

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 January 2015

CASE NO: 2012-LCA-00023

In the Matter of:

EDMUNDO VICUÑA,
Complainant,

v.

WESTFOURTH ARCHITECTURE, P.C., and
VLADIMIR ARSENE, President,
Respondents.

Appearances: Molly Smithsimon, Esq.
Bradford D. Conover, Esq.
Conover Law Offices
For Complainant

Nathaniel M. Glasser, Esq.
David Grunnblatt, Esq.
Proskauer Rose, LLP
For Respondent

Before: Theresa C. Timlin
Administrative Law Judge

DECISION AND ORDER

This case was brought under § 212(n) of the Immigration and Nationality Act, 8 U.S.C. § 1182(n), as amended (“INA”), and the implementing regulations set forth at 20 C.F.R. Part 655, subparts H and I. The INA permits employers to hire nonimmigrants in “specialty occupations” to work in the United States for prescribed periods. 20 C.F.R. § 655.700. Employers seeking to hire such workers, commonly referred to as H-1B¹ nonimmigrants, must obtain certification from the Department of Labor by filing a Labor Condition Application (“LCA”). The LCA stipulates the wage levels and working conditions that the employer provides the H1-B nonimmigrant. After securing certification, and upon approval by the Department of Homeland Security, the nonimmigrant receives a visa and may begin work. 20 C.F.R. § 655.705(a), (b).

¹ The instant matter involves an employee hired pursuant to Section H(i)(b)(1) of the INA, which applies specifically to nonimmigrant employees who are entering the United States pursuant to the United States-Chile Free Trade Agreement. See 8 U.S.C. §1101(H)(i)(b)(1), 8 U.S.C. §1184(G)(8)(a). H(i)(b)(1) employees enjoy essentially the same rights as those who enter the country as (H)(i)(b) employees and thus I will use the term H-1B to refer to both H(i)(b) and H(i)(b)(1) employees, except in circumstances where the applicable regulations differ.

In addition to the conditions set forth in the LCA, the INA requires employers to pay H1-B nonimmigrants as much as it pays other employees with similar experience and qualifications or 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). Complainant, Edmundo Vicuña, alleges that Westfourth Architecture and its president, Vladimir Arsene ("Respondents" or "Westfourth") violated this provision of the Act. On July 21, 2011, the United States Department of Labor Office of Administrative Law Judges ("OALJ") received this case and assigned it to me. I held a hearing on July 30 and 31, 2012 in New York, New York. The parties have filed closing statements and the matter is now ready for decision.

I. STATEMENT OF THE CASE

On May 3, 2010, Complainant filed a complaint with the U.S. Department of Labor alleging non-compliance with the H-1B1 labor standards. On January 31, 2012, the Administrator issued a Determination Letter finding no violations of the INA or its associated regulations. Complainant filed a timely appeal to OALJ.²

At the hearing, the parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before OALJ, 29 C.F.R. Part 18. I have based the following decision on the Act and its implementing regulations, and the evidence and testimony presented by the parties.

II. ISSUES PRESENTED

Complainant describes the issues in this case thus:

- 1) Whether Respondents violated the INA, 8 U.S.C.A. § 1101 *et seq.* and 20 C.F.R § 655.731, by failing to pay Complainant the higher of the actual wage for the position stated in the offer letter or the prevailing wage stated in the LCA;
- 2) Whether Respondents violated 20 C.F.R. § 655.731(c)(7) when they failed to effectuate a termination of employment in failing to pay Complainant's return airfare to Chile;
- 3) Whether Respondents violated 20 C.F.R. § 655.731(c)(7) when they failed to effectuate a termination of employment in failing to notify USCIS;
- 4) Whether Respondents violated 8 U.S.C.A. § 1182(n)(2)(c)(vii)(I) and 20 C.F.R. § 655.731(c)(7)(i) and illegally benched Complainant when they placed him on unpaid vacation and nonproductive status without pay;
- 5) Whether Respondents violated 20 C.F.R. § 655.731(c)(9) and/or (c)(11)³ or when they made deductions from Complainant's wages that were not "authorized deductions";

² See Complainant's request for hearing filed with OALJ on February 13, 2012.

³ Complainant also alleges that Respondents violated New York Labor Law §193, however, that issue is not within my purview.

- 6) Whether Respondents, pursuant to 20 C.F.R. § 655.731, are required to pay Complainant his full agreed and actual salary as stated in the offer letter during the period of his employment and/or during the duration of his visa; and
- 7) Whether Respondents violated 20 C.F.R. § 655.731 when they failed to provide Complainant with fringe benefits provided to nonimmigrant workers, including bonuses and health insurance.

(See Complainant's Pre-Hearing Statement, filed July 20, 2012 ("ALJX 1"), pp. 1-2.)⁴

III. STIPULATIONS

The parties stipulated only to the following:

- 1) Respondent Westfourth is an architectural firm, and at all relevant times maintained a principal office at 632 Broadway, Suite 801, New York, NY 10012. Respondents' office is currently located at 265 West 40th Street, Suite 601, New York, NY 10018.
- 2) On or about August 12, 2008, Zzing Lee, on behalf of Respondents, sent Complainant an employment offer letter via email inviting Complainant to join Westfourth. The terms were:
 - a) Starting salary of \$60,000;
 - b) Bonus at the end of each year after review of Complainant's work;
 - c) Oxford Medical Insurance coverage after three months of work as a full-time employee;
 - d) Two weeks of vacation per year, which can be taken after nine months work as a full-time employee;
 - e) Office will be closed between Christmas and New Years; and
 - f) Respondents would pay for and support transfer of visa expenses.

(See ALJX 1, pp. 2-3; Tr. p. 8.)

IV. EVIDENCE

A. Exhibits

I summarize the exhibits admitted into evidence at the hearing below:

1. Complainants' Exhibits

CX A: Email dated July 20, 2008 from Complainant to Respondents applying for position as Project Architect

⁴ I use the following abbreviations in this Decision: "ALJX" for Administrative Law Judge's Exhibits; "CX" for Complainant's Exhibits; "RX" for Respondents' Exhibits; and "Tr." for the transcript of the hearing, which took place on July 30-31, 2012.

