U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 29 January 2019

Case No.: 2012-LCA-00043

In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION
Prosecuting Party

v.

TLC PRECISION WAFER TECHNOLOGY, INC.
Respondent

Appearances: Dr. Timothy L. Childs, *pro se*
Rachel L. Graeber, Esq., U.S. Department of Labor

DECISION AND ORDER AFFIRMING ADMINISTRATOR'S DETERMINATION

This matter involves a case arising under the Immigration and Nationality Act ("INA") H-1B visa program, 8 U.S.C. § 1101(a)(15)(H)(i)(b) and § 1182(n), and the implementing regulations promulgated at 20 C.F.R. § 655.700 *et seq*. The Act's H-1B visa program permits American employers to temporarily employ nonimmigrant aliens to perform specialized occupations in the United States. See 8 U.S.C. § 1101(a)(15)(H)(i)(b). A hearing in this matter took place on July 6 and 7, 2016 in St. Paul, Minnesota.

I. PROCEDURAL HISTORY

This case centers on a complaint filed by the Administrator, Wage and Hour Division, U.S. Department of Labor ("the Administrator") on behalf of Satish Thiruvengadam ("Complainant" or "Thiruvengadam") against Respondent, TLC Precision Wafer Technology, Inc., ("Employer" or "TLC"), which employed Complainant on an H-1B visa from October 1, 2008 to September 17, 2011. (PX 4.)[1] The Administrator asserts that Employer violated the H-1B provisions of the Immigration and Nationality Act ("INA") by failing to pay Complainant the required wage for productive work totaling $29,217.00 as required by 20 C.F.R. §§ 655.731 and 655.805(a)(2). See Administrator's Post-Trial Brief at 3.

After an investigation, the Assistant District Director of the Wage and Hour Division office ("Wage and Hour") in Minneapolis, Minnesota determined that Employer failed to pay

[1] This Decision uses the following abbreviations: "ALJX" refers to Administrative Law Judge Exhibits; "JX" refers to Joint Exhibits; "PX" refers to Prosecuting Party Exhibits; "RX" refers to Respondent's Exhibits and "Tr." refers to the transcript of the July 6-7, 2016 hearing.

Complainant wages in the amount of $29,217.67; that Employer failed to maintain required documentation; and that Employer failed to cooperate in the investigation. Wage and Hour did not assess a civil money penalty, but did seek payment of the full amount of back wages due. (PX 17.)[2] On June 21, 2012, Employer requested a hearing before the Office of Administrative Law Judges ("OALJ"). Under § 655.840(b), an Administrative Law Judge("ALJ" or "Judge") has the authority to affirm, deny, reverse, or modify, in whole or in part, the Administrator's determinations.

A Notice of Hearing, issued on February 22, 2016, set the hearing for July 6 and 7, 2016 in St. Paul, Minnesota.[3] Complainant appeared and testified at the hearing, as did Wage Hour Investigator Valerie Ferris Jacobson and Employer. By Order dated October 20, 2016, the undersigned set December 20, 2016 as the deadline for final briefs. The Administrator filed its brief on December 20, 2016. Employer requested and received another extension, and this office received Employer's brief on January 26, 2017.

II. ISSUES

Based on the assertions made by the parties at the hearing and in their post-hearing briefs, the issues to be determined in this matter are:

1. Did Respondent TLC Precision Wafer Technology, Incorporated fail to pay required wages totaling $29,217.67 to one H-1B non-immigrant worker, as required by 20 C.F.R. §§ 655.731(b), and 655.805(a)(2)?
2. Did Employer fail to maintain documentation required by the regulations at 20 C.F.R. §§ 655.731(b), 655.738(e), 655.739(i), 655.760(c), and 655.805(a)(15)?
3. Did Employer fail to cooperate in the investigation as required by 20 C.F.R. § 655.800(c)?

Employer also raised the following issues: whether the investigation began within the ten-month timeline of the alleged violations; whether the former worker knowingly conspired to get funds for non-work voluntary time off; whether Employer intentionally or knowingly withheld funds from the former worker for services due to the worker; whether the former worker intentionally withheld information about the H-1B rules from the Employer and conspired to utilize and manipulate those rules and regulations in order to get funds for voluntary time off; and whether the charges were proper and within the guidelines of the Labor and Immigration Nationality Services rules, regulation and policies. (Tr. 18-19.)

---

[2] PX 17 is the letter dated June 7, 2012 sent to TLC by the Assistant District Director.

[3] This matter has a long history. The case was originally docketed with the Office of Administrative Law Judges in June of 2012, and the matter was assigned to several Administrative Law Judges, some for hearing purposes, some for settlement purposes. The undersigned received the assignment on February 8, 2016 and promptly set it for hearing.

III. STIPULATIONS

The parties stipulated to the following facts:

1) Jurisdiction over the hearing in this matter is vested in the Office of Administrative Law Judges by § 212(n)(2) of the Act, 8 U.S.C. § 1182(n)(2) and the applicable regulations, 20 C.F.R. § 655.1 *et seq*.
2) Respondent was an H-1B employer.

(Tr. 17.)

IV. EVIDENCE

The undersigned admitted the following exhibits into evidence at the hearing:

A. **Joint Exhibit (JX)**

1. Parties' Joint Prehearing Statement

B. **Prosecuting Party's Exhibits (PX)**

1. Labor Condition Application ("LCA") submitted by TLC for one Telecommunications Engineer / Analyst, at an annual salary of $43,000.00 for the term running from September 19, 2008 through September 17, 2011
2. Letter submitted by Timothy Childs, President of TLC, to USCIS on March 31, 2008, re: H-1B Petition filed by TLC Precision Wafer Technology, Inc. on behalf of Sathish Thiruvengadam
3. I-129 Petition for a Nonimmigrant Worker submitted to the Department of Homeland Security, submitted by TLC on March 20, 2008
4. I-797A Notice of Action approving TLC's petition for nonimmigrant worker Sathish Thiruvengadam, dated April 18, 2008
5. Letter dated October 5, 2007 to Sathish Thiruvengadam from TLC offering him a position as a TLC MMW Microfabrication Engineer at an annual salary of $43,000.00
6. Letter dated November 16, 2008 from Timothy Childs, President of TLC, to Sathish Thiruvengadam re: Employment Dismissal from TLC, advising Thiruvengadam that TLC is laying him off effective immediately
7. Emails from Dr. Childs to Sathish Thiruvengadam
   a. January 3, 2009 from tissy2@aol.com[4] to Thiruvengadam with a subject of "Brief TLC update!"
   b. January 26, 2009 from Childs to Thiruvengadam and others with subject "Jerry coming in in the morning"

[4] Dr. Childs testified that tissy2@aol.com is an alternate email address that he uses. (Tr. 58.)

c. January 29, 2009 from Childs to Thiruvengadam with subject "FYI"
d. January 30, 2009 from Childs to Thiruvengadam and others with subject "Update and progress plans Jerry come in at 12 noon Friday"
e. February 10, 2009 from Childs to daneller@hotmail.com with copy to Thiruvengadam and others regarding "Thank you for your response"
f. February 22, 2009 from Childs to Thiruvengadam and others with subject "Ajdusted (sic) schedule implemented"
g. February 26, 2009 from Childs to Thiruvengadam with subject "Can take off from work today"
h. March 3, 2009 from Childs to Thiruvengadam with subject "Call for Sathish"
i. March 4, 2009 from Childs to Thiruvengadam with subject "a few items for Thursday"
j. March 9, 2009 from Childs to Thiruvengadam and others with subject "This week technical objectives"
k. March 17, 2009 from Childs to Thiruvengadam and one other with subject "Jerry will be in – 9:30 tomorrow morning"
l. March 23, 2009 from Childs to Thiruvengadam and others with subject "IMPORTANT TLC team update and task for this week!"
m. March 30, 2009 from Childs to J.J. Geddes with a copy to Thiruvengadam, with subject "John G is it possible?"
n. April 14, 2009 from Childs to Thiruvengadam with subject "phone system"
o. April 21, 2009 from Childs to Thiruvengadam and others with subject "breif (sic) TLC This week project updates"
p. May 12, 2009 from Childs to J.J. Geddes with copies to Thiruvengadam and others with subject "Re: Yes, John g Come in tomorrow!"
q. May 17, 2009 from Childs to Thiruvengadam and others with subject "TLC Snapshot of next week tasks"
r. May 27, 2009 from Childs to J.J. Geddes with copies to Thiruvengadam and others, subject "for Thursday"
s. June 28, 2009 from Childs to Thiruvengadam with subject "IMPORTANT for Monday!!"
t. August 10, 2009 from Childs to Carlton Watson with subject "Re: letter"
u. September 7, 2009 from Childs to Thiruvengadam and others with subject "Brefiefing (sic) of the week"
v. September 20, 2009 from Childs to Thiruvengadam and others with subject "This week briefing for TLC"
w. November 2, 2009 from Childs to Thiruvengadam with subject "Re: Payroll and Timesheet"

x. December 14, 2009 from Childs to Thiruvengadam with subject "Re: Check for NFC, UMN"
y. December 29, 2009 from Childs to Thiruvengadam and others with subject "Re: Fab – updates"
z. December 30, 2009 from Childs to umanah2004@yahoo.com with subject "Re: Payment"
aa. December 31, 2009 from Childs to Thiruvengadam and one other with subject "[Fwd: Re: Koko Payment]"
bb. January 12, 2010 from Childs to Thiruvengadam with subject "Re: Electroplating – Prof. Franklin"
cc. January 13, 2010 from Childs to Thiruvengadam and others with subject "Re: Fw: PECVD"
dd. January 13, 2010 from Childs to Thiruvengadam and others with subject "Re: ips metal deposition"
ee. January 19, 2010 from Childs to Thiruvengadam with subject "Today at Work"
ff. February 4, 2010 from Childs to Thiruvengadam and one other with subject "Re: access to lab"
gg. February 16, 2010 from Childs to Thiruvengadam with subject "Re: Follow Up"

8. Emails from Thiruvengadam to Childs
a. September 22, 2008 from Thiruvengadam to Childs and one other with subject "PTO – Awaiting Options"
b. February 2, 2009 from Thiruvengadam to Childs with subject "Required Documents for H1B Visa Stamping"
c. July 2, 2009 from Thiruvengadam to Childs with subject "Pay stubs"
d. August 5, 2009 from Thiruvengadam to Childs and others with subject "Team Updates in my request for JJ G to come on Wed., Aug. 5"
e. August 13, 2009 from Thiruvengadam to Childs with subject "updates?"
f. September 3, 2009 from Thiruvengadam to Childs with subject "Status Request on Part Time Payout"
g. December 21, 2009 from Thiruvengadam to Childs with subject "Request for a meeting"
h. February 4, 2010 from Thiruvengadam to Childs with subject "Forward address"
i. March 31, 2010 from Childs to Thiruvengadam with subject "Re: Follow up"
j. June 1, 2010 from Thiruvengadam to Childs with subject "Pay Check – Follow up"
k. June 9, 2010 from Thiruvengadam to Childs with subject "Fw: Pay Check – Follow up"
l. June 23, 2010 from Thiruvengadam to Childs with subject "Re: Fw: Pay Check – Follow up"

m. August 4, 2010 from Thiruvengadam to Childs with subject "Re: Fw: Pay Check – Follow up"
n. October 11, 2010 from Thiruvengadam to Childs with subject "Fw: Fw: Pay Check – Follow up"
o. October 22, 2010 from Thiruvengadam to Childs with subject "Follow up"
p. February 8, 2011 from Thiruvengadam to Childs with subject "Re: W2 form and Pay check"
q. May 10, 2011 from Thiruvengadam to Childs with subject "Re: Pay Check – Follow up"

9. Emails / Personal Notes from Thiruvengadam to himself
   a. August 31, 2009 from Thiruvengadam to himself with subject "Meeting with Dr. Childs regarding my payroll"
   b. September 8, 2009 from Thiruvengadam to himself with subject "Follow up meeting with Dr. Childs on Part time payroll option"
   c. September 9, 2009 from Thiruvengadam to himself with subject "Contacted USCIS regarding part time H1B"
   d. December 17, 2009 from Thiruvengadam to himself with subject "RE: Conversation with Dr. Childs regarding paycheck"
   e. December 18, 2009 from Thiruvengadam to himself with subject "Re: Conversation with Dr. Childs on Dec 17, 2009"
   f. December 30, 2009 from Thiruvengadam to himself with subject "Meeting with Dr. Childs – Wednesday Dec 30, 2009"

10. Emails regarding payments received by Thiruvengadam from TLC
   a. January 12, 2009 from Thiruvengadam to Childs acknowledging receipt of $1,000.00 cash
   b. January 23, 2009 from Thiruvengadam to Childs acknowledging receipt of $600.00 cash
   c. February 10, 2009 from Thiruvengadam to Childs acknowledging receipt of $1,000.00 cash
   d. February 20, 2009 from Thiruvengadam to Childs acknowledging receipt of $2,000.00 cash
   e. March 5, 2009 from Thiruvengadam to Childs acknowledging receipt of $500.00 cash
   f. April 2, 2009 from Thiruvengadam to Childs acknowledging receipt of $100.00 cash
   g. April 21, 2009 from Thiruvengadam to Childs acknowledging receipt of $800.00 cash
   h. April 23, 2009 from Thiruvengadam to Childs acknowledging receipt of $500.00 cash
   i. May 13, 2009 from Thiruvengadam to Childs acknowledging receipt of $500.00 cash
   j. May 20, 2009 from Thiruvengadam to Childs acknowledging receipt of $200.00 cash
   k. May 29, 2009 from Thiruvengadam to Childs acknowledging receipt of $300.00 cash

l. June 5, 2009 from Thiruvengadam to Childs acknowledging receipt of $1,400.00 cash
m. June 18, 2009 from Thiruvengadam to Childs acknowledging receipt of $200.00 cash
n. June 25, 2009 from Thiruvengadam to Childs acknowledging receipt of $100.00 cash
o. July 2, 2009 from Thiruvengadam to Childs acknowledging receipt of $150.00 cash
p. July 21, 2009 from Thiruvengadam to Childs acknowledging receipt of $1,400.00 cash
q. July 30, 2009 from Thiruvengadam to Childs acknowledging receipt of $400.00 cash
r. August 13, 2009 from Thiruvengadam to Childs acknowledging receipt of $400.00 cash
s. August 20, 2009 from Thiruvengadam to Childs acknowledging receipt of $200.00 cash
t. December 17, 2009 from Thiruvengadam to Childs acknowledging receipt of $500.00 cash
u. January 4, 2010 from Thiruvengadam to Childs acknowledging receipt of $500.00 cash
v. January 15, 2010 from Thiruvengadam to Childs acknowledging receipt of $500.00 cash

