linden, Edward Ritz, Complainant, Helga Stefans Ingvarsdottir, and Respondent, Vickram Bedi.² I also admitted the following into evidence: Administrator’s Exhibits (“AX”) 1 through 10; Complainant’s Exhibits (“CX”) 1 through 26.³ Respondents did not offer any exhibits into evidence. (July HT at 6). The transcript for each day of the hearing will be referred to as “July HT” and “Sept HT.” Each party timely submitted a post-hearing brief. This Decision and Order is based upon the evidence of record, the arguments of the parties, and an analysis of law.

Statutory and Regulatory Framework

The Act’s H-1B visa program permits American employers to temporarily employ non-immigrant aliens to perform specialized occupations in the United States.⁴ 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”) 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) [i]s 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

² Vickram Bedi testified telephonically from prison in upstate New York on September 17, 2013.

³ CX 27 was identified on the record, but not received into evidence. (Sept HT at 31).

⁴ “Specialized occupation” is defined within the Act as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor degree or higher. 8 U.S.C. § 1184(i)(1).

- (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.

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 Immigration and Naturalization Service of the United States (“INS”) identifies and defines the jobs 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 an LCA with DOL, and certification of the application is required before INS approves the visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); *see also* 20 C.F.R. Part 655, Subparts H and 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 INS 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. 20 C.F.R. § 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 INS that is has terminated the employment relationship so that the INS may revoke approval of the H-1B visa. 8 C.F.R. § 214.2(h)(11). Employers must notify INS 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); 8 C.F.R. § 214.2(h)(4)(iii)(E).

The regulations specify how the H-1B worker must be paid. Under 20 C.F.R. § 655.731(c)(1), an employer must pay wages to the H-1B worker “cash in hand, free and clear, when due.” The regulations further specify that H-1B workers must be paid no less often than monthly. 20 C.F.R. § 655.731(c)(4). In terms of compensable hours, the regulations require an employer to pay the H-1B worker for the number of hours listed on the LCA, even if the H-1B worker is non-productive.

If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer . . . the employer is required to pay the salaried employee the full pro-rata amount due . . . at the required wage for the occupation listed on the LCA. If the employer's LCA carries a designation of "part-time employment," the employer is required to pay the nonproductive employee for at least the number of hours indicated on the I-129 petition filed by the employer with the DHS and incorporated by reference on the LCA . . .

20 C.F.R. § 655.731(c)(7)(i).

However, if the H-1B worker voluntarily becomes non-productive, then the employer is not required to pay wages. The regulations continue:

If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience . . . then the employer shall not be obligated to pay the required wage rate during that period . . . Payment need not be made if there has been a *bona fide* termination of the employment relationship. DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled [citation omitted] and require the employer to provide the employee with payment for transportation home under certain circumstances.

20 C.F.R. § 655.731(c)(7)(ii).

Contentions of the Parties

The Administrator

The Administrator as Prosecuting Party contends that Respondents owe back wages in the amount of \$285,858.27 to one H-1B non-immigrant Helga Stefans Ingvarsdottir because Respondents failed to pay such wages in violation of 8 U.S.C. § 1182(n)(1)(A) and 20 C.F.R. § 655.731(c).⁵ Further, the Administrator argues that Respondent Vickram Bedi is individually liable for violations under the Act because he is no more than an 'alter ego' for Datalink. Finally, the Administrator asserts Complainant is entitled to both prejudgment and post-judgment interest on any back wages found due.

⁵ The August 6, 2012 determination letter from the Administrator included an assessment of back wages in the amount of \$237,066.06, but the Administrator recalculated those back wages based on the evidence produced at the hearing. See Administrator's Post-Hearing Brief at 15 and Supplemental AX 6a, attached.

The Complainant

Complainant contends that Respondents are liable for the full amount of wages which she calculates as \$373,228.90 for the entire H-1B periods at issue because they failed to maintain payroll records as required under 655.731(c)(2)(i) – (iv). Complainant also contends Respondents are not entitled to credit for her absence while in Iceland during the H-1B periods at issue when, as she maintains, she was fleeing abuse or when she was incarcerated. Complainant further contends Respondents are liable for interest due on any unpaid back wages found to be due. Finally, Complainant argues that applicable New York state law supports a determination that the corporate veil should be pierced, allowing Mr. Bedi to be personally liable for any back wages due her under the INA.

The Respondents

Respondents argue that Complainant received compensation in cash and housing which exceeded the terms of the H-1B visa. Respondents also argue that work was available at Datalink after Complainant's release from incarceration in December 2010. Finally, Respondents maintain that Mr. Bedi should not be deemed personally liable if any back wages are due.

Issues presented

The issues presented in this case for resolution are as follows:

1. Whether Datalink is liable for unpaid back wages to one H-1B non-immigrant, i.e., Complainant, in violation of 8 U.S.C. § 1182(n)(1)(A) and 20 C.F.R. § 655.731(c)?
2. Whether Vickram Bedi should be held individually liable for Datalink's violations of the Act?
3. If Datalink is found liable for back wages, how should those back wages be calculated?
4. Whether should Claimant also recover pre- and post-judgment interest on any back wages found due?

Summary of Evidence

Witness testimony

Alex F. Linden (July HT at 11 – 39)

Mr. Linden is a certified public accountant (“CPA”). (July HT at 12). He has been Complainant’s CPA since February or March of 2011. *Id.* He was qualified as an expert witness and examined the foregoing tax records. (September HT at 28 lines 3-8). He testified that the wages and withholding reflected in the Forms W-2 issued by Respondents did not comport with the documentation obtained from the IRS or the State of New York regarding Complainant’s reported wages. (July HT at 31, 37). In his professional opinion, the wages and withholding reflected in the Forms W-2 issued by Respondents had not been reported to the IRS or the State of New York. (July HT at 36-7).

On cross-examination, Mr. Linden acknowledged that he prepared Complainant’s 2011 tax return, but that he did not review Complainant’s tax returns for 2005, 2006, 2007, 2008, and 2009 and had no knowledge of whether such returns were filed. (July HT at 35). On further cross-examination, Mr. Linden conceded that he could not determine whether or not wages were actually paid to Complainant based on his review of the W-2 Form, IRS Wage and Income Transcripts, and NYS Department of Taxation and Finance documentation of record. (July HT at 38).

Edward Ritz (July HT at 48 – 61)

Mr. Ritz has been employed with DOL Wage and Hour Division (“WHD”) as an investigator for 39 years; he was responsible for conducting an H-1B investigation involving Respondents. (July HT at 48). He did not receive materials requested from Respondents. (July HT at 49). Complainant did provide materials requested including an LCA and the I-797A, Notice of Action or approval notice. (July HT at 53; AX-4, AX-5). Mr. Ritz also reviewed checks payable to Complainant from Datalink which were obtained from the Westchester County District Attorney’s office. (July HT at 55; AX-9).