The exhibit contains only the cover email, sent from Complainant to Respondents at the address west4arch@hotmail.com on July 30, 2008.

CX B: Complainant's 2008 Resume

Complainant's resume describes his objective as to obtain a position as a project architect. He lists a Brooklyn, New York address. He detailed architecture experience in Chile, Spain, and France from 2002 to 2008, teaching experience in Chile, an architect degree from Universidad Mayor in Santiago, Chile and a European Master D.E.S.S. from Physics University Paris VI and Architecture University Paris Val de Seine. He also recounts awards he won in several architectural competitions.

CX C: Email dated August 12, 2008 from Zzing Lee to Complainant offering employment as a project architect

The email, sent from Zzlee@w4arch.net, offered employment at Westfourth as project architect under the following terms:

Salary: 60K (to start)

Bonus: the end of each year after review your work

Oxford Medical Insurance: will get coverage after 3 months being a full time employee.

Vacation: 2 weeks per year, you can start to take after 9 months being a full time employee.

Office closing: during Christmas and New Years

Visa expenses: W4 will pay and support for transfer

Lee asked Complainant to review the terms and "let me know what your thoughts are."

CX D: Labor Condition Application dated October 17, 2008

This is Form ETA 9053E, Labor Condition Application for H-1B & H-1B1 Nonimmigrants. Stephanie Charny, who lists a title of Director, signed the form on the Respondents' behalf on October 17, 2008. The Employer is identified as Westfourth Architecture, P.C., located at 632 Broadway, Suite 801, New York, NY. The Program Designation is H-1B1 Chile. Rate of Pay is \$60,000.00 per year and the position is not part-time. The period of employment is to begin on October 31, 2008 and end October 30, 2011. The job title is project architect. Prevailing wage for the locality is \$50,398.00 per year. Dominic Kong is the contact.

CX E: Letter in Support of Petition for H-1B1 Nonimmigrant Worker Visa dated October 21, 2008

The letter, written on Westfourth stationary, is dated October 21, 2008. Respondents, the Petitioner, addressed the letter to the U.S. Embassy in Santiago, Chile. The letter describes the offered position of project architect as being for a "temporary period of one year, commencing October 31, 2008 and ending October 30, 2009." Complainant is the beneficiary. The letter sets

forth his educational qualifications and work experience and requests that the US Embassy approve his visa. Charny signed the letter as “Director.”

CX F: Respondents’ Firm Profile as of September 15, 2008

The firm profile, taken from the website <http://www.westfourtharchitecture.com> describes Respondent Vladimir Arsene as the founder of the firm.

CX G: Complainant’s Airline Itineraries

The exhibit includes an email from Alba Michelini to Complainant dated May 14, 2008 listing (in Spanish) flights on July 28, 2008 from Santiago, Chile arriving ultimately in Newark, New Jersey on July 28, 2008, and another flight on October 22, 2008 from Newark, New Jersey to Santiago, Chile. Following the email is another email from Alba Michelini dated October 30, 2008 forwarding an electronic ticket for a flight leaving Santiago, Chile on November 4, 2008 to fly to Kennedy Airport in New York, and a flight returning from New York to Santiago, Chile on November 25, 2008.

CX H: Complainant’s pay stubs

The exhibit includes the following paystubs from Westfourth to Complainant:

9/26/2008: \$3,333.33
11/26/2008: \$3,333.33
1/23/2009: \$1,333.33

CX I: Visa

This exhibit is a very poor quality copy of a document. It includes the word “VISA” at the top. There is an unidentifiable photograph of a person’s head. The remainder of the exhibit is essentially unreadable. Complainant describes this document as “[Complainant’s] H-1B1 Visa dated 10/24/08, proving his legal status and period of the visa from 10/24/08-10/30/11.”

CX J: Complainant’s passport pages

The exhibit includes five pages copied from Complainant’s passport. The first page identifies Complainant as a citizen of Chile. The passport was issued April 23, 2007. The exhibit includes passport control stamps from Chile, Complainant’s visa issued May 31, 2007 (the remainder of the visa is unreadable), and a better copy of the visa issued October 24, 2008 under H-1B1, with Respondents as the sponsoring employer and an LCA expiration date of October 30, 2011.

CX K: Substitute for Complainant’s Form W-2

This is Department of the Treasury Internal Revenue Service Form 4852, captioned “Substitute for Form W-2, Wage and Tax Statement, or Form 1099-R, Distributions From

Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.” The form is filled out in Complainant’s name and lists wages of \$1,333.00 from Respondents. Complainant answered Question 9 “How did you determine the amounts on lines 7 and 8 above?” as follows:

I recieved (sic) 1 check from W4 in 2009. Westfourth incorrectly filed my taxes in '08, and did not pay anything they withheld from my paycheck to the IRS. I can only assume they did the same this year. We are in the process of suing the company and filing a complaint against the accountants. All efforts to obtain a W-2 including calls and emails to the owners and accountants have been unsuccessful.

Complainant answered Question 10 “Explain your efforts to obtain Form W-2, Form 1099-R, or Form W-2C, Corrected Wage and Tax Statement” as follows:

Both my wife and myself called the firm for tax documentation multiple times. We also called the accountants to make sure it didn’t get sent the wrong address. The accountant Eugene Blumberg stated a W-2 had not been sent, and he was not going to send one because there were issues with my pay. The owner Stephanie Charny has accused my wife of harrassment (sic) for asking for a form W-2.

CX L: 2008 Form 1099-Misc

This Form 1099-Misc for the year 2008 lists Respondents as Payer and Complainant as Receiver. According to the form, Respondents paid Complainant \$12,666.65 in “Nonemployee compensation” in 2008.

CX M: IRS Wage and Income Transcript dated April 27, 2010

This is a “Wage and Income Transcript” requested from the IRS on April 27, 2010. It lists Respondents as Payer and Complainant as Recipient, is characterized as a “Form 1099-MISC” and sets forth that Respondents reported payments of \$12,666.00 in “non-employee compensation” to Complainant, with no tax withheld.