11. Timesheets for Sathish Thiruvengadam for pay periods ending November 30, 2008 (82.25 hours), December 15, 2008 (90 hours), December 31, 2008 (91.50 hours), January 15, 2009 (86.50 hours), January 31, 2009 (95.50 hours), February 15, 2009 (82.00 hours), February 28, 2009 (75.00 hours), March 15, 2009 (56.00 hours), March 31, 2009 (57.00 hours), April 15, 2009 (56.50 hours), April 30, 2009 (64.00 hours), May 15, 2009 (48.00 hours), May 31, 2009 (49.00 hours), June 15, 2009 (80.00 hours), June 30, 2009 (73.00 hours), July 15, 2009 (48.00 hours), July 31, 2009 (56.00 hours), August 15, 2009 (48.00 hours), August 31, 2009 (48.00 hours), September 15, 2009 (64.50 hours), September 30, 2009 (69.00 hours), October 15, 2009 (90.00 hours), October 31, 2009 (88.50 hours), November 15, 2009 (80.00 hours), November 30, 2009 (89.00 hours), December 15, 2009 (92.00 hours), December 31, 2009 (94.00 hours), January 15, 2010 (93.50 hours), January 31, 2010 (80.00 hours), February 15, 2010 (6.00 hours)

12. Payroll documents for Sathish Thiruvengadam for the following dates and amounts:
    a. Checks for January 15, 2010 ($702.92) and January 4, 2010 ($702.92),
    b. Paystubs for September 10, 2009 ($1,397.50), October 1, 2009 ($702.92), October 19, 2009 ($702.82), November 3, 2009 ($702.92), November 15, 2009 ($702.92), December 3, 2009 ($702.92), December 16, 2009 ($702.92), January 4, 2010 ($702.92), and January 15, 2010 ($702.92)

13. Letter dated January 29, 2010 from Sathish Thiruvengadam to Dr. Timothy Childs formally resigning from TLC effective February 5, 2010 and attaching a table of calculations for work performed from November 16, 2008 through January 31, 2010, payment records, and a calculation of the balance owed by TLC for wages earned.
14. Memo from "TLC Management" dated February 3, 2010 acknowledging his resignation and including a checklist of items to be turned over, signed by Thiruvengadam and Childs on February 4, 2010
15. Form WH-4 Complaint filed by Thiruvengadam with Wage and Hour Division of U.S. Department of Labor alleging that "Employer failed to pay nonimmigrant worker(s) for time off due to a decision by the employer (*e.g.*, for lack of work) or for time needed by the nonimmigrant worker(s) to acquire a license or permit, with attached one-page narrative statement by Thiruvengadam.
16. Employee Personal Interview Statement of Thiruvengadam, dated October 18, 2012, signed October 19, 2012
17. Administrator's Determination Pursuant to Regulations at 20 C.F.R. Part 655 H-1B Specialty Occupations under the Immigration and Nationality Act (INA) Administered by Department of Labor (DOL) dated June 7, 2012, sent to TLC finding $29,216.67 owed by TLC to nonimmigrant worker Sathish Thiruvengadam
18. Wage and Hour Division worksheet calculating wages due to Thiruvengadam
19. Letter from Wage and Hour Division dated December 21, 2011 advising TLC that they have been scheduled for an investigation by Investigator Valerie Ferris[5] and detailing documents to be produced
20. Email correspondence
    a. From Childs to Valerie Ferris Jacobson dated January 5, 2012 with subject "TLC response is coming!!"
    b. From Ferris Jacobson to Childs dated January 6, 2012 with subject "TLC response is coming!!"
    c. From Childs to Ferris Jacobson dated January 9, 2012 with subject "Re: TLC response is coming!!"
    d. From Ferris Jacobson to Childs dated January 11, 2012 with subject "RE: TLC response is coming!!"
    e. From Childs to Ferris Jacobson dated January 15, 2012 with subject "reply to DOL request of TLC" and attaching a draft response
    f. From Childs to Ferris Jacobson dated January 18, 2012 with subject "TLC want to talk with our attorney on this matter"
    g. From Ferris Jacobson to Childs dated January 18, 2012 with subject 'TLC want to talk with our attorney on this matter"

[5] At the time of the investigation of TLC, the Wage Hour investigator was known as Valerie Ferris. At the time of the hearing, she had married and used the surname Jacobson. This Decision and Order refers to her as Ferris Jacobson.

h. From Ferris Jacobson to Childs dated January 18, 2012 with subject "Department of Labor: H-1B Investigation"

i. From Childs to Ferris Jacobson dated January 27, 2012 with subject "Re: Department of Labor: H-1B Investigation" and attaching a spreadsheet captioned "DOL Response from TLC"

j. From Ferris Jacobson to Childs dated January 31, 2012 with subject "Re: Department of Labor: H-1B Investigation"

k. From Childs to Ferris Jacobson dated February 3, 2012 with subject "Re: Department of Labor: H-1B Investigation request different visit date."

l. From Ferris Jacobson to Childs dated February 3, 2012 with subject "Re: Department of Labor: H-1B Investigation request different visit date."

m. From Childs to Ferris Jacobson dated February 6, 2012 with subject "Re: reply to DOL request of TLC"

n. From Childs to Ferris Jacobson dated February 13, 2012 with subject "TLC to Department of Labor: H-1B investigation request" attaching several .PDF documents

21. Information provided by TLC regarding Thiruvengadam (name, email address, LCA number, date entered USA, date commenced work, date commenced on payroll, last day of work, work site address, date at work site, unpaid periods, fringe benefits, termination date / date of notice to USCIS, any liquidated and penalty sought or collected)

22. I-129 Petition and supporting documentation filed by TLC for Thiruvengadam, with cover letter dated March 31, 2008 signed by Carey Thuente, attorney with Guyton Law Office

23. Copy of Thiruvengadam's handwritten notes during meetings at TLC on December 5, 2008 and December 15, 2008 and copy of email from Gina Davis to Childs dated December 4, 2008, subject "Guyton Law"

    a. Original notes at 23(a)

    b. Original email at 23(b)

24. Questionnaire filled out by Thiruvengadam for Wage and Hour, dated December 16, 2011

C. **Respondent's Exhibits**

1. Respondent's response to Administrator's Motion for Summary Decision

4. Wage and Hour Division PowerPoint presentation titled "The Employment of Non-Immigrants on H-1B Visas"

5. Wage and Hour Division Fact Sheet #62A "EChanges made by the H-1B Visa Reform Act of 2004"

7. Letter dated October 5, 2007 to Sathish Thiruvengadam from TLC offering a job as a Microfabrication / Telecommunication Engineer

8. Letter dated November 16, 2008 to Sathish Thiruvengadam from TLC advising of layoff of all employees, effective immediately

9. Email from Thiruvengadam to Childs on September 3, 2009 with subject "Status Request on Part Time Payroll"

10. Email from Thiruvengadam to Childs on September 23, 2009 with subject "Letter to NFC"
11. Email from Greg Cibuzar to Childs and one other dated September 28, 2009, with subject "RE: [Fwd: TLC Letter to NFC] addressing access to NFC facilities at University of Minnesota for TLC employees
13. Emails between Childs and jjcalane@stthomas.edu dated September 19, 2009, September 11, 2009, September 10, 2009, and September 9, 2009, with subjects "Fwd: TLC items for consideration" and "TLC items for consideration"
14. Letter from Thiruvengadam to Childs dated January 29, 2010 resigning from his position at TLC (also at PX 13)
15. Letter from TLC to Thiruvengadam dated February 3, 2010 regarding his resignation (also at PX 14)
16. TLC proposal to NASA for "X-Band to W-Band Doppler Radar Using Reconfigurable RF T/R MMIC Series"
18. TLC Purchase Requisition dated November 24, 2009 to University of Minnesota for usage of NFC equipment, not to exceed $10,000.
19. Documentation regarding TLC's use of the Nanofabrication Center at the University of Minnesota
    a. Nanofabrication Center Safety Training Class Directions
    b. Invoice from University of Minnesota Nanofabrication Center dated December 3, 2009 for access to facilities, access to general equipment and equipment short course training
    c. Invoice from University of Minnesota Nanofabrication Center dated January 4, 2010 for access to facilities, access to general equipment, use of equipment, supplies and equipment short course training
    d. TLC Order from Nanofabrication Center, University of Minnesota, dated November 24, 2009 for usage of NFC equipment
    e. TLC Order from Metro Chem Corporation dated November 24, 2009 for supplies
20. Spreadsheet of compensation paid by TLC to Sathish Thiruvengadam
21. Costs paid be TLC on behalf of Thiruvengadam, including
    a. Medical insurance benefits
    b. Fees paid in association with processing of Thiruvengadam's H-1B petition[6]
    c. Monthly fees in connection with Thiruvengadam's access to the Nanofabrication Center (including emails to NSSC regarding when TLC can expect payment on an awarded contract).
    d. Documentation regarding implementation of a consulting agreement with Koko Umanah, including emails between Thiruvengadam and Childs, the signed Consultant Agreement and invoices and checks

[6] Some of this documentation involves an H-1B petition filed by TLC for an individual named Gagan Aggarwal.

23. Printout from ETA website querying LCAs for TLC
24. Declaration of Sathish Thiruvengadam

V. TESTIMONY

A. Complainant Satish Thiruvengadam

At the time of the hearing, Complainant Satish Thiruvengadam worked in Malta, New York, with Global Foundries. He started working for Global Foundries in 2013, under an H-1B visa. He is originally from India. In 2002, he earned a bachelor's degree in electronics and communication engineering from Bharathiyar University in India. He left India in 2003 on an F-1 student visa to go to graduate school at Louisiana State University ("LSU") in Baton Rouge, Louisiana, studying for a Master's degree in electrical and computer engineering. While at LSU, he worked as a Research Assistant for his professor, Dr. Theda Daniels-Race, researching material analysis. He earned his Master's degree in August 2007. (Tr. 28-29.)

After graduation, he got a job with Employer. He learned about the job from Dr. Daniels-Race. Employer offered him a job during a phone interview in August or September 2007. (Tr. 30-31, PX 5.) Employer hired him as a "microfabrication engineer," to fabricate integrated circuits, in a clean room, wearing special clothing. However, since TLC is a small-scale business, Thiruvengadam had responsibility for different roles, from administrative to engineering to lab test and assembly. His agreed salary was $43,000. (Tr. 32.)

Initially as an F-1 student, he could work as an OPT, or "optional practical training," a transitional status. He started working with Employer in February 2007 as an OPT. Employer offered him health benefits, a signing bonus, and paid the airfare for him to get from Louisiana to Minneapolis. He had an option to take seven days a year vacation, after the probation period. He did not take paid time off while working on the F-1 visa. Employer paid him during the F-1 OPT period, by paycheck. (Tr. 33.) Employer took deductions out of those paychecks and paid him for all the hours he worked. On the F-1 visa, he was classified as an exempt employee, so he did not have to document his hours. Nevertheless, Employer had a timesheet for the other employees, so Thiruvengadam followed the same procedure. TLC's owner, Dr. Timothy Childs, had to sign the timesheets in order for the employees to be paid. (Tr. 34.)

TLC applied for Thiruvengadam's H-1B visa in April 2008 and it took effect October 1, 2008. Complainant switched to H-1B because OPT only allowed him to work for one year. (Tr. 34.) He reviewed the H-1B application and filed it. He reviewed the Labor Condition Application ("LCA"). (Tr. 35, PX 1.) The LCA lists a rate of pay of $43,000 annually for full-time work. He received a copy of the LCA after he filed it. Employer also submitted a petition letter to USCIS at the end of March 2008.[7] (Tr. 36, PX 2.)

Thiruvengadam's H-1B visa took effect on October 1, 2008. At that time, his paychecks became less reliable. He testified, "[t]he financial situation started shaky. I was getting most of the payments." (Tr. 38.) Paychecks would bounce or he would receive paychecks late. In

[7] See also the I-29 Petition for Non-Immigrant Worker (PX 3) and the I-797(a), Notice of Action. (Tr. 37, PX 4.)

August, a paycheck bounced. (Tr. 38.) Dr. Childs told him that finances were a little tighter, but if he waited for a few days, Employer would take care of it. In mid-November, before the holiday start, the team met in a conference room to learn that the financial situation might cause Employer to look into options like closing for some days during the holidays. (Tr. 39.)

Dr. Childs did not provide a letter or e-mail to Thiruvengadam documenting that Employer was laying him off. There was a meeting where Dr. Childs indicated that there was going to be a layoff period, but he received nothing in writing. (See PX 6.) He was still working full-time. Dr. Childs did not terminate him. He did not take any vacation time in November 2008. (Tr. 41.) He did not take any days off other than Thanksgiving Day and Christmas. He had a few talks with Dr. Childs about tasks he should accomplish. In early January, Dr. Childs advised through e-mail communication that funds would be coming in and he hoped to bring everybody back on board by the end of January. (Tr. 42.)