Mr. Ritz concluded that Respondents committed a violation of the H-1B regulations, i.e., failed to pay required wages. (July HT at 56). His initial computation of the unpaid back wages in the amount of \$237,066.06 was based on the prevailing wage amount referenced on the LCA corresponding with the employment period, offset by the total of checks from Respondent Datalink paid to Complainant and the 41-day period of Complainant’s incarceration when she was available for work. (July HT at 58-60; AX-6). As for crediting Mr. Ritz’s computation was noted in the letter of determination dated August 6, 2012 from DOL WHD to Respondent Vickram Bedi as President, Datalink stating that Datalink and Mr. Bedi individually committed the violation of the H-1B regulations. (AX-1). Mr. Ritz noted that he use the prevailing wage amount to compute unpaid back wages because it was unclear whether any other actual wage rate was established: if it were shown Complainant were receiving some other perhaps higher

rate, that “rate would become an actual rate which would be enforceable as the actual rate under the H-1B provisions[.]”⁶ (July HT at 57-8).

On cross-examination, Mr. Ritz acknowledged that he did not confirm with the IRS that wages were reported or taxes withheld as denoted on the W-2 Forms (Wage and Tax Statement) for Complainant or the Payroll Report to the NYS Insurance Fund which he reviewed. (July HT at 60-61; AX-7; AX-9).

Complainant (July HT at 63 – 110)

Complainant began working with Datalink end of 1999 or beginning of 2000; she was hired by Mr. Bedi, President and Owner of Datalink – a computer sales and services company. (July HT at 65). Mr. Bedi served as Complainant’s only supervisor. *Id.* As for her work schedule, Complainant averred that she “would work whatever hours Vickram Bedi worked,” varying from 9:00 or 10:00 a.m. until midnight, 1:00 a.m. or 2:00 a.m., six to seven days per week. (July HT at 67). She answered negatively when asked on direct examination if she were paid for all the weeks she worked for Datalink while she was on your H-1B visa. (July HT at 68). However, when further asked about the checks of record, Complainant testified that those “checks that were written from the Datalink account but [were] received from Vickram Bedi.” (July HT at 69).

Complainant confirmed that her H-1B visa extension expired in May 2011; she maintained that she never received notice her employment with Datalink was terminated prior to the expiration of that visa. (July HT at 69). She also confirmed that, in 2010, she was arrested and incarcerated for 41 days. *Id.*

Complainant received a credit card from Respondents which she used for groceries, dry cleaning and other “miscellaneous bills,” but maintained that she “paid those balances from my own account.” (July HT at 71). She lived at the home of Mr. Bedi from the summer of 2000 until her arrest in November 2010. (July HT at 72).

As for the W-2 Forms of record for 2006, 2007, 2008 and 2009, Complainant stated that she did not see them until she retrieved her property from the Harrison Police Department. (July HT at 75). She received six checks from Datalink or Mr. Bedi each in the amount of \$460 in 2006; six checks each in the amount of \$5,000 and one in the amount of \$500 in 2009. (July HT at 76-7; CX 9 at 44, 63). For those checks she received in 2009, Complainant testified as follows:

⁶ Include with the Administrator’s closing brief are revised back wage computations designate as a supplemental exhibit, i.e., AX 6a. Based on evidence adduced at the hearing, the Administrator contends Respondents are only entitled to credit only for those checks of record made payable to Complainant in 2006 and 2009 – the years for which IRS records proffered by Complainant show that federal wage tax withholding – and not for all the checks made payable to Complainant from Respondent Datalink of record. Administrator’s Post-Hearing Brief at 12; *see also* CX 5. The Administrator now argues that a total of \$285,858.27 is due Complainant for the period from May 20, 2005 through May 15, 2011. Administrator’s Post-Hearing Brief at 15, AX-6a

These checks were pass-through payment Seashell Realty as a dividend payment because Vickram Bedi told [her] that [she was] not allowed to receive payment from any other entity as an H-1B holder, other than Datalink, so [Mr. Bedi] would direct [her] to write a check from Seashell Realty to Datalink so that he could then, in turn, write [her] a check from Datalink so that [she] would be able to get [her] dividend payment from Seashell. (July HT at 77-8).

On cross-examination, Complainant acknowledged that, while she did not file a tax return for 2007, she did earn income for that year; she averred that Ed Haben, the accountant for Respondents “filed [her] taxes.” (July HT at 80, 89). Complainant believed she earned income in 2010, but averred that she did not work in 2011. (July HT at 89-90). She maintained a storage space beginning in the summer of 2000 for which Mr. Bedi eventually paid the rental fee. (July HT at 93). She was unable to pay the storage rental fee because she was not paid by Datalink. (July HT at 94).

Complainant returned to Iceland for three days in 2006, for six weeks in 2008 and for “[a] little less than a month” in 2010. (July HT at 95-6). She acknowledged receiving money “on rare occasion” from Mr. Bedi, but such money was “for the maid or groceries.” (July HT at 96).

In response to questions from her counsel, Complainant averred that she used money she received from Roger Davidson to pay for maid services and groceries.⁷ (July HT at 104-105).

Complainant was arrested on November 4, 2010 and charged with grand larceny in the first degree. (July HT at 101). On cross-examination, Complainant acknowledged that she was convicted of grand larceny in the second degree based on her plea and she is appealing that conviction.⁸ (July HT at 102-103).

Vickram Bedi (Sept HT at 6 – 26)

According to Mr. Bedi, Datalink builds custom computers, as well as serves as a dealer and servicer for Apple Computers, in addition to data backup security services. (Sept HT at 9). He served as President of Datalink from 1995 until 2010 when he began his current incarceration. *Id.* He acknowledged assisting Complainant in obtaining a visa so Complainant could work for Datalink. (Sept HT at 10). He thought Complainant’s “prevailing pay rate at the time was somewhere around 60 [60,000]” or “between 55 and 60” and she was to be paid every week or every two weeks, but that wasn’t formalized.” *Id.*

⁷ Roger Davidson was identified by both Complainant and Mr. Bedi as “a customer in the store” or a Datalink customer who gave Complainant money in February 2006; Complainant gave conflicting hearing testimony as to whether she was made a ten-percent shareholder in Seashell Realty, LLC by Roger Davidson. (July HT at 78; 91; 100-101; Sept HT at 13).

⁸ Roger Davidson was further identified by Complainant and Mr. Bedi as the victim of the grand larceny to which Complainant and Mr. Bedi pled guilty. (July HT at 103; Sept HT at 23-24).

Mr. Bedi averred that Complainant was paid by both cash and check. (Sept HT at 11). When asked how Complainant was paid, Mr. Bedi also offered the following:

She basically had no rent, all her expenses were paid, but from the get-go, she wasn't coming to work.