CX N: Copy C 2008 Form W-2 Wage and Tax Statement

This is Form W-2 Wage and Tax Statement for the year 2008 documenting that Respondents reported payments to Complainant of “wages, tips and other compensation” totaling \$13,715.92. Respondents further reported that it did not withhold any federal income tax, social security tax, or Medicare tax.

CX O: Purchase confirmation of return airline ticket

This is a purchase confirmation from LAN.com for Complainant, of a roundtrip plane ticket from New York to Santiago, Chile on Monday February 8, 2010, and returning from

Santiago, Chile to New York on Monday, March 8, 2010. The cost of the ticket is \$1,152.70, paid by credit card.

CX P: Email dated January 28, 2009 from Complainant to Ms. Charny

Complainant wrote to Charny, thanking her for speaking with him the day before and forwarding two emails from Attorney Dominic Kong, which Complainant writes will explain “my availability to stay in the country in case my work ends at W4 and also explains the case if I change my condition with W4 from full-time position to part-time position.” Attorney Kong’s first email, dated January 8, 2009, explains that Complainant’s visa will end the day his employment ends, and explains how to obtain a new H-1B visa if he finds a new employer. The second email, dated January 27, 2009, makes clear that “[a]n ‘unpaid vacation’ requested by the employer because there is no work for you is considered as ‘illegal benching.’ This is prohibited.” Kong also advises Complainant that if Respondents change his status from full-time to part-time, they will have to file a new LCA and petition to USCIS.

CX Q: Email dated February 18, 2009 from Complainant to Ms. Charny

This is actually an email chain, which begins chronologically⁵ with the January 8, 2009 email from Attorney Kong to Complainant. The second email in the chain is the January 27, 2009 email from Attorney Kong to Complainant. Next, on January 28, Complainant forwarded Attorney Kong’s emails to Charny. (See CX P.) There is a header from Complainant to Charny dated February 11, 2009, but no text. On February 18, 2009, Charny emailed Complainant asking for his attorney’s email address, stating, “I just need to get the social security or other reporting number for declaring income paid for 2008.” The final, most recent email in the chain is dated February 18, 2009 from Complainant to Charny forwarding Attorney Kong’s email address and stating, “I already applied for the Social Security number and I will probably receive it at the end of this week or at the beginning of the next one.”

CX R: Email dated March 10, 2009 from Ms. Charny to Rhonda Kopf at Gene Blumberg’s office

Charny’s email was in response to an earlier email from Rhonda D. Kopf, an employee at Gene Blumberg’s firm. On March 10, 2009, Ms. Kopf emailed Charny advising that she wanted to speak with Charny regarding Complainant, as he had called her about an “issue with his 1099.” Charny responded on March 10, 2009 that she had already spoken with Complainant and would go over “this tomorrow when I come in. It’s kind of a mess, but we will fix.” Charny copied Complainant and Mr. Arsene on the email.

CX S: Email dated April 30, 2009 from Complainant to Ms. Charny

Charny sent the initial email in this exhibit, dated Wednesday April 29, 2009, to Complainant. She asks him “if it is necessary to keep you on payroll.” She notes that the company kept Complainant on the payroll for January and February. Complainant responded on April 30, 2009. He copied Respondent Arsene on the email. In this email he thanked them for

⁵ Read from back to front.

sending him the W-2, but advises them that it needs to be redone as “[i]n the boxes for withholding for federal and state taxes; it states that nothing has been withheld, although this seems to be inconsistent with the checks that I received.” Complainant did not answer Charny’s question about remaining on the payroll.

CX T: Email dated May 1, 2009 between Ms. Charny and Complainant

The earliest email in this chain is the email from Charny to Complainant dated April 30, 2009. (See also CX S.) Charny copied Rhonda from Blumberg’s firm on that email. The next email in the chain is the April 30, 2009 email from Complainant to Charny and Respondent Arsene. (See also CX S.) Charny sent the most recent email in the chain, dated May 1, 2009, to Complainant, with copies to Rhonda at Blumberg’s firm. This email states “I don’t understand and I am sending a copy of this to Rhonda. Do u (sic) still need to stay on payroll for March?”

CX U: Email dated May 1, 2009 between Ms. Charny and Complainant

In response to the emails recounted at CX S and CX T, on May 1, 2009 Complainant sent an email to Charny, with copies to Respondent Arsene and Rhonda at the Blumberg firm. In this email, he again raised the issue that his W-2 does not include reductions taken from his pay for federal, state and city taxes. He stated that his salary, according to his contract, was \$60,000 per year or \$5,000 per month before taxes, but that he received checks in the amount of \$3,333.00 and \$2,666.00. He had assumed that the reduced amount reflected taxes withheld. He asked for “assistance in sorting this out.” He did not address Charny’s question about remaining on the payroll.

CX V: Email dated June 10, 2009 from Complainant to Ms. Charny

On June 10, 2009, Complainant sent an email to Charny, Gene Blumberg, Rhonda at Blumberg’s firm, Respondent Arsene and an individual at the email address “stephaniejeannette@msn.com.” He advised that although he had received tax documents from Rhonda “the problem [is] still not fixed.” He restates that his contract was for \$60,000 per year or \$5,000 per month before taxes; that he was paid \$3,333.00 and \$2,666.00 and that the difference should have been allocated to taxes and reflected on his W-2. He added:

Also, it is my understanding that my individual paychecks and contract will be scrutinized though (sic) my application process for getting a green card. Both the lawyer that we used for my H1B1 visa and the one we are currently using for my green card, has informed me that any discrepancies in my pay checks and my contract will result in fines for your company, automatically void my contract, and will prolong the whole process.

He attached a copy of the original job offer he received from Zzing Lee.

CX W: Email dated July 13, 2009 from Complainant to Respondent Arsene, Mr. Lee and Ms. Charny

On July 13, 2009, Complainant sent an email to Respondent Arsene, Mr. Lee and Charny with several attachments. He again raised the issue that the pay he received differed from the pay he should have received according to his initial employment offer and visa documentation. He listed the amounts received in his monthly paychecks from September 2008 through January 2009. He attached the W-2 Forms he received and pointed out that they did not reflect any withholdings for federal, state or city taxes. He again warned that any discrepancies between his contract and actual pay received could result in fines from USCIS to Respondents.