Thiruvengadam took handwritten notes, on a document with a note from Gina Davis of Employer's administrative staff. (PX 23[8]; Tr. 42.) Ms. Davis gave this to Dr. Childs, and Thiruvengadam received a copy. The document says that the situation is different for H-1B employees. Employer had the option either to terminate Thiruvengadam (and purchase the tickets to send him home) or to change his status from H-1B to another immigration status. Thiruvengadam discussed this with Dr. Childs, and said he was not interested in going back to school at that point. He took the notes during a meeting, and dated the notes December 5, 2008. Thiruvengadam received the e-mail on the bottom of the document. (Tr. 43.)

Dr. Childs was present at this meeting, when Gina Davis gave Thiruvengadam the e-mail. The note is dated December 4, and the meeting occurred on December 5. (Tr. 47-48.) The note says:

> 12/5/2008, tentative plan for December 2008 to January 2009, H-1B visa Guyton Law Firm, three days, can be used with no job, part-time H-1B labor, H-1B or schedule going home. Is TLC reporting INS or filing? TLC would like to have me continue coming on Monday, December 8, 2008, working on to pay my last paycheck, will be working on next paycheck. Possibly (sic) of getting RSL deal, then Nort is higher. Wait to order on Nort project. Explained Nort situation with TLC. Digikey order, get disk, tapes, when it's 12, try again on the same date. Ask Dr. Childs after the meeting -- after 1 p.m. Monday meeting about any paycheck, would be getting any paycheck. Can we use to any -- gets money -- when he gets money.

(Tr. 49; PX 23.)

---

[8] Although the undersigned admitted this document, the undersigned recognizes that the bottom portion, which consists of an email from Ms. Davis to Dr. Childs, is hearsay. While hearsay is admissible in hearings held under the Administrative Procedure Act, a factfinder may give a hearsay document less weight. In this instance, Dr. Childs denies having received or seen this document prior to the hearing. Accordingly, the undersigned accepts Thiruvengadam's testimony that he received a copy of it, but also recognizes Dr. Child's assertion that he did not receive a copy. (Tr. 44-46.)

In December 2008, he continued to go to work full-time, after Dr. Childs advised the team that the company was in financial difficulties. (Tr. 182.)

Dr. Childs did not do anything to amend Thiruvengadam's LCA or to provide Thiruvengadam with transportation home. At the time of the meeting, Dr. Childs had not contacted USCIS to advise that TLC had terminated Thiruvengadam.

In January, Dr. Childs mentioned in a conversation that to get through the situation, he was going to pay by cash, and then eventually TLC would give a paycheck to catch up with the arrears, so that everything would be as a paycheck for records. Thiruvengadam received cash payments in 2009 to the end of his time at Employer. (Tr. 53.) Thiruvengadam documented the cash payments by e-mails he sent to Dr. Childs anytime he received cash. The emails documented how much he had received in cash. (Tr. 54, PX 10.)

Dr. Childs was aware Thiruvengadam was working between January and September 2009. Dr. Childs was in the office sometimes; they also exchanged e-mails. (Tr. 55.) Thiruvengadam sent all his emails to Dr. Childs over the company e-mail, which he could only access from the office. (PX 7.) The emails document that he was involved in some of the projects, and that other people involved in the projects were also working there. (Tr. 56.) The emails in January followed the discussion that occurred in December. Other e-mails involved work in February and March about the project. Surprisingly, on a weekend, Thiruvengadam got an e-mail saying, "We would reduce your work hours, like day -- between three days in here." (PX 7, Tr. 57.) In January 2009, the team included Thiruvengadam, Jerry Cole, Justice Galane, Gina Davis (on and off), and Dan Eller. (Tr. 60-61.)

On a Sunday, Thiruvengadam received a personal e-mail. He was surprised to learn that TLC had reduced his work hours to three days a week, and Monday morning he asked what he was to do. (PX 7, p. 12.) Prior to this, he was working five days a week. He did not ask to work part-time or to take any time off. After he received this e-mail, he only worked when Dr. Childs told him to come in, which depended on who was available to get the work done. (Tr. 62.) Sometimes he worked five days a week, sometimes two or three days. In early 2009, Thiruvengadam still kept his log of the time he worked, but Dr. Childs did not sign it. (Tr. 63.) The log also contains job descriptions for the different projects at Employer and documents how much time he spent on different projects. (PX 11, Tr. 64.)

When Thiruvengadam started work at TLC, he had plans to go to India in 2009 for his brother's wedding. Since TLC only gave seven days off a year, Thiruvengadam wanted to combine weeks so he would have two weeks for the international trip. He discussed taking the days off with Dr. Childs, proposing to roll over the seven days PTO for one year into the next, so he could go to India for two weeks. He took no PTO during the time he worked at TLC. Unfortunately, he still missed his brother's wedding in September 2009 because of the continued uncertainty at TLC. He had conversations with Dr. Childs about what documents he would needed for his travel, given his visa status. Thiruvengadam knew he had to get a special stamp on his passport. He made Dr. Childs aware that he needed certain documents by sending e-mails saying, "Hey, these are needed for my travel if I have to leave." He never received the documents he needed. (PX 8 pp. 1-2; Tr. 66-67.)

He also emailed Dr. Childs about getting his paycheck. Dr. Childs said he needed to find a typewriter to get the paycheck run, so he should check back with Dr. Childs and Ms. Lorraine, who used to do the payroll. Thiruvengadam sent an email asking whether the typewriter was available to run his paycheck. (PX 8, p. 3; Tr. 68.) Thiruvengadam needed the pay stubs to document for his visa. (PX 8, p. 3; Tr. 69.)

He exchanged emails with the other team members working at that time, asking for feedback from the team and from Dr. Childs. (PX 8, pp. 4-7; Tr. 69.) He also constantly checked with Employer about his status, about being part-time, and about getting back on the payroll. He was receiving cash payments. In September 2009, Dr. Childs agreed to pay back for August 2009, and made a part-time payment. (Tr. 70.) Thiruvengadam discussed with Dr. Childs that in order for him to be part-time, TLC would have to amend the LCA with the USCIS. Dr. Childs asked Thiruvengadam to follow up. Thiruvengadam called the USCIS to ask about the procedure. USCIS advised that they could not discuss it with him as an employee; the discussion had to be done from the employer's side. He documented this call to USCIS by sending an e-mail to himself. Because of the frustration and emotional roller coaster he felt he was on, to make sense or to vent, he would send e-mails to himself about what was happening. (Tr. 71.) He could see other people at TLC who were getting paid, while Thiruvengadam received only promises that he was going to get fully paid eventually. In frustration, he began sending e-mail notes to himself. (PX 9; Tr. 72.)

Starting in September 2009, he began receiving checks for the period from August 1 continuing to the end of his time with Employer in December 2009. (Tr. 73; PX 12.) These paychecks were for part-time work. Employer took deductions for health benefits. For the pay period from December 16 to December 31, Employer deducted $61.67 from Thiruvengadam's paycheck for his health benefits. (Tr. 75.) He had health insurance benefits throughout the time he worked for Employer. Although he received partial paychecks, most of the time he worked full-time hours. The job required Thiruvengadam to be there full-time. (Tr. 76.)

In order to do his job, he had to use an outside facility, and he received training for that. Some of Employer's projects involved integrated circuit fabrication, which has to be done in a clean room. Although Employer has a clean room, it was not functional at the time and so Employer used the University of Minnesota's "Nanofabrication Center." (Tr. 76-77.) The Nanofabrication Center requires training to use their equipment. One has to be a member of the facility to reserve a tool. Thiruvengadam received training on how to use the facility and how to access the tool. He received separate training for each tool he needed to use. (Tr. 77.)

In the fall of 2009, other people started coming back to work. Employer also hired another person as administrative staff. Thiruvengadam decided to leave TLC when he started seeing people returning in the fall of 2009, but his situation was not changing. He had a discussion in December about going full-time based on the work needed for the project. (Tr. 77.) In January, however, he was still getting only half his paycheck. He discussed this with Dr. Childs. Thiruvengadam felt betrayed. Although Dr. Childs had agreed that he would take Thiruvengadam back full-time and pay him through payroll, nothing changed. This was a breaking point for Thiruvengadam. He gave Dr. Childs a resignation by writing and e-mail on January 29, 2010. (PX 13; Tr. 78.) Thiruvengadam attached an additional Excel sheet, to show

the cash amount received and the pending amount of pay that he had not yet received. (Tr. 79, 171, PX 13.) On February 10, 2009, he recorded having worked nine of the ten working days. On February 20, 2009, he recorded having worked seven of the ten working days. He did not always work all of the days in the work period. (Tr. 172.) For Thiruvengadam to resign, Dr. Childs had to sign-off on the resignation. (PX 14; Tr. 79.) When he resigned in early February 2010, he filled out an exit form. (Tr. 183.) Thiruvengadam did not inform the attorneys who did the LCA when he left Employer. (Tr. 170.)

He provided Dr. Childs with a forwarding address, so that he could send the outstanding pay to Thiruvengadam. He never received the outstanding amount. Dr. Childs did send a paycheck for January, dated February 1, 2010, but Thiruvengadam could not cash it. Employer did not send the check to the address he listed, so by the time he received it, more than ninety days had passed and the paycheck had expired. (Tr. 83, 180.) The check he received in June 2010 was for part-time pay. (Tr. 184, PX 8, p. 13.) The check was for $1,455.43 and his net pay for full-time would be twice that. (Tr. 185.) He sent an email to Dr. Childs requesting that Employer re-issue the paycheck. (Tr. 83.) He never received a replacement check for the check he could not cash. (Tr. 182.)

During the entire time from October 2008 through February 5, 2010, Thiruvengadam was available to work full-time. He was ready, willing, and able to work full-time for Employer. He took no vacation during that period. He does recall taking one day off because he was not feeling well. (Tr. 84.)

He decided to file a complaint with the Wage and Hour Division of the U.S. Department of Labor after talking with other friends who were in similar H-1B jobs. He was trying to figure out how to change jobs under H-1B. (Tr. 84.) He called the Department of Labor on the day he left Employer. The Department of Labor person asked him to submit Form WH-4 to report the incident. He filled out the form and attached a typewritten sheet addressed "To whom it may concern." He sent it by email the Monday after he left TLC. (PX 15; Tr. 85.) He had interviews with investigators from Wage and Hour Division. He reviewed and signed his interview statements. He added the handwritten notes to his signed interview statement. (PX 16; Tr. 87.) Before giving the interview, he filled out a questionnaire from Wage and Hour. He received monthly updates on the investigation. (Tr. 88.)

On cross-examination, Thiruvengadam testified that the offer letter he received from Employer gave a base annual salary with a start date of October 1, 2007. It notified Thiruvengadam that Employer had "an expectation to perform more than minimum of forty hours per week to timely complete important tasks." He received a salary. Employer paid semi-monthly, for the days from the first through the fifteenth, and then from the sixteenth until the end of the month. Thiruvengadam accepted the offer from Employer. (PX 5; Tr. 93.) Although Thiruvengadam did not sign an employment contract, he sent an email accepting the offer. In order to receive a paycheck, he needed to sign a timesheet recording his hours. (PX 11). He signed the timesheet on the line for the employee's signature and left it in a little basket. (Tr. 96.) Then a supervisor would sign it, and he would get paid. At first, he put his Social Security number on the paper when Dr. Childs was signing it. The copies at PX 11 do not contain Social Security numbers because Dr. Childs had stopped signing the timesheets. (Tr. 97.) Employer's

policy was that an employee had to sign the timesheet to verify the hours they worked before they got paid. (Tr. 98.)

Thiruvengadam sent emails[9] to Dr. Childs stating how much money he had received in cash. He wanted to ensure that he and Dr. Childs were "on the same page" about what he had received. (PX 10; Tr. 98-99.) Thiruvengadam also sent an email to Dr. Childs that said, "As we discussed, please find below the required document for H-1B stamping. And all pay stubs." He further wrote, "As I mentioned early already, I am reluctant to file my tax returns with Form W-2 based on partial pay stubs. According to USCIS, one of the major compliances is to have the same wages on Form W-2, as mentioned on LCA." (PX 8; Tr. 103.) The letter did not mention Employer providing the funds to travel. (Tr. 104.) Thiruvengadam received a W-2 for 2008 from Employer. Employer is responsible for keeping a copy of the LCA, and Thiruvengadam did receive a copy of the LCA from Employer. (Tr. 105.)

Employer did not tell Thiruvengadam he could not go on the trip. (Tr. 106.)

Thiruvengadam sent an email to Dr. Childs, writing, "I would like to follow up with regard to our part-time payroll conversation on August 31, 2009. Please let me know your convenience." (PX 8, page 8; Tr. 107.) In an email to himself, Thiruvengadam wrote,

> Dr. Childs called for a meeting with me today with respect to my earlier request for my payroll processing. He suggested about getting me into part-time payroll. … In the first or second quarter of 2009, Dr. Childs told me that my hours would change and I would become part-time. He said nothing about a pay change, although he changed my schedule to part-time. The amount of work he expected me to complete required more hours of work than the part-time schedule allotted.

(PX 9; Tr. 108.) Thiruvengadam further wrote,

> Today, September 8, 2009, I met with Dr. Childs to follow up on the part-time payroll option discussed on August 31, 2009. He mentioned that he spoke to USCIS officials regarding converting full-time to part-time employment on H-1B visa status. He heard verbally that there is no need to amend any change of status to USCIS while converting full-time status to part-time state for H-1B employees. He gave me a few print-outs from USCIS website to review and get comfortable on this process before he cuts a check on my part-time employment at TLC. I am supposed to look for details or talk to USCIS officials and get back to Dr. Childs by today evening or tomorrow. He would like to clear this up by this week.

(PX 9, p. 2; Tr. 109-110.)

In another email to himself, Thiruvengadam wrote, "Today, I was working at NFC UMN and Dr. Childs gave me a ride to TLC by noon." This was not the only occasion that Dr. Childs gave Thiruvengadam a ride, although he did it infrequently. (PX 9, p. 4; Tr. 110.) Thiruvengadam emailed himself, "He mentioned that he was surprised that I'm asking for more money and I agreed to work part-time." (PX 9, p. 4; Tr. 111.) "In spite of this, he started talking

[9] tissy2@aol is an alternate email address for Dr. Childs.

about the negotiation and offered to pay me similar to this week with a partial paycheck and partial cash." (PX 23; Tr. 112-113.)