Well there's a motion that she has filed in court, so she was taking money from me that I didn't know about which she had mentioned in her motion. And I don't know if that been submitted into evidence from her...motion that she filed to take her plea back, but she was getting 1,200 a week from just in cash to conduct expenses, and also she had her company car which she was driving, which was a Range Rover, which was solely for her. And she was going wherever she wanted in it. Plus, I paid debt back for her, including her apartment rent. I was paying her storage, and she was getting checks also, and she wasn't coming to work. (Sept HT at 11-12)

Mr. Bedi maintained that he paid Complainant \$1,200 per week in cash which "was supposed to part of her salary, but it wasn't recorded." (Sept HT at 12). He averred that "occasionally" there were receipts for these salary payments. *Id.*

Mr. Bedi averred that Complainant went to Iceland in 2008 for six or seven weeks and that he told her not to come back to work in 2008, but he maintained that he continued to pay Complainant at Mr. Davidson's insistence until his arrest on November 4, 2010. (Sept HT at 14-16).

Mr. Bedi offered contradictory testimony about the termination of Complainant's employment with Datalink. Initially, when asked on direct examination if he terminated Complainant's service, he stated that "[w]e attempted to," in 2008 and 2009, but Mr. Davidson objected. (Sept HT at 12-13; 16). He also testified that he told Complainant not to return to work in 2008 and that Complainant "was no longer serving any function after [2008]." (Sept HT at 14).

Mr. Bedi averred that Complainant's job functions included securing computers and building websites, but that Complainant was unable to perform those functions; as for Complainant's work schedule at Datalink, Mr. Bedi stated that Complainant "was supposed to be there from 9 to 5 and she wasn't coming." (Sept HT at 15).

On cross-examination, Mr. Bedi recalled that he represented on the LCA for Complainant that Complainant was to perform in a computer-related position at Datalink. (Sept HT at 19). He maintained that there were records of his cash payments to Complainant, but those records, used as evidence by a District Attorney, were incomplete and "haphazard" when returned. (Sept HT at 19-20). Mr. Bedi could not assert whether income taxes were deducted from the cash payments given to Complainant and he did not know if the amounts he paid for Complainant's rent or storage were reported to the IRS as wages. (Sept HT at 20).

He also acknowledged on cross-examination that Datalink never notified United States Citizenship and Immigration Service that Complainant's H-1B should be canceled. (Sept HT at 21). He maintained that the offer to Complainant for a return ticket to Iceland "was standing from 2006 on." (Sept HT at 21-22). Mr. Bedi further acknowledged that an order of protection had been issued protecting Complainant from him. (Sept HT at 24).

Documentary evidence

Complainant

The following exhibits were received into evidence:

- CX 1 – H-1B Approval Notice authorizing Complainant's employment by Respondent Datalink, valid from 5/20/2005 to 5/15/2008
- CX 2 – Certified Form ETA 9035E, Labor Condition Application (LCA)
- CX 3 – H-1B Approval Notice authorizing Complainant's employment by Respondent Datalink, valid from 5/16/2008 to 5/15/2011
- CX 4 – Certified Form ETA 9035E, LCA
- CX 5 – July 16, 2013 letter from Internal Revenue Service (IRS) regarding the record of federal tax withholding from wages for Complainant
- CX 6 - April 1, 2013 letter from the Wage Reporting Unit of the New York State Department of Taxation and Finance regarding the record of state tax withholding from wages for Complainant
- CX 7 – Complainant's W-2 Forms for tax years 2006 to 2009
- CX 8 – IRS Form 941 records for 2005 and 2006
- CX 9 – Datalink capital transaction list by vendor, January to December 2006
- CX 10 – Datalink capital transaction by account as of December 31, 2009
- CX 11 – Check issued to Complainant in amount of \$460 by Respondents in February 2006
- CX 12 – Respondent's application for compensation and employer's liability insurance in New York State
- CX 13 – letter from NYS Insurance Fund dated July 27, 2007
- CX 14 – Workers' Compensation Employer Inquiry Notice to Respondent dated May 15, 2007
- CX 15 – Respondent's response to penalty assessed by the NYS Workers' Compensation Board for failure to secure disability insurance for the period from June 15, 1997 to April 13, 2007
- CX 16 – Schedule K-1 Forms for 2006, 2007 and 2008 showing shareholder's share of income for Respondent Datalink
- CX 17 – Form I-918, U-Visa (non-immigrant status) certification for Complainant
- CX 18 - Letter to Complainant's counsel from Westchester County District Attorney's office dated April 26, 2013 regarding Mr. Bedi's parole board appearance

- CX 19 – orders of protection issued against Mr. Bedi for the protection of Complainant and others
- CX 20 – polygraph report of Complainant’s examination on April 18, 2012
- CX 21 – Uniform Sentence and Commitment of Respondent Datalink
- CX 22 – Uniform Sentence and Commitment of Mr. Bedi
- CX 23 – Administrator’s First Request for Production of Documents served on Respondent Datalink on February 13, 2013
- CX 24 – Respondent Datalink’s response to Administrator’s First Request for Production of Documents dated April 2, 2013
- CX 25 – Respondent Datalink’s request for a hearing dated August 18, 2012
- CX 26 – professional qualifications of Alex F. Linden, CPA, from the website of Silverman Linden LLP

Administrator

The following exhibits were received into evidence:

- AX 1 – Administrator’s determination letter dated August 6, 2012
- AX 2 – Labor Condition Application (“LCA”) for H-1B Nonimmigrant Visa Program (Form ETA 9035E) for the period from 3/9/05 to 3/9/08 signed by Mr. Bedi
- AX 3 – Notice of Action (Form I-797A) from INS approving Respondent Datalink’s H-1B visa application for Complainant to be valid from 5/20/05 to 5/15/08
- AX 4 - LCA for H-1B Nonimmigrant Visa Program (Form ETA 9035E) signed by Mr. Bedi for the period from 5/16/08 to 5/15/11
- AX 5 – Notice of Action (Form I-797A) from INS approving Respondent Datalink’s H-1B visa application for Complainant to be valid from 5/16/08 to 5/15/11
- AX 6 – WHD investigator’s wage calculations for Complainant, including a list of checks payable to Complainant and Complainant’s incarceration
- AX 7 – Form W-2 Wage and Tax Statements dated 2006, 2007, 2008 and 2009, listing Complainant as employee and Respondent Datalink as employer
- AX 8 – Copies of checks payable to Complainant from Respondent Datalink
- AX 9 – NYS Insurance Fund Payroll Report covering the period from 8/1/08 to 8/1/09
- AX 10 – Letter dated April 2, 2013 from Ms. Chhaya Bedi to Administrator’s counsel responding to Administrator’s request for production of documents

Findings and Analysis

Respondent Datalink is a corporation that is engaged in the business of computer sales and service in Mount Kisco, New York. (July HT at 65, Sept HT at 90). Respondent Vickram Bedi has been the President of Datalink since 1995 and is the company’s sole shareholder. (July HT at 65, Sept HT at 9; CX-14 at 88; CX-16). Complainant is a native of Iceland. (AX-3).