CX X: Email dated July 15, 2009 from Complainant to Ms. Charny

This exhibit begins chronologically with Complainant's July 13, 2009 email (CX W). On July 14, 2009, Respondent Arsene forwarded the email to Charny without comment. On July 14, 2009, Charny responded to Complainant, advising that she would forward the email to her accountant, as it was her intention "to make sure that we paid all taxes, and make sure that everything was correct pursuant to your visa requirements." On July 15, 2009, Complainant responded to Charny (with copies to Mr. Lee and Respondent Arsene), expressing his appreciation for her time, and assuring her that he believes she has the best intentions, but "Unfortunately after repeated request and explanations you (sic) office's paper is still incorrect."

CX Y: Email dated September 24, 2009 from Complainant to Ms. Charny

This email chain begins with an undated email from Complainant to Charny explaining that he is not using Attorney Kong for his green card and asking her to forward the earlier email with the attached offer, H-1B1 contract and W2 Form to her accountant as "Mr. Blumberg should know exactly what to do." He references a personal conversation with Respondent Arsene.

Charny (using Respondent Arsene's email address) responded to Complainant on September 23, 2009 asking him to explain what he wants her to do. Complainant responded to her on the same day, laying out the payments he received from Respondents, and his salary per his contract (with a note that his December salary had a "reduction 25% due to recession"). He also listed amounts for Social Security, Medicare and New York tax. He showed that he received \$12,666.65 in paychecks in 2008, that \$1,289.27 was attributed to taxes (Social Security, Medicare and New York state), for a total of \$13,955.94 in payments. He showed that under his contract, he was due \$18,750.00. There was a remaining difference of \$4,794.00. He then wrote, "This can be solved in two ways. You can send me a corrected W-2 form, or if it's easier for your office, you can write a check for the amount of the difference and I will redo the taxes myself."

On September 24, 2009, Charny emailed Complainant to advise that she was meeting Mr. Blumberg that afternoon and she asked him to "please forward a copy of the contract to me as I have never seen it." She then asked why he was no longer using Attorney Kong, as Respondent paid him "several thousand dollars for services." That same day, Complainant forwarded the

contract to Charny and explained that he was not using Attorney Kong for his green card as Respondents hired Attorney Kong only to process his H-1B1 visa. He agreed that his “contact” (sic) began in October, but added,

As I started working before that start of my contract, the offer functions as an employment contract as emails are considered legal documents. Vladimir also verbally confirmed that I would be paid my full salary before my H1B1 contract started. Also the money that I was paid before the contract started is included in the W-2 form that was sent.

CX Z: Email thread dated March 11, 2010 to March 12, 2010

On November 4, 2009, Charny sent an email to Complainant offering to “pay for your attorney’s fees for one or two hours” in order to resolve his problems. On March 10, 2010, Charny sent the next email in the thread to Complainant with a copy to Hilary Brown. She wrote that she received voicemails that day from Ms. Brown and Mr. Blumberg and stated, “I do not know what it is exactly that you want at this time and I ask you now, as I have asked in the past, that you communicate your specific request to someone at Westfourth.” Charny accused Ms. Brown of threatening Respondents “regardless of any efforts on Westfourth’s part to resolve any open matter, even extending an offer to pay for your attorney’s fees.” She characterized the “threats” as very disturbing, especially in light of Respondent Arsene’s heart condition. She asked for Complainant to “simply, specifically state what you want as there has not been any such request to my knowledge.”

Ms. Brown responded to Charny’s March 10, 2010 email on March 11, 2010. She advised that she called Mr. Blumberg to ask if he had sent Complainant’s W-2 or 1099 to Complainant and to ensure that Mr. Blumberg had Complainant’s correct address. Mr. Blumberg informed Ms. Brown that he had not forwarded Complainant’s tax documents because “there are issues with his pay.” She told Charny that “we are flagging this issue with the IRS.” She provided Complainant’s current address. She then addressed Complainant’s pay, saying, “We have yet to see evidence of West Fourth (sic) honoring or trying to honor any of the conditions it signed on to when hiring Edmundo and when signing Edmundo’s H1B1 visa.” She referred Charny to Complainant’s attorneys. On March 12, 2010, Charny forwarded Ms. Brown’s email to Complainant and said that she would give the issue of his W-2 or 1099 her “immediate attention” and advised that Respondents’ attorney would be in touch with Complainant’s attorney.

CX AA: Demonstrative Summary of Damages

This chart, created by Complainant’s attorneys, shows payments that Complainant received from Respondents beginning on August 29, 2008 through October 28, 2011 (when Complainant contends Respondents’ liability under his H1B1 visa ends), compared to what Complainant asserts was the salary due to Complainant. Complainant contends that Respondents owe him \$176,833.36 in total wages, \$1,152.70 in return airfare and \$1,600.00 for two months of health insurance, for a total of \$178,586.06, plus pre-judgment and post-judgment interest.

2. Respondents' Exhibits

RX 1: 2008 IRS Form W-2 Issued to Complainant

This is Form W-2 Wage and Tax Statement for the year 2008 documenting that Respondents reported payments to Complainant of “wages, tips and other compensation” totaling \$13,715.92. Respondents further reported that it withheld \$850.39 in Social Security taxes, and \$198.88 in Medicare tax. Respondents did not withhold federal income tax, or any state or local taxes. I note that this Form W-2 does not match CX N. I further note that this is the Form W-2 for 2011, but someone has crossed out 2011 and handwritten in 2008, suggesting that this Form was prepared in 2011, subsequent to the return included in CX N.

RX 2: Check No. 10251 issued to Complainant

This check for \$3,333.33, issued on Respondents' account, dated November 14, 2008, is payable to Complainant. Eugene Blumberg signed the check. The back of the check is endorsed and canceled.