Thiruvengadam felt that Employer treated him fairly, except for the financial part. It was known throughout the company that TLC was in a financial difficulty. (Tr. 114.) On November 16, 2008, Dr. Childs sent Thiruvengadam a memo that said,

> Dear Sathish Thiruvengadam,
>
> As in the meeting you attend with the TLC team, our customers have run out of funds and TLC has to lay off all employees. Therefore, with much regret, this is to officially inform you that TLC Precision Wafer Technology Incorporation is laying you from being an employee of TLC. Effectively immediately, you are laid off from TLC Precision Wafer Technology, Inc. As in the meeting you attend with TLC team, our customers have ran out of funds and TLC has to lay off all employees. We are willing to help with employees getting unemployment, if possible.

(PX 6; Tr. 116 - 117.) Thiruvengadam remembers attending a meeting with all of the employees in which Dr. Childs addressed the financial crisis. Thiruvengadam does not know about the details of who was laid off. (Tr. 117.) The meeting was open ended. The meeting was a discussion to hear thoughts from employees.

In his email to himself, Thiruvengadam wrote, "They (his co-workers) received unemployment compensation during this time." (Tr. 118.) He sent e-mails to Dr. Childs saying how much cash he had received up to January. He had health insurance throughout this period but did not pay the premiums. (Tr. 126.) Previously, Employer had deducted his health insurance premium from his paycheck. (Tr. 127.) From January 12 through August 13, 2009 Thiruvengadam did not receive any checks from Employer. He did receive cash. (Tr. 127.) He also received transportation back and forth to the university and on some occasions, to home. (Tr. 128.) Thiruvengadam received a phone system called "Magic Jack" to try. (Tr. 129.)

On his Affidavit given to the U.S. Department of Labor, Thiruvengadam wrote:

> I did not agree in the change in my hours from full-time to part-time. I told Dr. Childs that if he wanted to change my status as an H-1B employee or my hours from full time to part-time, he had to contact U.S. Citizenship and Immigration Services, USCIS. I never had a conversation with him, except when I told him he needed to change my status.

(RX 24; Tr. 129.) Employer reduced his hours, resulting in the difference in the number of days that Thiruvengadam worked compared to the number of days in the workweek in a pay period. He was willing to work full-time, but Employer asked him to cut the time and come back and do the project based upon availability of others. (Tr. 182.)

On November 25, 2008, Employer informed employees about the possible shutdown during the month of December 2008. Employer forced Thiruvengadam to take time off from February 2009 to September 2009. (PX 15; Tr. 137.) He never voluntarily took paid time off, sick leave, or other time off. Employer did not restrict him from coming into the building, but

did tell him he could not come in to work on certain days. (Tr. 138.) He logged in his time on the time sheet when he was there, so the time sheets show when Employer did not allow him to work. Sometimes Thiruvengadam worked off-site at the University of Minnesota NFC. He does not remember what hours the Nanofab Lab is open. No one in Employer restricted his entry into the University as long as he had the access card. (Tr. 139.)

He sent Dr. Childs emails about his non-immigrant employment situation and possible options. He discussed options regarding being a student or amending his status to part-time. (PX 15; Tr. 140.) Starting November 2009, Thiruvengadam noticed some positive trends at Employer. Employer called back former employees on a full-time basis and hired some new employees. On December 16, 2009, he received a partial check from Dr. Childs. He had expected a full paycheck, as he had learned from talking to his co-workers that other employees received pay for all the hours they worked at Employer. (Tr. 141.) The other employees received full pay for the pay period between November and December. In November 2009, he had been working more than forty hours a week as Employer had work that required him to be there full-time. (Tr. 142.)

He received e-mails where Dr. Childs set out his expectations for things to be done in a short period because of certain constraints. He thinks he asked, "Dr. Childs, how am I going to finish this if you want to limit my hours but still get the project done, how is that going to be possible?" He had no one supervising him at the university. (Tr. 143.) After a discussion with Dr. Childs on December 30, 2009, he promised to pay Thiruvengadam's full-time paycheck starting January 2010. (Tr. 144.)

Thiruvengadam is familiar with the SBIR program that awards grants and contracts to small businesses. Phase I is typically around 100 to 150,000, and Phase II is generally for a bit more, grants typically range from 600,000 to a million dollars. (Tr. 149) TLC was Thiruvengadam's first place of employment after graduate school. He had not done any milliwave circuit processing before Employer. At the University of Minnesota in their NanoFab, he did linear phase shifting fabrication. (Tr. 150.) Employer hired a consultant, Koko Umanah, to help Thiruvengadam on linear phase shifting. Thiruvengadam also went through training at the University of Minnesota to use their equipment to do the fab. Employer paid the University of Minnesota for this. (Tr. 153.) When Thiruvengadam left Employer, Employer had no other employee who had experience working on the linear phase shifter for the NASA project in the fabrication lab. (Tr. 179.)

Thiruvengadam does not know whether the people he saw at Employer's offices in November 2009 were full-time hires. (Tr. 154.) Dr. Childs promised to give Thiruvengadam full-time paychecks starting in January 2010. (Tr. 155, 157.)

Thiruvengadam gave at least one interview statement to the U.S. Department of Labor and had several conversations with the investigator. (Tr. 158, PX 16.) The Department of Labor gave him updates on the investigation. He primarily communicated with Investigator Valerie Ferris Jacobson. He gave his statement dated October 18, 2012 by telephone, like his other conversations with her, and later signed and dated it. (Tr. 159-160.) He also communicated with her by e-mail. (Tr. 161.) He filled out a questionnaire on December 16, 2011. (Tr. 161.) On the

questionnaire he listed his rate of pay as $43,000 per year and answered the question "Does the employer require you to pay an early termination fee or have a liquidated damages clause in your employment contract?" in the affirmative. (Tr. 162.)

Thiruvengadam wrote an email to Dr. Childs with the subject "proposal to Koko" on September 15, 2009. (Tr. 165.) The email said, "Were all objectives, get back to fab capabilities we had and continue the effort of fabrication process to move to routine commercial application and operation. Two main fab processes are LPS, INP, Indian Phosphate, MMIC, Circuit Fab." (Tr. 165-166; RX 21D.) Thiruvengadam was working with Koko Umanah to learn and get the fab process going at the University. (Tr. 170.) Koko had been involved in the LPS project and no records were available to redo the project, so Employer brought Koko back as a consultant to provide information so they could go back and start over. (Tr. 182.)

B. Wage Hour Investigator Valerie Ferris Jacobson

Ms. Ferris Jacobson has worked for the U.S. Department of Labor, Wage and Hour Division, in the Minneapolis District Office as a Wage-Hour Investigator for approximately eight years. She has a degree from the University of Minnesota in entrepreneurial management, applied economics, and writing studies, which she obtained in 2008. (Tr. 193.) She started at Wage and Hour on August 17, 2008. As a Wage-Hour investigator, her primary duty is to enforce labor laws that the agency investigates. She goes to different businesses and determines if they comply with the applicable labor laws. If they are not in compliance, she explains how to make changes in order to come into compliance. The main laws she investigates are the Fair Labor Standards Act, the Davis-Bacon and related Acts, the Service Contracts Act, and the H-1B, H-2A, and H-2B provisions of the Immigration and Nationality Act. She has been investigating companies for compliance with H-1B for approximately six years, completing twelve to fifteen H-1B investigations. (Tr. 194.) All investigators attend a basic training that focuses on some of these specialized laws. She also completed a week-long H-1B training in 2010 in Michigan, which consisted of specific training on the H-1B regulations, and conducting hands-on investigations in Michigan. (Tr. 195.)

Ferris Jacobson investigated TLC. Wage and Hour initiated the investigation because of a complaint. (Tr. 195, PX 15.) Whenever Wage Hour receives a complaint of an alleged violation regarding H-1B, either the Wage-Hour investigator or the complainant fills out a written form. In this case, complainant filled out and submitted the form to Wage and Hour sometime between February 7 and February 10, 2010. She knows that from records of notes from interactions with the complainant, as well as an e-mail correspondence between one of our Wage-Hour investigators at the time and the complainant. (Tr. 196.) Wage Hour reviewed the basic information entered it into their internal system, WHISARD on February 20, 2010. (Tr. 197.)

The complaint primarily alleged that the employer failed to pay a nonimmigrant worker for time off due to a decision by the employer -- for example, lack of work -- or for time needed by the nonimmigrant worker to acquire a license or permit. (Tr. 197.) Once Wage Hour receives a complaint, Wage and Hour contacts the complainant and obtains additional information to determine if there is the potential of a valid complaint or if the allegation is indicative of a

violation. After review, Wage and Hour determined that they would conduct an investigation, notified the complainant and assigning the matter to an investigator. Wage and Hour assigned Investigator Ferris Jacobson in December 2011. The first thing she did was review the complaint. (Tr. 198.) She discussed the case with her supervisor. Prior to initiating contact with the employer, she contacted the complainant, on or about December 16. She kept contemporaneous notes of her contacts with the complainant. Part of the investigation process is to obtain interview statements. She emailed a questionnaire to complainant to obtain additional information prior to going onsite and speaking with the employer. (Tr. 199, PX 24.) The questionnaire is standard; investigators send it out to any H-1B complainants or H-1B workers employed at the company during the initial period of investigation. She emailed this questionnaire on December 16, 2011. (Tr. 200.)

During this particular investigation, an additional Wage and Hour investigator, Jill Azocar, "shadowed" Ms. Ferris Jacobson, the lead investigator, on the investigation. Prior to meeting the employer, they prepared. They discussed the complaint, the allegations, and the process; and printed out some publications and notifications prior to their initial conference with the Employer. On December 21, 2011, they conducted a drop-in initial conference (unannounced visit) at TLC. (Tr. 202.)

When they arrived at the worksite, there was one individual there. They asked for the owner or general manager and he directed them to speak with Tim Childs. He is the principal of the business. During this initial conference drop-in, they gave Dr. Childs the standard appointment letter, which provides information about their visit, their authority to investigate, and includes a records request. (Tr. 203; PX 19.) For the majority of the H-1B investigations, Wage Hour conducts a drop-in visit rather than scheduling it in advance. (Tr. 204.) They asked to view the public access file that 20 C.F.R. 655.760 requires every employer that has H-1B workers to maintain. (Tr. 204.) The public access file should contain, at minimum, the labor condition application ("LCA") and the documentation of the wage rate that the employer plans to pay the H-1B workers. It also should have information about the actual wage and the prevailing wage, which would include some of the background information or supporting documentation of those, also a copy of the notification requirements for non-H-1B and H-1B workers that are working at the worksite. It must also include a summary of the benefits offered to U.S. workers and some additional things in the event of a corporate change. (Tr. 205-206.)

Employer had no records available on December 21. (Tr. 206.) Dr. Childs told them he did not know what the public access file was. At the initial conference, the Wage Hour investigators provided information to Dr. Childs, then sat down with him and discussed some of the aspects of the business to get an idea of how the business operated, if they had other H-1B workers, and if there were other potential violations that were apparent. (Tr. 207.) They learned that Dr. Childs was the president of the business. He informed the investigators that he had laid off many, if not all of the workers. The investigators informed him that they were looking at the one-year period from February 9, 2009, to February 8, 2010. (Tr. 208.) Dr. Childs told them that although at the time of this meeting he had one H-1B employee, he had had a different H-1B employee during that twelve-month window. They asked for information regarding the LCA and the I-129. They requested information about the H-1B worker's name, contact information, dates that work started and ended, and whether or not the H-1B worker was in the country prior

to receiving a job offer or if they were in another country. Although she requested the LCA and the I-129, she did not receive them that day. (Tr. 209.) Dr. Childs did disclose the name of the H-1B worker, but did not provide them with contact information or any of the other information requested specific to that LCA, including the specific dates of employment. After meeting with Dr. Childs, they explained the process of the investigation and gave him two weeks, until January 6, 2012, to produce the necessary records. On or about January 6, 2012, Dr. Childs emailed Wage Hour to request additional time. (Tr. 210.)

Exhibit PX 20 consists of copies of the e-mail correspondence between Dr. Childs and the Department of Labor. In the emails, Wage Hour requested that he provide information, records, or documentation. Dr. Childs asked for additional time because of the holidays. (Tr. 211; PX 20.) Wage Hour set a new deadline of January 11, 2012, three weeks from the initial drop-in conference. (Tr. 213.) On January 9, Dr. Childs again requested additional time to provide the records. Wage Hour informed him that if he was unable to send the documents, they could come out again to the company to review them, but asked him, at minimum, to return the initial conference spreadsheet by January 16, 2012. They included that spreadsheet in the appointment letter. The spreadsheet asks the employer for the number of the LCA, the employees who worked under the LCA, the date the work commenced, the date the work ended, and employee contact information such as e-mail and last known mailing address. (Tr. 214.) The spreadsheet also asks what benefits an employer offered to the H-1B workers. Wage Hour received an incomplete version of the spreadsheet on January 15. It had the LCA number and the worker's name. (Tr. 215.) Dr. Childs told Wage Hour he planned to send the more completed form on the following Tuesday. On Wednesday, January 18, Dr. Childs sent another email saying he wanted to refer Wage Hour to his attorney. He wrote, "I want to avoid issues and problems, as I already have too many in trying to survive this economy. Should I have her contact you directly?" (Tr. 216; PX 20.) Wage Hour informed Dr. Childs that he could decide who the point of contact for the investigation should be. Wage Hour received the completed spreadsheet January 27, 2012. Wage Hour received some of the other requested documents on February 13, 2012. Dr. Childs e-mailed the LCA, the labor condition application, the I-129, a W-2 for the H-1B worker, and what looked like a termination letter. (Tr. 217-218; PX 20.)