On March 1, 2005, Mr. Bedi, as President and on behalf of Datalink, signed a Labor Condition Application or LCA declaring under penalty of perjury that Datalink would pay one H-1B nonimmigrant, identified as Complainant, the higher of the “prevailing wage” or the “actual wage.” (AX-2). The prevailing wage indicated on the LCA was \$61,152 per year for the job title “Account Executive.” (AX-2). The LCA was certified by DOL. (AX-2). Datalink petitioned for and received approval for an H-1B visa for the Complainant that was valid from May 20, 2005 through May 15, 2008. (Sept HT at 9-10; AX-3).

On May 8, 2008, Mr. Bedi, as President on behalf of Datalink, signed a second LCA again declaring under penalty of perjury that Datalink would pay one H-1B nonimmigrant, i.e., Complainant, the higher of the “prevailing wage” or the “actual wage.” (AX-4). The prevailing wage indicated on the second LCA was \$59,717 per year for the job title “International Account Executive.” (AX-4). The second LCA was also certified by DOL. (AX-4). Datalink petitioned for and received approval for the extension of Complainant’s H-1B visa that was valid from May 16, 2008 through May 15, 2011. (AX-5).

Official records indicate that no payroll taxes were paid to the Internal Revenue Service (“IRS”) by Datalink for Complainant in 2005, 2007, 2008, 2010 and 2011. (July HT at 17-20; CX-5 at 12, 14, 15, 17, 18). Specifically, the record includes a July 16, 2013 letter from the IRS which, together with the attached IRS Wage and Income Transcripts, shows that the IRS has no record of federal tax withholding for Complainant by any employer for the years 2005, 2007, 2008, 2009, 2010, and 2011; the July 16, 2013 IRS letter does confirm federal tax withholding for the years 2006 and 2009. CX 5 at 11.

The record also includes an April 1, 2013 letter from the New York State (“NYS”) Department of Taxation and Finance, which states that the “GROSS WAGES” and “TAX WITHHELD” by employers for Complainant covering the years 2005, 2007, 2008, 2009, 2010, and 2011 was \$0.00, and that for the year 2006 the “GROSS WAGES” were \$68,000.00 and “TAX WITHHELD” was \$4,000.00. CX 6.

Notwithstanding the documentation from the IRS and NYS about the lack of withheld payroll taxes, there are “Form W-2 Wage and Tax Statements” (“W-2 Forms”) of record showing federal and/or state wage withholding for the years 2006, 2007, 2008, and 2009. CX 7. Those W-2 Forms indicate Complainant’s wages for 2006, 2007, 2008 and 2009 as \$68,000, \$60,000, \$66,000, and \$66,000, respectively.

Datalink is liable for back wages under the Act

The Act unequivocally requires the employer to pay an H-1B employee the greater of the prevailing wage or the actual wage that it pays to other workers of like qualifications who are working in the same position as the H-1B nonimmigrant. 8 U.S.C. § 1182(n)(1)(A)(i). The regulations provide that “[t]he required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9)9 of this section may reduce the cash wage below the level of the required wage”. 20 C.F.R.

§ 655.731(c)(1). In addition, the regulations state that “cash wages paid” must be shown in the employer’s payroll records as earnings and disbursed to the employee, cash in hand, and must be reported to the IRS as employee’s earnings, with appropriate tax withholdings. 20 C.F.R. § 655.731(c)(2)(i) and (ii).

The record shows Respondents failed to pay the Complainant her required wages during her entire six-year H-1B employment, in violation of 8 U.S.C. § 1182(n)(i)(A) and 20 C.F.R. § 655.731(c). *See also* 20 C.F.R. § 655.805(a)(2). Section 655.731(a) provides that the required wage rate is the higher of the prevailing wage rate or the actual wage. Actual wage is defined in the regulations as “the wage rate paid by the employer to all individuals with experience and qualifications similar to the H-1B non-immigrant’s experience and qualifications for the specific employment in question at the place of employment.” 20 C.F.R. § 655.715. Section 655.731(a)(1) further states that “where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B non-immigrant by the employer.” One of the criteria necessary for satisfaction of the wage requirement is that payment must be shown in the employer’s payroll records as earnings for the employee and disbursed to the employee, cash in hand, free and clear, when due. 20 C.F.R. § 655.731(c)(2)(i).

Either during the WHD investigation or at the hearing, Respondents failed to produce any payroll records for Complainant to show that they paid her required wages during those six years. (AX-10). According to Complainant, she worked fulltime hours performing tasks such as working directly with customers regarding computer sales or services, performing administrative work and going on service calls with Mr. Bedi. (July HT at 65,67). Mr. Bedi however averred that Complainant’s work schedule was erratic and that Complainant stopped coming to work in September 2008. (Sept HT at 16).

During the investigation, the Administrator received from the Westchester County District Attorney’s office copies of checks that were given to Complainant by Mr. Bedi during the course of her H-1B employment with Datalink. (July HT at 54-55, 69; AX-8). The checks issued in 2006 included the memo notation of “Adm Salary.” *See* CX 9 at 44. There were also checks from Datalink paid to Complainant in 2009. CX 9 at 63. In computing back wages owed, the Administrator originally gave Respondents credit for all the checks received. (July HT at 59; AX-7). However, based upon the evidence introduced at the hearing by the Complainant, it is now the position of the Administrator that Respondents are only entitled to credit for the checks from 2006 and 2009 because those are the years for which the IRS has confirmed withholdings. (July HT at 17, 19-20; CX-5 and CX-6; Administrator’s Post-Hearing Brief at 12).

Pursuant to 20 C.F.R. § 655.731(c)(2):

“Cash wages paid,” for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:

- (i) Payments shown in the employer’s payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;

- (ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, *et seq.*);
- (iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, *et seq.* (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid *except that* when the H-1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (*i.e.*, an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.
- (iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

It is clear from the IRS records introduced by the Complainant that no payroll taxes or required deductions were taken in years 2005, 2007, 2008, and 2010. (July HT at 17-20; CX-5 and CX-6). Those IRS records show that, in 2006, \$68,000 was reported as wages for Complainant as "employee" and Respondent Datalink as "employer"; in 2009, \$66,000 was reported as wages for Complainant as "employee" and Respondent Datalink as "employer". CX 5 at 13; 16. Either during the WHD investigation or at hearing, Respondents produced no formal payroll records for the Complainant. AX-10 However, I will give significant credit to the IRS and NYS tax records which Complainant herself has presented in determining what wages were paid during the relevant periods: I find that those records are much more reliable than the inconsistent testimony of Complainant and Respondents offered at hearing.