RX 3: Form NYS-45s for Third and Fourth Quarters of 2008

Form NYS-45 is the Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return. The first three pages of RX 3⁶ appear to be the filing by Respondents for the third quarter of tax year 2008 (July 1 – September 30). Eugene Blumberg is listed as CPA in the signature block (his name is typed but there is no corresponding signature). The form reports that Respondents paid \$133,005.00 in total remuneration that quarter, that \$126,172.00 was the amount of remuneration paid in the third quarter to each employee in excess of \$8,500.00 since January 1. Wages subject to Unemployment Insurance contribution amount to \$6,833.00, for a contribution due of \$83.70. The firm further reports that Respondents withheld \$7,550.22 in New York state tax and \$1,213.79 in New York city tax. Page 2 is blank other than information identifying Eugene Blumberg as the “paid preparer.” Page 3 is the NYS-45-166 Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return – Attachment. The form identifies seven employees, including Respondent Arsene and Charny, but not Complainant.

The fourth through sixth pages of RX 3⁷ constitute the Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return filing by Respondents for the fourth quarter of tax year 2008 (October 1 – December 31). Eugene Blumberg is listed as CPA in the signature block (his name is typed but there is no corresponding signature). The form reports that Respondents paid \$458,682.00 in total remuneration that quarter, that \$447,349.00 was the amount of remuneration paid this quarter to each employee in excess of \$8,500.00 since January 1. Wages subject to Unemployment Insurance contribution amounted to \$11,333.00, for a contribution due of \$116.16. The firm further reported that Respondents withheld \$49,341.76 in

⁶ Bates-stamped R004, R005 and R006.

⁷ Bates-stamped R007, R008 and R009.

New York state tax and \$943.61 in New York City tax. Page 5 is blank other than information identifying Eugene Blumberg as the “paid preparer.” Page 6 is the NYS-45-166 Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return – Attachment. The form identifies eleven employees, including Respondent Arsene, Charny and Complainant. Respondents reported paying Complainant \$13,715.92 in “total UI remuneration paid this quarter,” and the same amount as “gross federal wages or distribution.”

RX 4: Email dated February 21, 2012 from Ms. Charny to Jacqueline Petricevic

On February 21, 2012, Charny sent an email to Jacqueline Petricevic, an investigator at the Wage and Hour Division of the U.S. Department of Labor with the subject line of “w2, etc.” In the email, Charny advises Ms. Petricevic that Complainant’s complaint about Respondents’ failure to withhold federal taxes in 2008 is “unfounded” because Respondents had resolved the issue to Complainant’s satisfaction in 2009. She then explains why no Federal taxes were paid. She wrote that Complainant received a 1099 because Respondent Arsene had not advised Mr. Blumberg that Complainant was on the payroll. “Months later, when the situation was corrected, Mr. Blumberg grossed up the net amount of the checks that Vlad wrote and paid the appropriate taxes that were due (Medicare and SS as indicated in the W-2) and zero (\$0.00) federal taxes.” Respondents issued the 2008 W-2 retrospectively. She further states that Mr. Blumberg prepared Complainant’s personal tax return because Respondents were responsible for incorrectly issuing a 1099. She further states that Complainant did not owe any federal taxes, which was why Respondents reported that it had not withheld any.

RX 5: Email dated January 5, 2012 from Ms. Charny to Jacqueline Petricevic, with attachments

Charny also emailed Wage Hour Investigator Petricevic on January 5, 2012, attaching the corrected first quarter 2009 payroll report that Respondents submitted to New York State and to the Treasury Department. She explains that Respondents corrected and resubmitted the report in May 2010 because Respondents incorrectly issued a 1099 to Complainant in January 2010. She explains her belief that Respondents only paid Complainant once in January 2009, for \$1,333.33 net (\$1,974.50 gross). She believes that Mr. Blumberg may have written a second check to Complainant for his usual monthly salary, but never actually issued the check to Complainant. Thus, she states that Respondents “overpaid” withholding taxes. She then tells Ms. Petricevic that she will forward the third quarter 2008 payroll reports and an email from Complainant that she believes establishes that he knew his employment had been terminated as of January 15, 2009.

Attached is a printout which is captioned United States Treasury 5/27/2010, and lists amounts next to the categories “Federal Withholding,” “Medicare Company,” “Medicare Employee,” “Social Security Company” and “Social Security Employee.” At the bottom of the page is written “Checking Account- Cit.” with an account number and a total amount of \$2,826.85. (RX 5, p. R014.) Following, is Form 941-X: Adjusted Employer’s Quarterly Federal Tax Return or Claim for Refund filed by Respondents for the first quarter of 2009. The corrected amounts are for the categories “wages, tips and other compensation,” “income tax withheld,” “taxable social security wages” and “taxable Medicare wages.” The total amount of

the correction is \$2,826.85. The explanation given is that an individual whom Respondents should have paid as an employee was paid as an outside contractor. (RX 5, pp. R015-R017.) Following is another printout, captioned New York State Employment Taxes 5/27/2010, and listing amounts next to the categories “NY-City Resident,” “NY-Re-employment Service Fund,” “NY-Unemployment Company,” and “NY-Withholding.” At the bottom of the page is written “Checking Account-Cit.” with an account number and a total amount of \$642.98. (RX 5, p. R018.) Charny also attached Form NYS-45-X-MN Amended Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Reform filed by Respondents for the first quarter of 2009, correcting the amounts withheld for Complainant. (RX 5, pp. R019-R020.) The next page shows Respondents’ Payroll Summary for January through December 2009 for Complainant. (RX 5, p. R021.) Two payroll stubs for Complainant are included, showing a net payment of \$1,333.33 issued on January 23, 2009 for the pay period January 10 through January 23, 2009, and a second payment of \$3,333.33 issued on January 30, 2009 for the pay period January 17 through January 31, 2009. (RX 5, pp. R0022-R0023.) The final page of the attachment shows Respondents’ Payroll Liability Balances for January 2009.

RX 6: Labor Condition Application (also CX D)

This is Form ETA 9053E, Labor Condition Application for H-1B & H-1B1 Nonimmigrants. Charny, who lists a title of Director, signed the form on October 17, 2008. The Employer is identified as Westfourth Architecture, P.C., located at 632 Broadway, Suite 801, New York, NY. The Program Designation is H-1B1 Chile. Rate of Pay is \$60,000.00 per year and the position is not part-time. The period of employment is to begin on October 31, 2008 and end October 30, 2011. The job title is project architect. Prevailing wage for the locality is \$50,398.00 per year. Dominic Kong is the contact.