PX 21 is the completed initial conference spreadsheet that Employer provided to Wage and Hour on January 27. (Tr. 218.) According to the spreadsheet, Employer did not collect any liquidated damages and penalties. (Tr. 220; PX 21.) PX 22 are the documents provided by Dr. Childs regarding the H-1B worker and the LCA. (Tr. 222; PX 22.) Wage Hour requested, but did not receive, payroll records and information from the public access file, including documentation of the actual wage rate and how it was established, and documentation of the prevailing wage rate, and the notice to employees. (Tr. 224.) Wage Hour made their final request for records by phone around March 26, 2012, but they received no documents in response to that request. (Tr. 225.)

The LCA was filed for a full-time employee. The I-129 petition form asks whether the position is part-time or full-time. On page 2 of the LCA, Section C, "Rate of Pay", question number 4 asks "Is this position part-time?" and Employer marked "No". (Tr. 227.) The rate of pay listed in section C on page 2 of 4 is the wage rate of $43,000 per year. Under H-1B, the employer is responsible to pay the employee the full wage, which is the required wage, as of the

date that the employee enters into employment. The required wage is the higher of the prevailing wage or the actual wage. Section E of the LCA states that the prevailing wage is $40,581. The rate of pay listed in Section C is $43,000. Thus, the actual wage rate is $43,000 and that becomes the required wage rate. The responsibility for the employer is, with very limited exceptions, to pay that for a salaried employee on a pro rata basis for every pay period after the worker enters into employment for the entire period covered by the LCA, unless the employment relationship is completed or for other various reasons listed in the Code of Federal Regulations. (Tr. 228.) Employer is required to pay no less often than monthly, on the regular payroll. If the employer's payroll is normally weekly, then the pro rata salary is the total salary divided by 52. If it were biweekly, then it would be $43,000 divided by 26 pay periods. In this case, the investigation disclosed that the employer paid semi-monthly, which is twice per month, and so the pro rata amount is the $43,000 divided by 24 pay periods per year. The pro rata amount is defined in 20 C.F.R. 655.731. (Tr. 229.) Employer did not provide Wage Hour for the background information to determine the wage rate. Section E of the LCA identified the wage source as the FLC wage survey.

Part 5 of the I-129 form includes the basic information about the proposed employment and employer and asks, "Is this a full-time position?" (Tr. 230- 231, PX 3.) On this I-129 form, Employer answered "Yes" to the question "Is this a full-time position?" The wages per year are $43,000. To change from a full-time to a part-time position, an employer would need to notify USCIS and submit another I-129 form to correct this. (Tr. 233.)

Wage Hour conducted the final conference in May 2012. As required by the Code of Federal Regulations, Wage Hour sent a determination letter, dated June 7, 2012, after the final conference was conducted with the employer. (Tr. 234-235; PX 17.) The investigation disclosed violations which fell under three different categories. As set forth on the Summary of Violations and Remedies, "TLC Precision Wafer Technology, Inc. failed to pay wages as required, in violation of 20 C.F.R. 655.731." (Tr. 236.) Wage Hour found that TLC failed to pay the required wage rate for both productive and nonproductive time. The second violation was a failure to maintain documentation as required. (Tr. 237.) TLC failed to have the required documentation regarding the actual wage and the prevailing wage, the payroll records, the public access file, and required documentation of benefits and benefit plans. The third violation that was disclosed was failure to cooperate in the investigation as required, because several times the employer was unresponsive, and failed to provide Wage Hour what they requested. (Tr. 239.)

The list of violations attached to the determination letter is a standard form that Wage Hour uses. Although this form states that the first violation includes failure to pay the required wage for productive work, the violation also included nonproductive times. An employer is required under the regulations to pay for the entire wage while the H-1B worker is ready, willing, and able to work, regardless of whether they're working or not. Nonproductive time is when there is a lack of work due to a business reason or a reason by the employer. For example, this might be a lack of work, a lack of funds, or a lack of materials. But, if the H-1B worker is ready, willing, and able to work, then the employer is required to pay the worker for that time. If the employee takes time off for family and medical leave or travel that is not work related, they do not need to be paid on the same basis. (Tr. 240.) Complainant had nonproductive time when he was working at TLC whenever he did not work the full number of expected hours for reasons

determined by the business. That is considered nonproductive time. He would be due wages whether he was working or not, if it was his employer's reasons that caused the reduction in hours, even if it is just one or two hours. (Tr. 241.) If his reason for not working was not for the benefit of the employee, then there is a requirement to pay.

The total amount of back wages computed was $29,216.67 to one H-1B nonimmigrant worker. Ferris Jacobson used an Excel spreadsheet to explain her calculations. (Tr. 242; PX 18.) In general, back wages are computed by determining the total amount that should have been paid and by subtracting any amounts that were paid. The H-1B regulations do not contain the workweek-by-workweek requirement in other statutes, such as the Fair Labor Standards Act. Thus, payments made in different periods can offset the amounts due. Here, Employer typically paid semi-monthly. The spreadsheet shows the semi-monthly dates ending each pay period. The next column shows the LCA wage per year; the required wage was the actual wage of $43,000 per year. The next column shows the pro rata amount for the semi-monthly payroll. Wage Hour uses the gross amount for these calculations, because the employer is responsible for that amount. They acknowledge that there are normal deductions, such as taxes, potentially health insurance and others. (Tr. 244.) In this investigation, Wage Hour determined a gross amount of $29,216.67 owed. The next column is the gross amount actually paid. Employer never provided any payroll documents to Wage Hour. They relied on Complainant's check stubs and his own records of cash payments to verify the information. Ferris Jacobson noted that, technically, under the H-1B requirements, if the wages were not reported to the IRS, they should not be counted as payments made under the regulations. But in the course of this investigation, Wage Hour determined that this complainant did receive those sums, and so credited them in favor of the Employer. So Employer received credit for those payments made in cash. The $29,216.67 reflects the total amount still due, even after the regular payroll payments and the cash payments.

If benefits, such as health benefits, are afforded to the U.S. workers, they should be made on the same basis to the H-1B workers. If an H-1B worker is receiving health insurance, then it is very common, customary, and regular for them to have a deduction from their pay for their own portion of the premium. (Tr. 245.) The employer's portion of those benefits cannot customarily be deducted from the worker.

Once the employee enters into employment or makes herself available to work, the employer has the liability to pay the required wage. If the employer has a bona fide termination of the employee or if the employee resigns, then the employer's liability would end, if they do certain activities. Three steps determine whether a bona fide termination has occurred. First, did employer give the worker notice of the termination? Second, did the employer offer return transportation to the worker's home country? Third, did the employer notify USCIS of the termination so that the H-1B LCA can be withdrawn or canceled? (Tr. 247.) The investigation disclosed that Employer did not provide Complainant with a notice of termination, did not offer or pay for return transportation to Thiruvengadam's home country, and did not provide notice to USCIS. Wage Hour has the ability to check to see if the petition, the I-129, or the LCA was canceled or withdrawn, and it was not. (Tr. 248.)

Ferris Jacobson determined that TLC had failed to maintain documentation as required by the Act because there were several instances where Dr. Childs informed her that he did not have

the records or that the records were not available or simply did not provide them. The employer is required by the H-1B regulations to have the public access file available to anyone from the public within one working day of the LCA being filed. (Tr. 249.) There is also a requirement that the H-1B employer maintain payroll records for at least three years after the creation of those records. TLC's failure to maintain or produce records that she requested impeded her investigation by delaying it greatly. Wage Hour made the original records request December 21, 2011. Wage Hour made the final records request March 26, 2012. To this date, the Department of Labor has still not received payroll records and some of the other requested records.

TLC failed to cooperate, in violation of 20 C.F.R. 655.800(c) because there were many attempts made to interview workers, to review records, and multiple attempts to accommodate the employer by offering to go out to the worksite, or to work with a different representative, if that was necessary, and Wage Hour still was unable to get the documentation that it needed in order to complete the investigation with the employer's records. (Tr. 250.)

Therefore, they had to rely on Sathish Thiruvengadam's records. (Tr. 251.)

On cross-examination, Ms. Ferris Jacobson testified that she has done searches for LCA's and that the search returns a document similar to the printout from the ETA Foreign Labor Certification webpage that is RX 23. She has not run searches for the number of LCAs an employee may have, and is unaware of anyone in her office doing so. (Tr. 258.) RX 23 is a search that Ferris Jacobson ran on TLC as part of her investigation. (Tr. 259.) The printout lists eight records. (Tr. 260.) Wage Hour is authorized to conduct investigations without complaints. Ferris Jacobson has not personally investigated TLC other than for this period for this law. (Tr. 262.) The initial period of investigation starts at the twelve-month window. If Wage Hour finds violations within that twelve-month window, they are authorized to extend the period of investigation. (Tr. 263.) In this case, the initial twelve-month window was from February 9, 2009 through February 8, 2010. (PX 19.)

Ferris Jacobson does not know the specific date that Wage Hour received the complaint in this case. (Tr. 264; PX 15.) She received the assignment in December 2011. (Tr. 265.) Thiruvengadam provided the WH-4 form complaint. (Tr. 266.) Ferris Jacobson has conducted in total approximately twelve to fifteen H-1B investigations. She does not know the specific number that she conducted prior to TLC, probably eleven. (Tr. 267.)

Her drop-in visit to TLC took place on December 21, 2011, four days before Christmas. Before talking to Dr. Childs, she saw one other person at the workplace. (Tr.268.) As far as she knows, Dr. Childs was not expecting the visit. (Tr. 269.)

The Form I-129 at Part 5, item number 6, lists wages per week or per year as $43,000 for a full-time position. In this investigation, Wage Hour determined that $43,000 was the required wage. (Tr. 273.) The form does not specify the number of hours required per week. An employer is not necessarily in compliance by paying the full $43,000, if payments are not made at least monthly. However, other payments that are made can be credited towards the total amount due throughout the year. (Tr. 274.) The employer is relieved from the obligation to pay the full annual required wage due for a year when there is a bona fide termination. Wage Hour

uses a three-part test to determine if the termination is bona fide. Did Employer notify the worker that they were terminated, and how did Employer notify the worker? Did Employer offer the worker return transportation to their home country? Did Employer notify USCIS that the worker was no longer working? (Tr. 276.)

Other circumstances that would relieve an employer from their obligation to pay the full required wage include instances where an employee has not yet entered into employment. Another circumstance where employees need not be paid is if they do in fact resign, but Wage Hour still requires an employer to meet the three part test. The employer would need to notify USCIS. The circumstances where an H-1B employer need not pay that H-1B employee are outlined in the regulations. (Tr. 277.)

The offer letter at RX 7, page 2, section III (same as PX 5) states "This offer and bonus have the following additional contingencies." Item number 9 says, "Receiving your written response by October 22, 2007." Yet Thiruvengadam testified that he did not provide the written acceptance. (Tr. 279.) Wage Hour would not consider the offer letter an employment contract. Even if it were an employment contract, however, the offer letter would not invalidate the requirements of the H-1B regulations. (Id.)

Ms. Ferris Jacobson received PX 6 from Dr. Childs by e-mail on February 13, 2012 in response to her investigation related to H-1B employees or former employees. (Tr. 281.) PX 6 is dated November 16, 2008. (Tr. 282-283.) The document includes a signature and states that it is regarding "Employment Dismissal from TLC". It is addressed to Sathish Thiruvengadam.[10] (Tr. 284.)

RX 14 is the same document as PX 13. (Tr. 286-87.) The letter is dated January 29, 2010, which is within the investigation period and is before the H-1B application expiration date. The H-1B employee resigned from TLC before the end of the H-1B period. (Tr. 287.)

PX 24 is the interview of Sathish Thiruvengadam dated December 19, 2011. (Tr. 289.) He answered yes to the question "Does the employer require you to pay an early termination fee or have a liquidated damages clause in your employment contract?" (Tr. 290.) Ferris Jacobson interpreted this to mean that the worker believed there was a fee for early termination. (Tr. 291.) If an H-1B worker breached their H-1B contract and created business losses for the employer before that one-year or during that one-year period of investigation, those losses would not necessarily be in compliance with the H-1B rules.

Her calculation for back wages included both productive work and nonproductive work time. (Tr. 292.) The initial investigation period was from February 2009 through February 2010. (Tr. 293.) Gross pay is the amount prior to legal deductions. A legal deduction can be medical expenses for the employee under certain circumstances. (Tr. 294.) If he received medical benefits, the employee's deduction can be taken out of the gross amount due afterwards for any of those pay periods. (Tr. 295-296.) She calculated the back wages due on full-time

[10] At the hearing, Thiruvengadam testified that he did not recall ever receiving PX 6. (Tr. 41.)

employment. To base wages on part-time employment, TLC would have had to appropriately amend the I-129. (Tr. 297.)

She did hear that there had been emails advising Thiruvengadam that he would be converted to part-time. (Tr. 299.) She did not receive anything from Employer that would cause her to adjust the total of back wages due. (Tr. 311.) If the worker took days off at his discretion, not due to lack of work or lack of funds, then the calculations would have to be edited. (Tr. 313.) If he had been working on a part-time LCA, and worked more than part-time hours, Employer would have to pay him for all hours suffered or permitted to work. If the employer did, in fact, offer to pay for the employee to go home, that would be a factor considered in whether there was a bona fide termination. But technically, because the employer never notified USCIS, Wage Hour could have calculated back wages until the end of the LCA period whether a return trip home was offered or not. Wage Hour looks at all three requirements: notice to the employee, offered return transportation to home country and notification to USCIS so that the LCA can be canceled or withdrawn. (Tr. 314.)