I find Complainant a less than credible witness because her hearing testimony was inconsistent. Her testimony varied about the frequency with which she received money from Mr. Bedi on direct and cross-examination. On direct examination by the Administrator, Complainant initially stated she was never paid by Respondents, but later acknowledged that she received checks as payment from Mr. Bedi. (July HT at 69). She answered affirmatively when asked by her attorney if she ever had a credit card from Datalink and Mr. Bedi, but testified that she, and not Respondents, paid the balances on those cards from her own account. (July HT at 71). On cross-examination, she initially stated she was given money on rare occasions to pay for household expenses such as groceries or cleaning, but then in response to my questioning she indicated that she shopped for groceries weekly on Sunday and that housekeeping occurred three times per week in 2006. (July HT at 97). She testified that Roger Davidson made her a ten percent shareholder in Seashell Realty, (July HT at 78). Then when asked later if she were a ten percent owner of Seashell Realty, she answered negatively. (July HT at 91).

I also find Mr. Bedi to be less than credible as well. He offered contradictory testimony about the termination of Complainant's employment with Datalink. Initially, when asked on direct examination if he terminated Complainant's service, he stated that "[w]e attempted to," in 2008 and 2009, but Mr. Davidson objected. (Sept HT at 12-13; 16). He then testified that he told Complainant not to return to work in 2008 and that Complainant "was no longer serving any function after [2008]." (Sept HT at 14).

The testimony of both Complainant and Mr. Bedi lack trustworthiness. Both have pled guilty to the criminal charges of larceny the victim of which was a customer of Respondent Datalink. Those criminal convictions, in conjunction with their inconsistent testimony at hearing regarding material factual issues, greatly undermine their credibility regarding the payment of wages during the relevant period. Therefore, I will place great evidentiary weight on the documentary evidence of record from the IRS and NYS regarding wages paid.

I agree with the Administrator that the checks payable to Complainant from 2005, 2007, 2008 and 2010 obtained from Respondents during the WHD investigation do not qualify as "wages paid" under the regulations: there is no evidence of record to support that they were reported to the IRS. *Administrator v. The Lambents Group, et al.*, ARB No. 10-066, slip op. at 8 (November 30, 2011); *Administrator v. Pegasus Consulting Group, Inc.*, ARB Nos. 03-032, 03-033, slip op. at 10 (June 30, 2005).

Complainant argues that (1) wages and withheld taxes were only reported to both the IRS and NYS for 2006 and (2) Respondents' financial information of record shows that six checks each in the amount of \$460.00 for a total of \$2,760 were issued as payable to Complainant in 2006. Moreover, Complainant contends that there has been no evidence presented that the requisite deductions were made from that \$2,760.

Complainant's expert witness, Mr. Linden, averred that the wages and withholding reflected in the Respondent-generated W-2 Forms of record had not been reported to the IRS or NYS; he noted that those W-2 Forms are inconsistent with the correspondence from IRS and NYS State Department of Taxation and Finance about the wage and withholding information reported to those taxing authorities. (Sept HT at 28). For example, there are W-2 Forms for Complainant as employee with Respondent Datalink as employer showing wages and withholdings for 2007 and 2008. However, the IRS confirmed that its Wage and Income Transcripts for those years show no wages or taxes withheld for Complainant. CX 5 at 11; 14-15; CX 7. Moreover, WHD Investigator Ritz testified that he did not verify the wages and taxes shown in the W-2 Forms. (July HT at 60-61). Thus it appears that the information on W-2 Forms of record is not reliable and therefore the information from the IRS regarding wages and withholdings of record appears to be based on information derived from those W-2 Forms. CX 5 at 11.

Because both the IRS and the NYS State Department of Taxation and Finance confirmed possession of wage and withholding information for Complainant in 2006, I will give Respondents credit for the checks made payable to Complainant in that year. I agree with Complainant that Respondents are not entitled to such credit for the checks made payable to

Complainant in 2009 because there is no confirmation from either federal or state taxing authorities that wages or withholdings were reported to NYS for Complainant that year.⁹

Respondents contend that credit should be given for non-cash remuneration provided to Complainant in the form of housing, transportation, and debt payment, etc. Assuming the testimony of Mr. Bedi truthful about his payment of Complainant's storage unit fees and his provision of housing to Complainant during the visa period at issue, Respondents would still have failed to present sufficient evidence showing such payments or housing constituted an "authorized deduction" from Complainant's wages under the Act. Pursuant to 20 C.F.R. § 655.731(c)(9)(iii), "authorized deduction" means a deduction from wages that meets all of the following five criteria:

- (A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);
- (B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this "benefit of employee" standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (*e.g.*, employee living at worksite in "on call" status));
- (C) Is not a recoupment of the employer's business expense (*e.g.*, tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (*e.g.*, preparation and filing of LCA and H-1B petition)). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.);
- (D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D):The employer must document the cost and value); and
- (E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under

⁹ As Complainant argues in her Post-Hearing Brief, to credit Respondents for any payments to Complainant in 2009 as the Administrator has argued in its Post-Hearing Brief would violate the applicable regulations. Complainant's Post-Hearing Brief at 10, fn 4; *see* 20 C.F.R. § 655.731(c)(2)(iv) (to be deemed 'case wages paid' in satisfaction of the required wage obligation under the Act must be "payments reported and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all appropriate Federal, State and local governments in accordance with any other applicable law.").

which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek.

The ARB has held that a deduction would not be appropriate unless the employer has met the conditions set forth under all five clauses outlined in the above-cited regulation. *Yano Enterprises, Inc. v. Administrator*, ARB Case No. 01-050, slip op. at 5 (September 26, 2001).

I am unpersuaded by Respondents' argument that it should be absolved of any liability under the Act because Respondents paid Complainant wages which exceeded the terms of her H-1B visas at issue in both cash and "in kind" in the form of housing, debt payment, etc. Respondents have failed to meet any of applicable conditions and are therefore not entitled to any credits. There was no "voluntary, written authorization by the employee." 20 C.F.R. §655.731(c)(9)(iii)(A). Respondents present no evidence of any such authorization by Complainant. Also, Respondents failed to establish the fair market value of the housing they claim to have provided Complainant; Respondents also failed to provide any records establishing the amounts claimed as payment for Claimant's storage unit. 20 C.F.R. § 655.73 1(c)(9)(iii)(D).

The Complainant testified that prior to its expiration on May 15, 2011, her H-1B visa was never canceled by Datalink. (July HT at 69; AX-5). She further testified that she was never offered airfare back to Iceland by anyone from Datalink. (July HT at 108). Mr. Bedi averred that he never terminated the Complainant's H-1B employment. (Sept HT at 12, 16-17).