RX 7: Email dated July 21, 2011 from Ms. Charny to Investigator Petricevic with Attachments

On July 21, 2011, Charny sent an email to Investigator Petricevic, attaching the LCA and related documents (found at RX 6). She explained the company policy that employees are not eligible for health insurance until they have worked for ninety days. Other benefits include unlimited paid sick days, a paid vacation between Christmas and New Year’s Day, one week paid vacation after completing one year of employment, two weeks paid vacation after that, and usually a holiday bonus equal to two weeks of salary. The company does not offer dental insurance. This July 21, 2011 was in response to a chain of emails between Investigator Petricevic and Charny beginning July 12, 2011, seeking documents in response to the Wage Hour investigation of Complainant’s complaint. Another copy of the LCA is included in this exhibit. (RX 7, pp. R037-R046). The final page of the exhibit is an email from Attorney Dominic Kong to Charny dated July 18, 2011, in which he explains that Complainant’s petition was filed under H-1B1 and thus it does not involve Form I-129 (Petition for Nonimmigrant Worker) and instead of being filed with USIS, it is filed directly with the US Consulate. Mr. Kong informs Charny that there is no obligation to inform USCIS when an H-1B1 employee’s employment is terminated.

RX 8: Email dated July 18, 2011 from Attorney Kong to Ms. Charny with attachments

On July 13, 2011, Charny sent an email to Attorney Kong advising that the U.S. Department of Labor is investigating Complainant's application process and asking for documentation. She forwarded a list of documents that Wage and Hour wanted and asked him to provide them. On July 18, 2011, Attorney Kong responded. He advised that he had not been in contact with Complainant since January 2009 and that he had not been "specifically informed" that Complainant's employment had been terminated. He asked whether Respondents had petitioned for any other H-1B or H-1B1 employees since 2008, and advised that Wage and Hour usually only investigates in response to complaints. He told her that she should still have the Public Access File to present to the Department of Labor and resent an email from 2008 that explained how to maintain the Public Access file. He then sets forth his charges for the emailed response and explains what his charges would be to represent the company in a Wage and Hour investigation. Attorney Kong sent a second email on July 18, 2011, which is included and described above at RX 7.

The exhibit also includes a Memorandum from Attorney Kong to Charny dated October 10, 2008 with the subject heading "Public Access Files for H-1B1 Nonimmigrant Workers." (RX 8, pp. R051-R055.) Attached are blank forms including a "Declaration of Posting of Labor Condition Application," a "Declaration that the Labor Condition Application was provided to the H-1B1 Employee," an "Actual Wage Memorandum," a "Statement Regarding Working Conditions," and a "Declaration that the Labor Condition Application was provided to the H-1B employee." (RX 8, pp. R056-R060.) Also included is a document titled "Online Wage Library – FLC Wage Search Results" which shows that in the New York-White Plains – Wayne, NY-NJ Metro Div, the prevailing wage for architects, except landscape and naval, ranges from \$50,398 a year for Level 1 to \$100,547 a year for Level 4. (RX 8, p. R061.) The exhibit also includes the U.S. Department of Labor determination made on the Labor Condition Application for Complainant. (RX 8, pp. R062-R077.) The exhibit includes a second copy of the October 10, 2008 email from Attorney Kong to Charny, with all the above-described attachments. (RX 8, pp. R078-R097.) The exhibit also includes the letter written in support of the petition for H-1B1 Nonimmigrant Worker Visa on behalf of the complainant. (RX 8, pp. R098-R101.)

RX 9: July 18, 2011 Email from Attorney Kong to Ms. Charny

Part of this exhibit is the same as RX 8, an email, dated July 18, 2011, from Attorney Kong to Charny enclosing the blank forms described above. (RX 9, pp. 102-106.) Following that is an email chain between Complainant and Attorney Kong, which begins on January 8, 2009. (See also CX P and CX Q.) The next email in the exhibit, dated January 27, is also from Attorney Kong to Complainant. No year is given and the email itself is heavily redacted. (Exhibits CX P and CX Q include the full text of the email, described *supra*.) The next email in the chain is dated January 28, 2009 and is from Complainant to Charny. (Again, see description of the email *supra* at CX P, Q.) Charny replied to Complainant by email on February 18, 2009 requesting Attorney Kong's contact information. Complainant responded. Charny then sent an email on February 25, 2009 requesting that Complainant forward his social security number to Mr. Blumberg's office. (Again, see CX P, Q.)

RX 10: September 20, 2009 Email between Ms. Charny and Complainant

These are the same emails found at CX W and CX X, described *supra*.

RX 11: October 2, 2009 Email exchange between Ms. Charny and Hillary Brown

Ms. Brown (Complainant's wife) sent an email to Charny in which she expressed their frustration that Respondents had not fixed Complainant's tax issues and advises that they have set up an appointment with an attorney, during which they will also discuss "the legality of [Complainant's] pay decrease when he has a contract, and [Complainant's] 'payment' in February." Charny responded by email on October 2, 2009 asking that Complainant's attorney contact her, as she is confused. She states that she does not want to re-file fourth quarter 2008 payroll taxes again and does not understand why Complainant has not contacted Attorney Kong if there is an immigration issue.

RX 12: November 21, 2011 Email from Ms. Charny to Investigator Petricevic

On November 21, 2011, Charny sent an email to Wage Hour Investigator Petricevic forwarding information she had received from Attorney Kong regarding the differences between H-1B1 and H-1B. According to Attorney Kong, the differences include the facts that petitions are filed with the US Consulate rather than with USCIS and that there is no process for employers to notify USCIS when they terminate an H-1B1 employee. Charny also informed Investigator Petricevic that under H-1B1, employers are not liable for paying return transportation. Charny attached a copy of publication M-582 (August 2008) from USCIS – "I am an Employer How Do I—Hire a Foreign National for Short-Term Employment in the United States?" The document answers basic questions about hiring nonimmigrant employees. The publication mentions the H-1B1 visa only once, in answer to the question "What are the various types of visa classifications." In response, the document lists "H-1B1 – Specialty occupations for certain nationals of Singapore and Chile." (RX 12 pp. 120-122.)