Ferris Jacobson calculated wages due to the employee from certain entries that were prior to February of 2009, which was outside of the initial investigation period, as outlined in her letter to TLC. Whenever Wage Hour finds a violation that has occurred in the twelve-month window, the agency can extend the period of investigation to the time that the violation started. (Tr. 316.) She determined that the violations started as early as November 2008. The first cited violation is that TLC failed to pay wages as required, in violation of 20 C.F.R. 655.731. The regulation includes requirements to pay nonproductive time. In this case, she determined that there were wages due for nonproductive time. (Tr. 317.) She does not consider the failure to amend the LCA from full-time to part-time to be a technical or procedural failure. A technical or procedural failure would be a failure to actually change the LCA because of procedure or because of a technicality. If an employer filled out an I-129 form and forgot to actually modify it but sent it to USCIS; that might be a technical error, if they could provide information that they notified USCIS in some other way. In this case, Ferris Jacobson does not believe Employer made a good faith attempt to comply. If a good faith attempt to comply had been made, Employer would have been in compliance in other ways. (Tr. 318.) Also, Employer never provided Wage Hour with the requested payroll records. Employer claimed it wanted to lay off the employee and yet allowed him to continue working. He was not in fact terminated, even if a termination letter existed. (Tr. 319.)

An early termination fee or penalty is not the same as liquidated damages. The regulations permit some liquidated damages, if they meet certain criteria, set forth at 20 C.F.R. 655.731(c)(7)(ii), (c)(9), (c)(10). Liquidated damages can vary based on state law, but in general, the employer and worker must agree to such damages prior to any work being performed. For example, if an employer had outlined, "If you quit within this much time, this amount of money was paid for this training," or, "This amount of money was paid just to get you hired on." Costs should be outlined and there should be some background information as to why the expenditures were made. In this case, Wage Hour did not make a determination regarding liquidated damages, because none had been sought. (Tr. 320, 340-41.)

There was no employment contract between Thiruvengadam and TLC, per se. The H-1B regulations do not require an employment contract. Most benefits offered as a part of employment are included in the offer letter. It is very common, in H-1B investigations, to see an offer letter that stipulates benefits, but to have no official contract. (Tr. 321.) From the records Wage Hour reviewed, which primarily came from Complainant, there was no evidence that liquidated damages had been reduced or any kind of penalty had been taken from the gross wages paid. Only the legally acceptable deductions had been made. (Tr. 322.) Ferris Jacobson has not seen any documentation that would lead her to believe that liquidated damages would be appropriate or that Wage Hour should permit any reduction in the back wages due because of liquidated damages. (Tr. 323.) During the initial conference, Wage Hour goes through a lot of different factors and asks about penalties for early cessation, filing fees, liquidated damages. They did talked about liquidated damages with TLC during the investigation. (Tr. 326.) On PX 21, Employer wrote that liquidated damage were not collected. (Tr. 327.)

When Wage Hour gathers information about the H-1B worker and the specific LCA, they ask if there are any unpaid periods of time that somebody was not working, like for vacation or other. On PX 21, Employer stated "Personal time off" without listing any dates. (Tr. 328.)

Dr. Childs told Ferris Jacobson that he was not familiar with the requirements of H-1B. TLC sent e-mails to Wage Hour with reasons for their delays in providing records. Ferris Jacobson found it unusual that Dr. Childs signed the Labor Condition Application attestations and statements without actually finding out what they say, what they are, or how to comply. (Tr. 329.) A lack of knowledge of the requirements is not a legitimate reason for noncompliance. Every CEO is not going to be an expert in the requirements of H-1B. But there is some onus on the part of an employer to find out what it is they are signing up for. (Tr. 330.)

The H-1B worker filed his complaint in February of 2010, and it was registered in the WHISARD system on February 20th of 2010, yet Ferris Jacobson was not assigned until December, 2011. (Tr. 332.) Wage Hour had a very large backlog of H-1B and non-H-1B complaints. They did not have enough investigators to investigate the complaints. (Tr. 333.)

They sought information regarding all H-1B employees during the twelve-month investigative window. Wage Hour did not receive any LCAs from Employer until February 13, 2012. At that point, they received the one for Complainant.

To determine the prevailing wage, the LCA said Employer used the FLC ("foreign labor contractor") wage survey, which is one of the resources employers can use to try to determine what the appropriate wage rate would be. (Tr. 334.) The other main source employers use to determine prevailing wage is the OES from the Bureau of Labor Statistics, which is very similar to the FLC wage survey. (Tr. 335.) Investigator Ferris Jacobson created a spreadsheet (PX 18) which started with the pay period ending November 30, 2008, although Thiruvengadam began his H-1B employment on October 1, 2008. As far as Wage Hour could tell from Thiruvengadam's documents, the pay between October 1 and November 30, 2008 was correct. (Tr. 336.)

When paid by check, legal deductions were taken. When he was paid in cash, there was no way for Wage Hour to know if he received gross or net amounts. Wage Hour assumed they were gross amounts, as they were cash payments off the record. (Tr. 337.) The gross amount paid, $22,741.66, was the amount before any deductions. The total Wage Hour determined to be due, $29,216.67, is the gross amount due. Out of that, the worker would still be responsible for any of the appropriate legal deductions (taxes, potentially reimbursement for health insurance contributions that he should have made during that time). (Tr. 338.)

Dr. Childs wrote a letter to Thiruvengadam dated November 16, 2008, informing him that TLC was laying him off. (RX 8.) There are some circumstances where a termination letter would be considered sufficient notice, even without proof that the other two factors were met, but it is very unusual and it is fact specific. Wage Hour did not consider the letter an appropriate termination in this case because the complainant continued to work for Employer. (Tr. 339.)

Wage Hour cited TLC for failure to maintain documents because Wage Hour never received certain documents that we had requested. They cited failure to cooperate primarily because Wage Hour made so many attempts to contact the employer to get what they needed to conduct the investigation, and often Wage Hour did not get responses back. Wage Hour sent e-mails and called. Without the documents, they did not have the information necessary to determine the back wages. So Wage Hour obtained a permission-to-use-name statement signed by the complainant and used his personal records.

Wage Hour could determine how many hours were spent in productive versus nonproductive time because the employee kept his own records of his hours worked. They could rely on those to determine an hourly equivalent for the number of hours he worked in each workweek or pay period. (Tr. 343.) She did do a calculation that sets out what his wages would be for only productive time. (Tr. 344.) However, she only did it for a specific period of time. (Tr. 345.) Ferris Jacobson believes a little bit more than $21,000 of the back wages due was for productive time. The remainder would be for nonproductive time. (Tr. 346.)

Wage Hour will treat an offer letter as a contract for purposes of liquidated damages. They did not do that in this case because the offer letter is from October 2007. The letter sets forth a 24-month period in which the employee would have to pay back bonuses. Thiruvengadam resigned from his employment in February 2010, after the two year period. (Tr. 347.)

The deductions that can be taken out of the employee's pay must be agreed to and be for the benefit of the employee. For example, it would be to the employee's benefit to receive health insurance, therefore his portion of his health insurance premium would be an acceptable deduction. Training would be principally for the benefit of the employee if it is portable, if it goes beyond the scope of work. When the training is specific to the job and required by the employer, then it is for the benefit of the employer. (Tr. 348-349.)

The information TLC provided by e-mail February 13, 2012, was only regarding Thiruvengadam. If there were other H-1B employees employed at that same time during the

twelve-month window, Wage Hour never received documents from TLC showing that. (Tr. 350.)

C. Dr. Timothy Childs

Dr. Timothy Childs is a physicist with a Ph.D. from Stanford University. He is the AT&T Fellow, specializing in advanced semiconductor technology. After working with Bell Labs during his graduate education, he worked for Honeywell as a scientist, in advanced semiconductor technology areas. While there, he developed new technologies and capabilities, and eventually spun out TLC Precision Wafer Tech from Honeywell. (Tr. 359.) Through an Act of Congress and the Pentagon, TLC worked with Lockheed Martin to transfer technology and capabilities in the area of millimeter wave. TLC develops capabilities and patents for the U.S. Government such as Department of Defense and NASA. TLC built the company in a low-income and low-job area of Minneapolis, which was determined to have the lowest employment rate in the United States. TLC successfully built up the company doing research and developing new technologies for the Government and training and employing technicians and engineers in that regard. In addition, TLC started a foundation, TLC Education Foundation, as a way of giving back to the community, and in which TLC employees participate. TLC develops capabilities that enrich its employees. Often an employee comes to TLC with little knowledge or no knowledge of the field and then leaves as one of the leading experts in the field. (Tr. 360.)

TLC started in 1991. (Tr. 360.) Around 2012, TLC decided to utilize some of the research developed for the Government in the commercial area, and they started a sister company called TLC Millimeter Wave Products and Services ("TLC MWPS"). TLC MWPS creates advanced systems for both commercial and government entities, mainly with systems of security. One of the key items that TLC MWPS is working on is how to detect threats from a distance. For instance, he testified, people go through a millimeter wave system now when traveling inside an airport. The capability exists to detect threats of a person coming through the parking lot. Handling and protecting that capability is very important. (Tr. 361.) As the company has concentrated more on commercial projects, they have started downsizing TLC and moving it to a non-active mode. TLC MWPS actually started in 2012, the same year as the Wage Hour investigation. (Tr. 363.)

Dr. Childs had a colleague, Dr. Theda Daniels-Race, a fellow student in graduate school at Stanford University, who was a professor at Louisiana State University. Thiruvengadam was one of her students and he came to work at TLC Precision. (Tr. 363.)

PX 13 is a spreadsheet prepared by Thiruvengadam as part of Wage Hour's investigation. He asked for less in back wages than Wage Hour alleges is due. TLC would make even further adjustments. For instance, TLC did not approve any paid time off ("PTO") for Thiruvengadam during this time. TLC just laid off everyone, without pay. (Tr. 364.)

TLC did maintain required records; however, there was no HR personnel or any other employee working at the time of DOL's unannounced, surprise visit to TLC on December 21, 2011. Dr. Childs was not familiar with the HR files at that moment. (Tr. 365.) Wage Hour presented a list three pages long, and they could not expect him to know of all of those items at

that time. The payroll did not exist. As TLC had laid off all employees, there were no payroll records to keep, except when TLC made paper copies or rehired workers back on a part-time basis. In 2008, TLC had the most contracts in the company's history at the beginning of the year. By the end of the year, those customers had no funds. Therefore, TLC held a meeting and laid off all the employees, including Thiruvengadam. Thiruvengadam also received a letter notifying him of the layoff. (Tr. 366.)

Dr. Childs asserted that the Wage Hour investigation was invalid, as Wage Hour initiated it more than one year from the period of complaint. Wage Hour has not provided any document that proves that the complaint was timely. The only document with a date from DOL is the interview with complainant in December 2011. (Tr. 367.)

Complainant had nonproductive time, as he did in fact take off voluntary time to travel, to be with his friends and do other things of a personal nature. He also took time off to interview with other employers. (Tr. 368.)

TLC did submit the job offer to Thiruvengadam to Wage Hour. (RX 7; Tr. 370.) Thiruvengadam came back to follow up with a discussion of part-time work. (RX 9; Tr. 371.) He e-mailed Dr. Childs saying that he would like to follow up with regard to the part-time payroll conversation they had on August 31, 2009. He wrote "Please," indicating that he was initiating the follow-up discussion on part-time work. (Tr. 372.)

On February 22, after TLC laid off Thiruvengadam and closed its doors, Dr. Childs e-mailed Thiruvengadam to tell him that he would be going to a part-time status of three days a week, immediately. The email further says, "You are not to come in unless you are volunteering your time." Dr. Childs was not familiar personally with the obligation to pay Thiruvengadam if he did not work. However, Thiruvengadam knew of that rule. (PX 7, page 12, RX 24; Tr. 374.) Thiruvengadam did not tell Dr. Childs that he had learned that TLC had to pay him for both productive and nonproductive work. (Tr. 378.) TLC did not have a lack of work; they had a lack of funds. Dr. Childs thought by moving Thiruvengadam to part-time, he could pay him for working part-time. There was plenty of work that needed to be done. (Tr. 379.)

RX 10 is an e-mail dated September 23 from Thiruvengadam to Dr. Childs. He was in discussion with the University of Minnesota to start the training and the fab process for TLC. RX 11, an e-mail from University of Minnesota to Dr. Childs, shows that TLC made an initial payment of $4,837.20 so that a TLC employee could have access to the NFC. (RX 11; Tr. 380.) Thiruvengadam was the only TLC employee at this time. (Tr. 382.) RX 12 is an e-mail from Thiruvengadam to Dr. Childs, dated Wednesday, September 23, 2009, with the subject "Letter to NFC." (Tr. 383.)

RX 13 is an e-mail from Dr. Childs to Justice Calane, who wanted to return as a consultant for TLC. Midway through the email Dr. Child discussed helping Thiruvengadam. (Tr. 385; RX 13.) Justice Calane was also one of TLC's H-1B applicants. He was in that meeting and laid off, with everyone else. Subsequently, Dr. Childs learned that Calane had a green card, and was no longer under the H-1B restriction. (Tr. 386.) In the email, Dr. Child was trying to work out a transition for Calane to return as a consultant to help Thiruvengadam again. (Tr. 387.)

RX 16 is a notice of intent from NASA for "X-Band to W-Band Doppler Radar Using Reconfigurable RF T/R MMIC Series." (Tr. 388.) TLC did eventually receive that award, which was based on the Recovery Act, to get the economy going. The award accelerated the proposed period of performance not to exceed eighteen months and required the grantee to provide jobs. (Tr. 391-392.) Part of TLC's ability to perform on this particular contract relied on Thiruvengadam's continued employment at TLC. (Tr. 393.) To accelerate performance, TLC needed to get Thiruvengadam's training up to speed so that TLC could move the contract forward when they received it. Thiruvengadam did not have experience in millimeter wave circuit fab. (Tr. 396.) RX 18 is a purchase requisition requested by Thiruvengadam to the University of Minnesota lab for $10,000. RX 19A, B, C, D and E are invoices from the University of Minnesota for usage of the NFC facility and equipment by a TLC employee or contractor. (Tr. 399-400.)