Under § 655.731(c)(7), the employer is required to pay the employee the full pro-rata amount due at the required wage. The employer's obligation to pay ends only when an employer has made a *bona fide* termination of the H-1B employee's employment. *See* 8 C.F.R. § 214.2(h)(ii)(1)(A). The Administrative Review Board ("ARB") has held that in order to make a *bona fide* termination of an H-1B employee, the employer must: (1) notify the worker of the employment termination; (2) notify Department of Homeland Security ("DHS") authorities so that its petition for a non-immigrant worker can be canceled; and (3) pay for the worker's transportation home. *Limanseto v. Ganze & Co.*, ARB No. 11-068, slip op. at 7 (June 6, 2013); *Administrator v. University of Miami*, ARB Nos. 10-090, 10-093, slip op. at 8-9 (December 20, 2011); *Mao v. Nasser Engineering & Computing Services*, ARB No. 06-121, slip op. at 7-8 (November 26, 2008).

The preponderant evidence supports finding that Respondents did not cancel Complainant's H-1B visas. (July HT at 69, Sept HT at 12, 16-17). At best, Mr. Bedi gave conflicting testimony about whether he gave Complainant notification that her employment was terminated; he conceded that no notification was given to DHS for it to cancel Respondents' petition for a non-immigrant worker. Complainant averred that she was never given notice of termination or offered airfare back to Iceland. (July HT at 108). Mr. Bedi's testimony that there existed a 'standing offer' to Complainant of a return ticket to Iceland is insufficient to show that an actual payment or offer of payment for Complainant's transportation home to Iceland was made. Therefore, I find no *bona fide* termination was effected in the instant matter. Therefore, Respondents were obligated to pay Complainant required wages from the beginning of her H-1B employment on May 20, 2005 until her H-1B visa expired on May 15, 2011, except for those

periods when Complainant was in a non-productive status due to conditions unrelated to employment which took her away from her duties.

Respondents are entitled to credit when Complainant was unavailable for work

Complainant contends Respondents should not be given credit for the periods of Complainant's trips to Iceland and of Complainant's incarceration. She testified that she returned to Iceland for an unspecified period in 2004 to see an oncologist; in 2006 for three days to attend to her ailing grandmother; and in 2008 for six weeks. (July HT at 95-96). Complainant maintains that she fled to Iceland for those six weeks in order to flee domestic abuse inflicted on her by Respondent Mr. Bedi and therefore, her nonproductive status for those weeks was employer-induced. She also acknowledged that she was in custody after her arrest in 2010 for 41 days. (July HT at 69). Complainant argues, however, that her non-productive status during her incarceration was also employer-induced and should not be deducted from any back wages found to be owed her in this matter. She maintained that she did not return to work for Datalink after her incarceration ended in December 2010 because she "had finally gotten free" from Respondent. (July HT at 105-106).

I note that "[i]f an H-1B nonimmigrant employee "experiences a period of nonproductive status due to conditions unrelated to employment which take [that employee] away from his/her duties," an employer is generally not required to pay wages if the employee is in that nonproductive status due to her "voluntary request or convenience," for e.g., touring the U.S., or caring for a sick relative, or due to conditions which render the H-1B nonimmigrant employee unable to work, such as for e.g., maternity leave or incapacity due to an automobile accident. 20 C.F.R. § 655.731(c)(7)(ii).

The Complainant testified that she was unavailable to work for six weeks in 2008, one month in 2010, and the period she was incarcerated from November 4 through December 14, 2010 (i.e. 41 days). (July HT at 69, 95-96).

Clearly, the period of time Complainant was in Iceland to attend to her grandmother in 2006 falls directly within the regulatory description of circumstances where wages need not be paid to the H-1B nonimmigrant employee.

In support of her assertion that she was a victim of domestic abuse, Complainant cites orders of protection issued against Respondent Bedi by the Westchester County Court covering the period from February 28, 2011 to March 5, 2025, as well as certification she received from the Westchester County District Attorney's office dated May 2, 2011 as part of her application for a "U-visa."¹⁰ CX 17; CX 19.

I note the U-visa certification describes Complainant's "prolonged and continuous abuse" as "the criminal activity being investigated and/or prosecuted." CX 17 (at 100). I find that this certification required as part of a visa application does not constitute any final adjudication or

¹⁰ A U Visa provides victims of certain crimes, such as domestic violence, temporary legal status and work eligibility in the United States. See www.uscis.gov.

determination on the part of any tribunal as to whether domestic abuse occurred. Moreover, the orders of protection of record do not encompass the period of time when Complainant traveled to Iceland in 2008 when she stayed there for six weeks. Finally, I find Complainant's incarceration as a result of her arrest on criminal charges to which she eventually pled guilty cannot reasonably be attributed to Respondents, notwithstanding Respondents' own related criminal activity. The preponderant evidence supports finding Complainant's non-productive status in 2008 and 2010 was voluntary or due to conditions which rendered Complainant unable to work. Therefore, Respondents are entitled to credit for Complainant's nonproductive status in 2006, 2008 and 2010.

Mr. Bedi should be held individually liable

The determination letter issued by the Administrator on August 6, 2012 named Vickram Bedi individually as well as Datalink, the entity named as the sponsoring employer on the LCA submitted for the Complainant. (AX 1). I find Mr. Bedi individually liable for the back wages owed to the Complainant, as he was the alter ego of Datalink during the relevant time period and, as such, had an employment relationship with Complainant. Both LCAs submitted for Complainant list the employer's full legal name as "Datalink Computer Products, Inc." See CX 2; CX 4. Mr. Bedi signed both LCAs as "President." *Id.*

The pertinent regulations define "employer" as follows:

A person, firm, corporation, contractor, or other association in the United States which has an employment relationship with H-1B non-immigrants. The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H-1B non-immigrant is deemed to be the employer of that H-1B non-immigrant.

20 C.F.R. § 655.715; see also *Administrator v. Avenue Dental Care, et al.*, ARB No. 07-101, slip op. at 5 (January 7, 2010); *Administrator v. Mohan Kutty, M.D., et al.*, ARB No. 03-022, slip op. at 17 (May 31, 2005); *Native Technologies, Inc.*, ARB No. 98-034, slip op. at 7-8 (May 28, 1999).

An "employment relationship" is defined in the regulations as determined by the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed.

The ARB has looked to applicable state common law in deciding whether to pierce the corporate veil to reach an individual for liability. *Mohan Kutty, supra*, slip op. at 17. I find the H-1B violations occurred in New York, where Datalink is located. An early case on the issue, *Lowendahl v. Baltimore & Ohio R.R. Co.*, 247 A.D. 144 (1st Dept.), *aff'd*, 6 N.E.2d 56 (1936), set forth the New York rule for corporate disregard: the parent corporation or individual must at the time of the transaction complained of: (1) have exercised such control that the subsidiary "has become a mere instrumentality" of the parent, which is the real actor; (2) such control has been used to commit fraud or other wrong; and (3) the fraud or wrong results in an unjust loss or injury to plaintiff. *Id.* at 157.