RX 13: Aetna certification of prior health coverage

This "Certification of Prior Health Coverage" from Aetna, Inc. for Charny, under Respondents' Group Health Plan, has a note describing the coverage waiting period, which states "90-Days eligibility after effective date begins on the 1st day of the calendar month coinciding with or next following completion of the period of service."

RX 14: Adoption Agreement for the Datair Mass-Submitter Prototype Standardized Defined Benefit Pension Plan

Respondents have offered a Defined Benefit Pension Plan as of January 1, 2006. Charny and Respondent Arsene are the Plan Trustees. The plan sets out that eligibility computation periods "subsequent to the initial Eligibility Computation Period are the Plan Years beginning with the first Plan Year commencing prior to the first anniversary of the employment commencement date." All employees are eligible "except members of a collective bargaining unit and non-resident aliens." Employees may participate if they are at least twenty-one years

old and have a minimum of one year of service. Employees can enter the plan semi-annually, after they have met the one-year service minimum.

RX 15: LinkedIn Profile of Complainant

Complainant's LinkedIn Profile (with a date on the bottom right corner of July 19, 2012) lists his current position as "Arquitecto asociado at VGO Arquitectos." Under experience, he lists that his work with VGO Arquitectos began in February 2009.

RX 16: UPworld and Elance Profiles for Complainant

This copy of a webpage from <http://www.upworld.com/edmundovicuña>, with a date of July 9, 2012, is mostly illegible. Under "Work Experience," he lists a title of Architect for a company named 2nyad Architecture and Design in Brooklyn, New York with a start date of July 2009. The second page of the exhibit is also mostly illegible, but appears to be a copy of a webpage from <https://www.elance.com/s/eVicuña/resume> dated of July 9, 2012. Under the name "Edmundo V." at the top of the page it reads "English > Spanish Translations."

RX 17: January 13, 2009 Email from Complainant to Ms. Charny and Respondent Arsene

On January 13, 2009, Complainant emailed Charny and Respondent Arsene. In the email, he wrote:

As Vladimir can not (sic) employ me at the moment, he has offered to change my status to "unpaid vacation." Without this status I would have to leave 4 weeks from this coming Friday so it is imperative that this is completed soon. I realize that you are busy, and I very much appreciate all your help on this and my visa application. I will call you tomorrow to confirm receipt of this email and to see if you need me to do anything.

Also since this process dictates my legal ability to stay in this country, would you please let me know when the process has been completed? When is a good time to call you?

RX 18: October 2, 2009 Email from Ms. Brown to Ms. Charny

This is the same document as RX 11.

RX 19: November 4, 2009 Email from Ms. Charny to Complainant

This is the same document as CX Z.

B. Summary of Testimony

Complainant

Edmundo Vicuña is a Chilean citizen who lives in Santiago, Chile. He has a Bachelor degree and two Master's degrees, one in architecture and the other in urban and architectural acoustics, from Universidad Mayor in Santiago, Chile. He received his Master's degree in architecture with High Honors in 2002. He received his Master's degrees in architectural acoustics from the Physics School and the Architectural School at Paris-Val de Seine in Paris. (Tr. 15.) He participated in several competitions, winning prizes and honorable mentions. In 1999, he received second prize for the competition of the Hartford Science Improvement in the City of Puerto Monte, Chile, another second prize for a competition for Santiago, Chile, and an honorable mention for the international competition of housing in Argentina. In 2003, he received honorable mention for the design of architectural support for the artwork of the artist Jorge Pimenta (ph) in the Chilean Airport. (Tr. 16-17.) Before studying in Paris, he worked as an independent architect. After he obtained his Masters' degrees, he worked for Archipel in Paris. He returned to Chile and started working with Space Planning International, a large architecture firm. (Tr. 17.) He worked primarily on retail interior design projects, but also on large-scale projects and competitions. (Tr. 62.) Then he started his own company, VGO Architects, in Chile. (Tr. 17.)

Westfourth Architecture is an architecture firm with offices in Romania, Turkey, and New York. He first learned of the firm when he read an announcement posted on ArchArt.net, a specialized website for architectural work. He applied for a position as project architect on or about July 30, 2008. (Tr. 17-18; CX A.) He submitted his resume, cover letter, and samples of his work and received a response from Westfourth Architecture inviting him to an interview at the office. (Tr. 20.)

He interviewed with Respondents and seven other architect firms. He received job offers from Respondents and Bill Brothers Architectural firm. He chose to accept the offer from Respondents because he felt that the type of work that Bill Brothers offered did not match his skillset; the offer from Respondents was also more interesting. He received the job offer in an e-mail from Zzing Lee. The terms of the job offer included a salary of \$60,000 per year, with a bonus at the end of the year, health insurance after three months as a full-time employee, two weeks of vacation per year after nine months as a full-time employee and visa expenses to sponsor his H-1B1 visa. (Tr. 21.) His monthly gross salary would be \$5,000 a month. Complainant accepted the offer. (Tr. 22.)

He had not worked in the United States before. After accepting the offer, the company asked him to start immediately; he began working around August 15, 2008. He worked full-time from his start date and Respondents paid him for his work in August 2008. However, Respondents did not pay him at the rate of \$5,000 per month. He was paid \$1,666 for the half month of August. (Tr. 22.) He continued to work full-time for Respondents in September and October. (Tr. 22.)

Respondents sponsored his H-1B1 visa. Charny sent in the LCA, and gave him a cover letter to submit at the U.S. Embassy in Chile. (Tr. 24; CX D; CX E.) The wage rate listed on the LCA is \$60,000 per year. (Tr. 25; CX D, page 6, ¶ D.) The U.S. Department of Labor certified the LCA for the period beginning October 31, 2008 and ending October 30, 2011.⁸ (Tr. 25; CX D, page 8, ¶ J.) Charny signed the LCA and cover letter as Director of Westfourth Architecture. (Tr. 25.) Complainant obtained legal status to work in the United States for Westfourth Architecture. His H-1B1 visa issued on October 24, 2008 with an expiration date of April 23, 2010. (Tr. 26; CX I.)