RX 20 is TLC's calculation of Thiruvengadam's compensation, based on the information that Thiruvengadam provided. (Tr. 401.) The entry for "16 weeks voluntary time off" applied to the time from November 30, 2008 to January 31, 2010. (Tr. 403.) As TLC had no paid holiday, sick, or vacation time, anyone who selected not to work was voluntarily taking the day off. Thiruvengadam took the equivalent of sixteen weeks of voluntary time off. (Tr. 404.) Subtract out the $10,988 for voluntary time off from working, Thiruvengadam was owed $27,472.20 in net wages, which is $3,000 less than what TLC compensated him. This does not include the training costs TLC expended. (Tr. 416.)

RX 21A lists the history of TLC members who had health insurance for the respective period of time. The list includes Thiruvengadam. (Tr. 412.) Thiruvengadam is supposed to pay half of the premium for health insurance. His monthly premium was $ 261.62. (Tr. 415.)

RX 21B is a letter from Guyton Law Office, the attorney that handled the H-1Bs for TLC employees, including Thiruvengadam. (Tr. 417.) The letter is dated July 5, 2016 and signed by Leslie M. Guyton. (Tr. 418.) TLC had to hire a replacement for Thiruvengadam because they needed someone to do the processing for the NASA contract. TLC hired another H-1B employee to do the work, a Mr. Aggarwal. (Tr. 426.) These were additional costs that TLC had to assume because Thiruvengadam left early. Aggarwal worked for TLC until at least 2012. He did not complete the full period of his LCA. But TLC did complete the full period of the NASA contract. (Tr. 427.)

RX 21C is an e-mail from Tonia Simmonds, Employer's bookkeeper, to Brian McGinley, of NNSS, NASA. (Tr. 428.) Alex Christiansen of NASA responded, with a copy to Brian McGinley. The exhibit also includes an email from Dr. Childs to Greg Cibuzar dated January 12, 2010 and his response on January 13, 2010. (Tr. 429.) TLC was awarded the contract and began building up the team, bringing people back to work. TCL told Thiruvengadam that they would pay him full-time in January. (Tr. 430.)

The University of Minnesota charged TLC a monthly fee of $5,000 to maintain access for Thiruvengadam. (Tr. 430.) RX 21D includes a consultant agreement with Koko Umanah signed by Koko Umanah and Dr. Childs on November 11, 2009, invoice number 1000 from Koko to

TLC in the amount of $1,500, and check number 12250 check stub to Koko Umanah for $1,500. (Tr. 432.) The exhibit includes a document titled "Process Statement of Work for Mr. Koko Umanah, Processing Fab Consultant, for Processing LPS MMICs for TLC," signed by Koko Umanah and Dr. Childs on June 5, 2010, invoice number 1001 from Koko Umanah in the amount of $2,385 and check stub for check number 12599 to Koko Umanah in the amount of $2,385. RX 21D also includes invoice number 1002 from Koko Umanah and check stub number 12542 to Koko Umanah, invoice number 1003 from Koko Umanah and check stub number 12347, a document titled "TLC Precision Wafer Technology, Incorporated Consultant Agreement with Koko Umanah," signed by Koko Umanah and Dr. Childs on February 24, 2011. (Tr. 433.) TLC brought Koko Umanah on to help train Thiruvengadam. (Tr. 434.) The contract with Umanah was written on June 5, 2010 while Thiruvengadam left in the very beginning part of February 2010. So TLC also needed Umanah to work with Gagan Aggarwal. (Tr. 435.) Dr. Childs also included in the documentation Purchase order 5446 dated November 24, 2009 for a photoresist ordered from Mays Chemical Company. This order was for job number "LPS", which stands for linear phase shifter project; the project that Thiruvengadam was working on. (Tr. 436.)

TLC provided check number 7268 to Thiruvengadam at the end of November 30, 2008, for $1,459.17. (Tr. 445.) TLC documented this on RX 20, the spreadsheet that Dr. Childs prepared. Under the column "Thiruvengadam received cash or check" is a notation for $1,459.17 that TLC gave Thiruvengadam in check number 7268. (Tr. 446.) TLC offered funds to Thiruvengadam to go home. Dr. Childs spoke to Thiruvengadam and he said he wanted to go home. Dr. Childs wanted to assist him, but the issue then became not the money but the paperwork. (Tr. 449.) Dr. Childs offered him the funds for the transportation to go back to India in a conversation near the end of December of 2008 and January of 2009, during the shutdown period. (Tr. 450.) Dr. Childs sent an e-mail on Saturday, January 3, using his tissy2@aol.com email account. In the second paragraph, he stated that he was going to be paying people arrears payroll as soon as possible. (Tr. 452.) The "arrears" refers to one pay period for some of the employees around November 16. He ended up getting a loan from his attorney to pay the employees. (Tr. 453.) He does not remember if Thiruvengadam worked between November 16 and January 5. He remembers having some discussions about the situation, because Dr. Childs had Gina look into some things. He does recall Thiruvengadam being at TLC and having some discussions. (Tr. 454.) He was there more than one day, but it was not a whole lot of days. Dr. Childs does not remember exactly how many days it was. (Tr. 455.)

Prior to 2008, employees could accumulate paid time off. They accrued two days for so many months to a cumulative of seven. However, as a small company, TLC is not obligated to have paid time off. In times of crisis, the president can eliminate the paid time off. In addition TLC had the policy of use it or lose it, unless you had specific approval to carry it over. (Tr. 456.)

In 2008, before the financial crisis happened, TLC had six employees. At its largest, the company had twenty-two employees, around 1997. (Tr. 458.)

VI. PARTIES' ARGUMENTS

Administrator's Position

The Administrator asserts that Employer failed to pay Complainant, an H-1B employee whom it hired as a telecommunications engineer/analyst, the required wage in violation of 20 C.F.R. § 655.731. Employer obtained an LCA in which it promised to pay Complainant at the full-time annual salary of $43,000 from September 18, 2008 to September 17, 2011. The Administrator asserts that beginning November 16, 2008, Employer stopped paying Complainant full-time wages, while Complainant continued to work full-time. Subsequently, Employer asked Complainant to work part-time hours but Employer never sought to amend Complainant's LCA petition to part-time employment. Employer also never effected a bona fide termination of Complainant. According to the Administrator, Employer failed to properly pay Complainant until January 31, 2010, when Complainant resigned his position. The Administrator further argues that Employer is not entitled to a penalty for early cessation of the employment relationship nor for liquidated damages to offset the back wages owed.

The Administrator further argues that Employer failed to maintain the required records and failed to cooperate in the investigation. Despite numerous attempts to obtain the records from Employer, it never produced them, delaying Wage and Hour's ability to complete its investigation.

Respondent's Position

Respondent denies the Administrator's allegations and further argues that Complainant did not file his complaint with Wage and Hour within one year of the alleged violation, that Respondent is entitled to a good faith defense for failing to notify USCIS of the change in Complainant's employment status and for failing to change the LCA, and that Administrator failed to prove that Respondent did not pay Complainant the full wages due. In fact, Respondent argues that it paid Complainant more than the full wages due, by paying for training, consultant support, and technical fees.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

If the Administrator finds that an employer has violated its obligation to pay wages to the H-1B worker, the Administrator may conduct an investigation with respect to suspected violations. See 20 C.F.R. § 655.50. The Administrator may then issue a Determination Letter citing violations, requiring payment of wages, and imposing fines. See 20 C.F.R. § 655.70. If a party disagrees with the Determination Letter, that party may appeal to the DOL, Office of Administrative Law Judges ("OALJ"). In this proceeding, the Administrator is the Prosecuting Party and the employer is the Respondent. The Prosecuting Party bears the burden of proof with regard to each alleged violation. See Kumar v. Samuha, Inc., 2012-LCA-00005, slip op. at 3 (Feb. 28, 2013.)

The Administrator bears the burden of demonstrating that the employee performed the work for which he was not properly compensated. "Testimony by the employee alone regarding hours worked and wages paid has been found to be sufficient evidence to meet this burden."

Law Offices of Sergio Villaverde, 2009-LCA-00019, slip op. at 11 (ALJ Nov. 4, 2010.) Once the Administrator meets that burden, this burden shifts to the employer to rebut the Administrator's evidence. See Anderson v. Mt Clemens Pottery Co., 328 U.S. 680, 687-88 (1946). If the employer fails to do so, then the fact-finder must find in favor of the employee.

A. Timeliness

Initially, the undersigned will address Respondent's argument that the complaint was untimely. Respondent bases his argument on the fact that Thiruvengadam left his employment at TLC in February 2010, however, Wage and Hour did not send its letter advising TLC that it had scheduled Employer for an investigation until December 21, 2011. (PX 19.) The complaint Form WH-4 filled out by Thiruvengadam is undated. (PX 15.)

The regulations governing the employment of H-1B workers allow persons to file complaints with Wage and Hour for violations of 20 C.F.R. § 655.805, including the failure to pay wages for productive and some nonproductive time. 20 C.F.R. §§ 655.806, 655.805(a)(2). The regulations require that a complaint be filed "not later than twelve months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA…" § 655.806(a)(5).

In this case, Thiruvengadam left his position with TLC on February 5, 2010, so he should have filed his complaint by February 5, 2011. The complaint form in evidence is undated. (PX 15.) However, Thiruvengadam testified credibly that he called the Department of Labor on the day he left TLC. The Department of Labor person asked him to submit Form WH-4 to report the incident. He filled out the form and attached a typewritten sheet addressed "To whom it may concern." He sent it by email the Monday after he left TLC. (PX 15; Tr. 85.) Investigator Ferris Jacobson testified that Complainant filled out and submitted the form to Wage Hour sometime between February 7 and February 10, 2010, which she knew from records of notes from interactions with Complainant, as well as an e-mail correspondence between one of the Wage Hour investigators at the time and Complainant. (Tr. 196.) She further testified that Wage Hour reviewed the basic information and entered it into their internal system, WHISARD, on February 20, 2010. (Tr. 197.) The unrebutted testimony establishes that Complainant contacted Wage Hour and filed his complaint in February 2010, within days of his last employment at Employer. Thus, his complaint is timely.

However, once Complainant filed his complaint with Wage Hour, the Director failed to comply with the regulatory time frames for its own investigation. § 655.806(a)(3) provides

> If the Administrator determines that an investigation on a complaint is warranted, the complaint shall be accepted for filing; an investigation shall be conducted and a determination issued within 30 calendar days of the date of filing. The time for the investigation may be increased with the consent of the employer and the complainant, or if, for reasons outside of the control of the Administrator, the Administrator needs additional time to obtain information needed from the employer or other sources to determine whether a violation has occurred. No

> hearing or appeal pursuant to this subpart shall be available regarding the Administrator's determination that an investigation on a complaint is warranted.

Here, Investigator Ferris Jacobson did not contact Employer about the complaint and ensuing investigation until December 21, 2011, well more than thirty days beyond the filing of the complaint. (PX 19.) Wage Hour issued its determination that Employer had violated the regulations and the Act on June 7, 2012. (PX 17.) Ferris Jacobson testified that she received the assignment to investigate in December 2011, and that at the time, there was a very large backlog of H-1B and non-H-1B complaints. Wage Hour did not have enough investigators to investigate all the complaints. (Tr. 332-333.)

The Administrative Review Board ("ARB" or "Board") has held that the time limits for processing an INA complaint are directional and not jurisdictional, so the Administrator's failure to meet the thirty-day time period for completing the investigation and issuing an initial determination does not deprive an ALJ of jurisdiction to consider a complaint. Administrator, WHD v. Integrated Informatics, No. 08-127, ALJ No. 2007-LCA-026, slip op. at 6 (ARB Jan. 31, 2011), citing Administrator, WHD v. Synergy Systems, Inc., ARB No. 04-046, ALJ No. 2003-LCA-022, slip op. at 7 (ARB June 30, 2006).

Complainant filed a timely complaint, however, the Administrator did not meet the regulatory directions that it complete its investigation within thirty days. Nevertheless, despite the delay in starting the investigation, Employer is not entitled to have this matter dismissed as untimely.

B. Failure to Pay Required Wage

The INA's implementing regulations at 20 C.F.R. § 655.731 set forth the requirements employers must meet in employing nonimmigrant workers in specialty occupations. Employers must pay H-1B nonimmigrants as much as they pay other employees with similar experience and qualifications, or they must pay the prevailing local wage level for the H-1B nonimmigrant's occupational classification, whichever is greater. 8 U.S.C. § 1182(n)(1)(A)(i)(I), (II). To satisfy this obligation, § 655.731(c) provides as follows:

> …the required wage must be paid to the employee, cash in hand, free and clear, except that deductions [permitted by law, union contract, etc.] may reduce the cash wage below the level of the required wage.…

20 C.F.R. § 655.731(c). Section 655.731(c) further requires that the cash wages be: 1) recorded in the employer's payroll records as earnings for the employee; and 2) reported to the Internal Revenue Service as the employee's earnings, with appropriate withholding for the employee's tax paid. 20 C.F.R. § 655.731.

An H-1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant "enters into employment" with the employer. 20 C.F.R. § 655.731(c)(6). The H-1B nonimmigrant is considered to "enter into employment" when he or she first becomes "available for work or otherwise comes under the control of the employer, such as….reporting

for orientation or training…." (Id.) For salaried employees, wages are due in prorated installments (e.g., weekly or bi-weekly) paid no less often than monthly. 20 C.F.R. § 655.731(c)(4). For hourly employees, the wages are due for all hours worked at the end of the employer's ordinary pay period but no less frequently than monthly. 20 C.F.R. § 655.731(c)(5).

Finally, H-1B employees must be paid a prevailing wage even if they are not performing work and are in a nonproductive status "due to a decision by the employer" such as a lack of assigned work or lack of a permit or license. 20 C.F.R. § 655.731(c)(7)(i). On the other hand, wages need not be paid if an H-1B employee is nonproductive "due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience [ ] or renders the nonimmigrant unable to work." 20 C.F.R. § 655.731(c)(7)(ii).