Under New York law, it has been held that when a corporation is used by an individual to accomplish his own and not the corporation's business, such an individual may be held liable for the corporation's commercial dealings as well as for its negligent acts. *Wm. Passalacqua Builders, Inc. v. ResnickDevelopers South, Inc.*, 933 F.2d 131, 138 (2d Cir. 1991) (quoting *Walkovszky v. Carlton*, 18 N.Y.2d 414, 417 (1966)). The Second Circuit in *Wm. Passalacqua Builders, Inc.* held that in order to pierce the corporate veil, the control held by the individual must have been used to commit a fraud or other wrong that causes a loss or injury. Liability therefore may be predicated upon a showing of fraud or upon complete control by the individual that leads to a wrong against third parties. *Id.* at 138.

To determine whether to pierce the corporate veil under New York law, the trier of fact is entitled to consider factors such as: (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, *i.e.*, issuance of stock, election of directors, keeping of corporate records and the like; (2) inadequate capitalization; (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes; (4) overlap in ownership, officers, directors, and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the amount of business discretion displayed by the allegedly dominated corporation; (7) whether the related corporations deal with the dominated corporation at arm's length; (8) whether the corporations are treated as independent profit centers; (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group; and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own. *Id.* at 139; *See also American Fuel Corp. v. Utah Energy Development Co., Inc.*, 122 F.3d 130, 134 (2d Cir. 1997).

The ARB has affirmed the holding of an individual liable for back wage violations in an H-1B case. In *Mohan Kutty, supra*, the ARB rejected the Respondents' argument that no authority existed under the INA for imposing personal liability. The ARB held that because Dr. Kutty was the sole owner, held sole control over the corporate entities that submitted the LCAs, and made all the decisions regarding the corporations, he should be held personally liable.⁷ The ARB further held that because Dr. Kutty's corporations had "no mind, will, or existence of their own and his domination was used to perpetuate violations of the Act, we conclude that, in addition to the corporate respondents, Kutty is personally liable for the back wages and the civil money penalties." *Mohan Kutty*, slip op. at p. 19. *See also Administrator v. Avenue Dental Care, supra*, slip op. at 5-6 (holding that because the owner signed the LCAs for submission to DOL, he was deemed to be the H-1B's employer under 20 C.F.R. § 655.715).

In this case, Mr. Bedi hired the Complainant and signed official documents on Datalink's behalf in order to secure her H-1B visa. (July HT at 65; AX-2 and AX-4). He was Complainant's only supervisor and was the only other person working at Datalink. (July HT at 65-67; AX-9). Furthermore, Mr. Bedi decided how much money to give the Complainant; he personally gave her checks and cash himself. (July HT at 69, Sept. HT at 11-12; AX-8). No corporate records or minutes were entered into the record; nor were any corporate tax returns proffered. Respondent Bedi was Datalink's only shareholder. It is apparent that Mr. Bedi had complete control of Datalink which led to Respondents' failure to pay Complainant the required wage rates under the INA. In addition, to allow Mr. Bedi to remain unanswerable for the actions of Datalink would constitute fundamental unfairness.

Accordingly, I find Mr. Bedi should be held individually responsible as an employer for the violations of the applicable statute and regulations.

Back wage calculations

Complainant argues that Respondents are liable for the actual, rather than the prevailing, wage rate, because that is the greater amount as referenced on the LCAs of record. *See* Complainant's Post-Trial Brief at 9, footnote 3. The required wage rate is the greater of the "actual wage," or the "prevailing wage," as those terms are defined by the Act. *See* 8 U.S.C. § 1182(n)(1)(A)(I) and (II); 29 C.F.R. §§ 655.715, 655.731(a). The Administrator found that the prevailing wage rates set forth on the LCAs must be deemed the required wage rates because Complainant did not receive consistent wage payments.

It is more properly stated that the prevailing wage is the required wage rate because the record shows that Datalink did not employ any other "account executive," and therefore, did not pay actual wages to any other individual or individuals with similar experience and qualifications for the specific employment in question. Thus, I find the required wage rate is the prevailing wage of \$61,152 per year from May 20, 2005 through May 15, 2008 and \$59,717 from May 16, 2008 through May 15, 2011. (July HT at 57-58; AX-2, AX-3, AX-4 and AX-5).

Therefore, the computation of the required wages due Complainant for the six-year H-1B employment period at issue should be done by multiplying the prevailing wage rate applicable during her initial H-1B visa by three years from May 20, 2005 to May 15, 2008 (\$61,152 x 3 years = \$183,456) and then multiplying the prevailing wage rate applicable when Complainant's H-1B visa was extended for another three years from May 16, 2008 to May 15, 2011 (\$59,717 x 3 years = \$179,151) for a total of \$362,607 in required wages due for Complainant's entire six-year H-1B employment period. (July HT at 57-58; AX-2, AX-3, AX-4, AX-5).

I will credit the amount which Complainant was paid by checks of record in 2006: the total of six checks each in the amount of \$460 or \$2,760 will therefore be subtracted from \$375,000.¹¹ (July HT at 59; AX-8.) Also the following amounts will be subtracted for the periods when Complainant was unable to work as discussed in detail above:

- 42 days (i.e., 6 weeks or 11.5% of the year) in 2008¹² when Complainant was in Iceland for a total of \$6,867.46

¹¹ The Administrator credited the 2006 and 2009 checks received by Complainant, citing evidence that wages for the Complainant were reported to IRS for both 2006 and 2009. (July HT at 17, 19-20; CX-5, at 13, 16; CX-6 at 19). I find however the Administrator did not consider the evidence of record which shows the non-reporting of wages for Complainant to NYS for 2009. CX 6 at 19.

¹² It is not clear from Complainant's testimony the specific dates of her visit to Iceland in 2008 which is covered by both LCA periods at issue. Mr. Bedi testified that Complainant returned in September 2008. I am compelled to find that this visit occurred during the second LCA period with the lower actual wage rate, absent any evidence from Respondents to the contrary.

- 69 days in 2010 (i.e., 41 days when Complainant was incarcerated and 28 days when she was in Iceland or 18.9% of the year) for a total of \$11,286.51

Therefore, I find back wages in the total amount of \$341,693.03 are due to the Complainant for the period of LCA periods of May 20, 2005 through May 15, 2011 at issue.

Respondents are liable for both pre- and post-judgment interest on back wages owed

Although the INA does not specifically authorize an award of interest on back pay, the ARB held in *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012 (May 17, 2000), a whistleblower case under the Energy Reorganization Act of 1974, that a “back pay award is owed to an individual who, if he had received the pay over the years, could have invested in instruments on which he would have earned compound interest.” *Doyle*, slip op. at 16. The ARB has interpreted the *Doyle* analysis to apply in H-1B cases and has held that prejudgment compound interest and post-judgment interest should be calculated according to the procedures set forth in *Doyle*. See, e.g., *Administrator v. University of Miami*, ARB Nos. 10-090, 10-093, slip op. at 12-3; *Mao v. Nasser Engineering & Computing Services*, ARB No. 06-121, slip op. at 11-2; *Innawalli v. American Information Technology Corp.*, ARB No. 04-165 (September 29, 2006), slip op. at 8-9.

It is well-settled that where an H-1B worker is entitled to payment of back wages, she is also entitled to interest on those unpaid wages. See e.g. *Limanseto v. Ganze*, ALJ Case No. 2011-LCA-00005, slip op. at 13 (June 30, 2011). Interest is due on any unpaid wages from the time each installment of wages became due. *Id.* The wage liability begins the first day of the approved H-1B period, which, in this case, was May 20, 2005. See 8 U.S.C. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(6)(i). Wages became payable at the end of each month. See 20 C.F.R. § 655.731(c)(4), (5) (wages are payable, “...no less frequently than monthly...”). Respondents’ liability for back wages ends only on May 15, 2011, the end of Complainant’s H-1B period. See e.g., *Limanseto* at 13.

Based on the remedial nature of the employee protection provision and the ‘make whole’ goal of back pay,” prejudgment interest on back pay, “. . . ordinarily shall be compound interest...” *Mao* slip op. at 11; *Doyle*, slip op. at 16. The interest rate shall be the that charged on the underpayment of federal income taxes prescribed under 26 U.S.C. § 6621(a)(2) (Federal short-term rate plus three percentage points).

The Secretary’s regulations prescribe that the Administrator will, “. . .oversee the payment of back wages or fringe benefits to any H-1B nonimmigrant who has not been paid . . . as required. . .” 20 C.F.R. § 655.810(a) see also § 655.810(f). The amounts due in this matter (including compound interest) must be calculated by the Administrator, who must disburse the unpaid wages and associated interest to Complainant. See *Limanseto* at 13; see also 20 C.F.R. § 655.810(f) (prescribing the Administrator’s involvement in the distribution of unpaid wages, and presumably other unpaid amounts too).

Administrator's non-determination of a willful violation is appropriate

I note that the Administrator did not (1) assess any civil money penalties and (2) make any determination as to whether Respondents willfully violated the INA in this matter. The INA provides that the Administrator “may” assess civil money penalties up to \$1,000 for non-willful violations and up to \$5,000 for willful violations or for discrimination. 8 U.S.C.A. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii). In addition to the imposition of civil money penalties, a determination of willful violation would require the Secretary of DOL to notify the United States Attorney General who must then disqualify the employer from employing H-1B non-immigrants for at least two years. 8 U.S.C.A. § 1182(n)(2)(C)(ii).

Under 20 C.F.R. § 655.840(b), an Administrative Law Judge (“ALJ”) has the authority to affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.. The ALJ’s authority to review the Administrator’s assessment specifically includes a determination of the appropriateness of a civil penalty. *See Administrator, Wage and Hour Division v. Law Offices of Anil Shaw*, 2003-LCA-20 (ALJ May 19, 2004) (*citing Administrator v. Chrislin, Inc.*, 2002 WL 31751948 (DOL Adm.Rev.Bd)).

The regulations specify seven factors that may be considered in determining the amount of the civil money penalties to be assessed: previous history of violations by the employer, the number of workers affected, the gravity of the violations, the employer’s good faith efforts to comply, the employer’s explanation, the employer’s commitment to future compliance, the employer’s financial gain due to the violations or potential financial loss, injury or adverse effect to others. 20 C.F.R. § 655.810(c).

I have considered these factors and concluded that the Administrator’s decision not to make willful violation finding or to assess a civil money penalty was appropriate. The Administrator is vested with “enforcement discretion” “in fashioning remedies appropriate to the violation.” 65 Fed. Reg. at 80,180. *See also* 8 US.C.A. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii), (e)(2), (f). Complainant argues that Mr. Bedi’s familiarity with the requirements of the H-1B regulations and wage requirements was evidenced by Mr. Bedi’s use of the term “prevailing pay rate” when asked by his counsel during hearing testimony about how much Complainant was to be paid. (Sept HT at 10); Complainant’s Post-Hearing Brief at 14. She maintains that such familiarity can establish willfulness within the meaning of 20 C.F.R. § 655.805(c).¹³ While Respondent’s knowledge of wage requirements under the H-1B visa program may be one factor considered in assessing whether a violation is willful, I note that there has been no evidence proffered of past INA violations by Respondents and that Complainant is the only affected worker – factors which I find support the non-imposition of a civil money penalty. Having considered the relevant factors, I find that the record does not support the assessment of a civil monetary penalty in this case.

¹³ 20 C.F.R. 655.805(c) provides, in part, that “willful failure” “means a knowing failure or a reckless disregard to whether the conduct was contrary to [the Act].”

Conclusion

I affirm the Administrator's assessment of that back wages are owed Complainant for the period May 10, 2005 to May 15, 2011, although I have recalculated the amount due for the reasons set forth, infra. I find that Respondents are liable to pay Complainant back wages in the total amount of \$341,693.03. I also find that Vickram Bedi is an alter ego of Datalink, and is individually and personally liable, jointly with Datalink, to pay those back wages. I also affirm Administrator's non-assessment of any civil penalties.

ORDER

IT IS ORDERED that

1. Datalink and Vickram Bedi pay Complainant Helga Ingvarsdottir \$341,693.03 in back wages.
2. Respondents shall pay prejudgment compound interest on the award of accrued back wages at the applicable rate of interest which shall be calculated by the in accordance with 26 U.S.C. § 6621.
3. Respondents shall be assessed post judgment interest under 26 U.S.C. § 6621 until satisfaction.
4. The Administrator, Wage and Hour Division, Employment Standards Division, U.S. Department of Labor, shall forthwith make such calculations as may be necessary and appropriate with respect to back pay, and all calculations of interest necessary to carry out this Decision and Order, which calculations, however, shall not delay Respondents' obligation to make immediate payment of back wages.
5. This Decision and Order shall supersede the Administrator's findings regarding the amount of back wages due.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845. To be effective, such petition shall be received by the Board within thirty (30) calendar days of the date of this Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. The Board's address is:

U.S. Department of Labor
Administrative Review Board
Room S5220 FPB
200 Constitution Ave NW
Washington, DC 20210

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.