Here, Complainant began work for Employer under his H-1B visa and associated LCA on October 1, 2008. (Tr. 34; PX 1.) At that point, Employer became responsible for paying Complainant his approved rate of pay of $43,000.00[11] annually for full-time work, for the entire period of the LCA. By signing and filing the LCA, Employer attested that for the entire period of authorized employment it would pay the required wage to Complainant. 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(a). 20 C.F.R. § 655.731(c)(7)(ii) details circumstances where wages need not be paid, including when the H-1B nonimmigrant worker experiences a period of nonproductive status due to conditions unrelated to his/her employment, or where there has been a bona fide termination of the employment relationship. Certain steps must be taken to effect a bona fide termination including notifying the Department of Homeland Security ("DHS") that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and providing the employee with payment for transportation home. 20 C.F.R. § 655.731(c)(7)(ii). See Vinayagam v. Cronous Solutions, Inc., ARB Case No. 15-045, 2017 WL 1032321, at *2 (February 14, 2017).

The record clearly establishes that beginning in November 2018, Employer stopped paying Thiruvengadam his full wage. Thiruvengadam testified that in mid-November 2018, Dr. Childs held a meeting where he advised the staff that the company was in a difficult situation and that they may have to close over the holidays. (Tr. 39.) Thiruvengadam continued working in November, December and January. (Id.) Thiruvengadam testified to a meeting with Dr. Childs in early December when they discussed his H-1B status, and Dr. Childs' desire that Thiruvengadam continue working, while Dr. Childs tried to find the funds to pay him. (Tr. 47-49; PX 23.) In 2009, Thiruvengadam continued to work and received occasional cash payments, which he documented by sending an email to Dr. Childs noting the amount of cash received. (Tr. 54; PX 10.) The emails show that between January 12, 2009 and January 15, 2010, Thiruvengadam received $13,250.00 in cash payments from Employer. (PX 10.) This is far short of the wages that he was entitled to receive under the terms of the LCA.

---

[11] Although the prevailing wage rate for a full-time Telecommunications Engineer/Analyst in Minneapolis for September 2008 through September 2011 was $40,581, Respondent's actual wage paid to telecommunications engineers was $43,000. The regulations require that an H-1B pay the higher of the prevailing wage versus the actual wage. 8 U.S.C. §§ 1182(n)(1)(A)(i)(I) & (II). Thus, TLC was obligated to pay Thiruvengadam $43,000.00 annually.

Starting in September 2009, Employer paid Thiruvengadam by check for part-time work. (Tr. 73-75; PX 12.) The pay stubs at PX 12 document that between August 1, 2009 and January 15, 2010, Employer paid Thiruvengadam net wages of $8,426.70. The pay stubs show gross pay of $900.00 with taxes and deductions for health insurance taken out. (PX 12.) Investigator Ferris Jacobson testified that her investigation disclosed that Employer paid semi-monthly, which is twice per month, and so the pro rata amount would be $43,000 divided by twenty-four pay periods per year.[12] The pro rata amount is defined in 20 C.F.R. 655.731. (Tr. 229.)

Employer did not prove that it paid Complainant more than the amounts Thiruvengadam testified to or documented through emails and checks. Rather, Employer argues that it paid Complainant part-time wages as he was only working part-time, and that any hours Complainant spent working beyond part-time were hours when Complainant knew he was "volunteering" because of TLC's financial difficulties. At times, Dr. Childs reduced Thiruvengadam's work schedule and asked him to come in less than full-time. (Tr. 57, 62; PX 7, p. 12.) Thiruvengadam kept a log of his time, documenting the projects he worked on and the time spent on those projects. (Tr. 63-64; PX 11.) He took no paid time off, even missing his brother's wedding in India in September 2009. (Tr. 66-67; PX 8, pp. 1-2.)

The regulations set forth very limited circumstances where an employer need not pay wages to an H-1B worker. These circumstances are set forth at 20 C.F.R. § 655.731(c)(7)(ii).

> 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 (*e.g.*, touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (*e.g.*, maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period, provided that such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq*.) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq*.). 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 (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

Essentially, Employer must pay all the wages due unless the H-1B worker is not working due to something in the control of the worker (*e.g.*, travel for the worker's own purposes) or unless Employer has effected a bona fide termination. 20 C.F.R. § 655.731(c)(7)(i). The evidence presented in this case clearly establishes that Thiruvengadam was available to work full-time and for much of the time did work full-time, yet Employer failed to pay him the wages due. The lack of funds to pay Thiruvengadam and any requests from Employer that

[12] At a pay rate of $43,000 per year, Thiruvengadam should have received $1,791.67 in gross wages for each pay period. The records at PX 12 document only one check in that amount, for the period of August 1 to August 31, 2009 (which amounts to two pay periods, rather than the one pay period that the amount should have covered).

Thiruvengadam work less than full-time hours were conditions due to employment, not under the control of Thiruvengadam. Thus, Employer is liable for all wages due. Id.

The undersigned is sympathetic to the dilemma Employer faced in the waning months of 2008. The national economy was in recession. Employer was not receiving the income it had expected when it undertook to hire Thiruvengadam as an H-1B employee. However, the regulations set forth specific steps that an employer can take when circumstances change and Employer here took none of those steps.

Employer could have effected a bona fide termination of Thiruvengadam once it knew that it did not have the funds to pay him.

> 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 (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

20 C.F.R. § 655.731(c)(7)(ii). The evidence shows that Employer here did neither. Employer did not notify DHS that it was terminating its employment relationship with Thiruvengadam and Employer did not provide Thiruvengadam with payment for transportation home.

Even if Employer had wanted to convert Thiruvengadam to part-time status,[13] Employer still needed to notify USCIS in writing of the change in the terms and conditions of Complainant's employment. 8 C.F.R. § 214.2(H)(11)(i)(A).[14] This, Employer did not do.[15]

1. Cash and Check Payments Made and Back Wages Due

In determining what back wages are due to Thiruvengadam, Wage Hour credited Employer with the cash payments Thiruvengadam recorded and with the checks Thiruvengadam

---

[13] Although the evidence shows that Employer was not even paying Thiruvengadam part-time wages; rather, Employer made random cash payments to Thiruvengadam when it was able, and those cash payments appear unrelated to actual hours worked.

[14] The regulation states:

> The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition. However, H-2A and H-2B petitioners must send notification to DHS pursuant to paragraphs (h)(5)(vi) and (h)(6)(i)(F) of this section respectively.

Thus, Employer should have immediately notified USCIS that it had changed Thiruvengadam's status to part-time and should have filed an amended I-129 petition.

[15] Employer was aware of this requirement of the regulations. (RX 24; Tr. 129.)

produced documenting payments received from Employer. (PX 7-11.) Ferris Jacobson testified as to the computation she made based on the $43,000.00 annual wage rate on the LCA. (Tr. 242; PX 18.) She determined that Thiruvengadam should have been paid $51,948.33. Thiruvengadam's records showed payments of $22,741.66, leaving a back wage balance of $29,216.67. (Tr. 244-45; PX 18.)

Ferris Jacobson's worksheet at PX 18 shows "cash" payments to Thiruvengadam in the amount of $14,150.00. Wage Hour had no obligation to credit Employer with the cash payments it made to Thiruvengadam, as Employer did not withhold taxes from those payments. See 20 C.F.R. § 655.731(c)(2)(iii) (to satisfy the required wage obligation, the payment of wages must indicate the payments of the tax reported and paid to the IRS). For purposes of satisfying the H-1B required wage, 'Cash wages paid' consist only of those payments that meet all the criteria set forth in 20 C.F.R. § 655.731(c)(2)(i)-(iv). Payments must be shown in the employer's payroll records, must be disbursed to the employee, less authorized deductions, and the employer must report the payments to the IRS as the employee's earnings, with appropriate withholdings for taxes. 20 C.F.R. § 655.731(c)(2)(i)-(iv). See also Administrator, Wage and Hour Div., USDOL v. Xcel Solutions Corp., ARB No. 12-076, ALJ No. 2011-LCA-16 (ARB July 16, 2014); Administrator, Wage and Hour Div. v. The Lambents Group, ARB No. 10-066, ALJ No. 2008-LCA-36 (ARB Nov. 30, 2011) (where an employer paid its employees with a combination of monthly salary plus a percentage of their billable hours, recorded as "per diem" payments and reported to the IRS as 1099 income, Board found the payment to be "ineligible [for qualification] as cash wages paid pursuant to the prevailing regulations").

Adding the $14,150.00 cash payments back into Wage Hour's calculation of the wages due increases Employer's liability to Thiruvengadam for back wages from $29,216.67 to $43,366.67. An Administrative Law Judge has the authority to "affirm, deny, reverse, or modify, in whole or in part, the determination of the [Wage Hour] Administrator." 20 C.F.R. § 655.840(b). Here, given the length of time that Employer failed to pay Thiruvengadam his regular wages (at least fourteen months), the failure of Employer to keep any records of the cash payments to Thiruvengadam,[16] Employer's failure to report such payments to the IRS or to withhold appropriate taxes, and Employer's clear disregard of its regulatory obligations to its H-1B employee, the undersigned does not afford Employer credit for the cash payments.

2. Employer is not Entitled to Any Offsets

The undersigned declines to credit Employer's worksheet at RX 20, calculating "sixteen weeks of voluntary time off." As discussed above, the record establishes that any time between November 2008 and January 2010 when Thiruvengadam was not working full-time hours was not "voluntary" time off – but was due to Employer's failure to provide work and failure to pay for full-time employment.

[16] In making its calculations, Wage Hour relied on emails Thiruvengadam sent to Employer documenting these payments. Employer did not produce any record of these payments and they are not shown on Employer's payroll.

Employer argues that it undertook to pay certain expenses in light of its employment of Thiruvengadam and in consequence of Thiruvengadam's resignation before the end of the LCA period. Employer points to the costs of obtaining access and training for Thiruvengadam to use laboratory facilities at the University of Minnesota's Nanofabrication Center. Employer is not entitled to offset its back wage liabilities with these expenses. The fees to use the laboratory facilities were not for the benefit of Thiruvengadam. They were fees Employer would have paid on behalf of any person, because Employer needed access to the Nanofabrication Center for Employer's business needs. The regulations do not allow Employer an offset to wages due for expenses it would have undertaken whether it employed an H-1B worker or other worker.

Employer is also not entitled to offset its back wage liability based on Thiruvengadam's resignation before the end of the LCA period. § 655.731(c)(10). Employer attempted to argue that its offer letter, signed by Thiruvengadam, constituted an employment contract which Thiruvengadam breached. Thiruvengadam testified that he did not sign an employment contract. (PX 5; Tr. 93.) Ferris Jacobson testified convincingly that Wage Hour did not consider the offer letter to be a valid employment contract. (PX 5; RX 7; Tr. 279.) Moreover, the Administrative Review Board ("ARB" or "Board") has rejected an employer's argument that it should be absolved of its wage obligations under the LCA for H-1B workers who did not comply with the terms of their contracts. Administrator, Wage and Hour Div., USDOL v. Xcel Solutions Corp., ARB No. 12-076, ALJ No. 2012-LCA-16 (ARB July 16, 2014). The ARB stated, "In adjudicating an H-1B nonimmigrant employee complaint, the ALJ and Board have only the authority expressly or implicitly provided by law." Slip op. at 9 (citation omitted). Employer there, as here, failed to point to any legal authority to resolve alleged breaches of a private contract as potential offsets to wage obligations under the INA. Employer's contention that Thiruvengadam should be penalized in any way for having resigned in January 2010 after having worked for Employer from November 2008 forward without receiving anything remotely like regular paychecks is disingenuous.

C. Failure to Maintain Required Records

Wage Hour also cited Employer for failure to maintain required records in violation of §§ 655.731(b), 655.738(e), 655.739(i), and 655.760(c). Ferris Jacobson testified credibly that despite numerous attempts to obtain records from Dr. Childs, Employer never produced records documenting the actual and prevailing wage, records supporting the method used to determine the prevailing wage, or wage and payroll records. Employer's public access file was incomplete. (Tr. 249-250). Employer failed to rebut this testimony. The citation is upheld.[17]

D. Failure to Cooperate in Investigation

Wage Hour cited Employer for failure to cooperate in the investigation, in violation of § 655.800(c). Again, Ferris Jacobson testified credibly to the numerous attempts she made to obtain information from Dr. Childs that was relevant to her investigation. Emails between Ferris

[17] Wage and Hour did not assess a civil money penalty for this violation.

Jacobson and Dr. Childs corroborate her testimony. (Tr. 205-225; PX 21.) Employer failed to rebut this testimony. The citation is upheld.[18]

E. Interest

Despite the fact that the Immigration and Nationality Act does not specifically authorize an award of interest on back pay, the Administrative Review Board has held that interest shall be paid on awards of back pay, with compound interest to be paid pre-judgment. Innawalli v. Am. Info. Tech. Corp., Case No. 05-165 (ARB Sept. 29, 2006), slip op. at 8-9; Amtel Group of Florida, Inc., v. Yongmahapakorn, Case No. 04-087 (Sept. 29, 2006), slip op. at 12-13. The Board has also set the rate of interest at the rate charged on underpayment of federal income taxes prescribed under 26 U.S.C. § 6621(a)(2). Mao v. Nasser, Case No. 06-121 (ARB Nov. 26, 2008), slip op. at 11-12.

Based on the foregoing, pre-judgment compound interest is due on the back wages to which Complainant is entitled. Post-judgment interest is due on all back wages until paid or otherwise satisfied.

VIII. ORDER

For the foregoing reasons, the undersigned **AFFIRMS** the Administrator's determination that Employer violated 20 C.F.R. §§ 655.731(b), 655.738(e), 655.739(i), 655.760(c), 655.800(c), and 655.805(a)(2),(15) through its failure to pay the required wages for an H-1B employee, failure to maintain the required documents and failure to cooperate in the investigation. The Administrator has not sought a civil money penalty. However, Employer is ORDERED to pay Wage Hour back wages in the amount of $43,366.67 plus applicable interest to be paid to Complainant.

SO ORDERED

THERESA C. TIMLIN
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.

---

[18] Again, Wage and Hour assessed no civil money penalty for this violation.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

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.