Complainant was in New York from July 28, 2008 until October 22, 2008, when he returned to Santiago, Chile.⁹ (Tr. 28.) After receiving the visa, Complainant purchased a plane ticket and flew from Chile to New York on November 4, 2008 to resume working for Respondent.¹⁰ (Tr. 27, 32; CX G.)

Respondents paid Complainant \$3,333.00 for September 2008 and the same amount for October. (Tr. 22; CX H.) Complainant did not question why his pay was less than the \$5,000.00 he had expected because he assumed Respondents were taking out taxes. (Tr. 34.) In December, Respondents paid Complainant even less. Respondent Arsene explained that the business was not doing very well, so he reduced the salaries of the employees. (Id.) Respondents paid Complainant \$2,666.00 for his full-time work in the month of December. (Tr. 38.) He worked full-time for Respondents in December 2008, except for the week between Christmas and New Year's Day when Respondents closed the office. (Id.) According to Complainant, Jair Laitei, another project architect from Mexico, who was supposed to be paid \$60,000, also had his salary reduced in December.¹¹ (Tr. 35, 38.) In January 2009, Complainant worked for two weeks and received \$1,333.¹² (Tr. 38-39.) Respondents did not provide health insurance to Complainant and did not offer a pension plan or any other benefits or pay aside from salary. (Tr. 39.)

⁸ Although U.S. Department of Labor certified the LCA for a three-year period, the offer letter describes the position as a one-year temporary position. (Tr. 78.) I note that a one-year term is consistent with the H-1B1 regulation. 8 U.S.C. §1101(H)(1)(b)(1). In contrast, the H-1-B regulation allows employment terms of up to three years.

⁹ During this time in Chile, Complainant attended his brother's wedding. (Tr. 68.)

¹⁰ Although Complainant's ticket included a return flight back to Santiago, Chile, leaving New York on November 25, 2008, Complainant never used the second half of the ticket. (Tr. 70.)

¹¹ Although Complainant testified to this fact, there is no outside corroboration. Mr. Laitei did not testify and neither party introduced records of Laitei's immigration status or salary payments. This is hearsay and although admissible, I find Complainant's testimony about Mr. Laitei insufficient to demonstrate that Respondents failed to pay any nonimmigrant employee other than Complainant less than the wage stated in their LCA. (Tr. 35-38.)

¹² I note that earlier in the hearing, Complainant testified that he received \$3,330.00 in January 2009. (Tr. 22; CX H.) Later, he testified that he never received the check for \$3,330.00 issued in January 2009. (Tr. 45-46.)

In the beginning of January 2009, Respondent Arsene held a meeting at Respondents' offices. Jair Laitei was also present. (Tr. 40.) Arsene told the architects that the projects were on hold and there was not enough work for them. (*Id.*) After the meeting, Complainant had a private conversation with Arsene in which they discussed Complainant's visa status, and Arsene proposed keeping Complainant on unpaid vacation status. Arsene told Complainant to speak with Charny to arrange this. (Tr. 40-41.) Complainant did not report to the office after January 15, 2009, following Respondent Arsene's direction. On January 28, 2009, Complainant sent an email to Charny to inquire about his employment status. (Tr. 41; CX Q.)

Respondents issued Complainant a Form 1099 rather than a Form W-2 for his work in 2008, and paid no income taxes on his behalf. (Tr. 48; CX L.) Respondents subsequently issued a Form W-2 for 2008, indicating that Respondents had paid no taxes on Complainant's behalf. (Tr. 49; CX N.) In August 2009, Complainant and his wife met with Respondent Arsene to discuss fixing his paychecks, to correct for what he was paid compared with what they felt Respondents should have paid him, and to discuss whether there was any available work. (Tr. 47.)

Complainant returned to Chile in February 2010. He paid \$1,152.70 for his own plane ticket. (Tr. 56, 94.) He also paid \$1,300.00 for his flight to New York for this hearing. (Tr. 57.) Complainant calculates that Respondents underpaid him \$9,366.00 between August 2008 and January 2009. (*Id.*; CX AA.) He also feels that Respondents owe him \$167,000.00 for pay from the time Respondents placed him on unpaid leave until his visa ended, and that Respondents owe him health insurance benefits of \$800.00 per month. (*Id.*; CX AA.)

Although Complainant's LinkedIn profile shows him as an associate architect at VGO Associates beginning in 2009 and he used a VGO email address, he testified that he earned no money with VGO in 2009. (Tr. 99, 101; RX 15; CX Y.) In 2010, he received a salary from VGO of about \$4,000.00 US dollars a month (converted from Chilean pesos). (Tr. 99.) He earned the same amount with VGO in 2011. (Tr. 100.) From July 2009 until November 2009 he collaborated with an architectural firm named 2 NYAD in looking for work, however, no projects came to fruition and he received no income from that collaboration. (Tr. 104-105.) He earned about \$800.00 in 2009 working as translator. (Tr. 105.) He earned about \$1,000.00 in December 2009 working at a deli in Brooklyn and another \$1,000.00 working there in January 2010. (Tr. 107.)

Hillary Brown

Ms. Brown, who is married to Complainant, currently lives in Santiago, Chile. She has lived there since July 29, 2010. She is an American citizen who previously lived in Brooklyn, New York. She works as a financial analyst for Lending Partners, based in Santiago, Chile. Before that, she worked at a company called FSI Capital until April 2010. She filed her 2008 income taxes singly, preparing them herself and submitting them online. (Tr. 129.) In 2009, she filed jointly for herself and Complainant. She submitted her W-2, provided by her company and a substitute W-2 for Complainant because they never received any documentation from Westfourth. (Tr. 130; CX K.) Ms. Brown contacted Charny and Westfourth's accountant, Eugene Blumberg, about the missing W-2. She and her husband also contacted the IRS and

learned that Westfourth had not paid any income taxes for Complainant. (Tr. 131-136.) In August 2009, she went with her husband to a meeting with Respondent Arsene to discuss salary that Complainant had not received. She exchanged emails with Charny regarding Complainant's pay. (Tr. 137.)

Vladimir Arsene

Respondent Vladimir Arsene earned a Master's Degree from the School of Architecture of the University of Bucharest in 1976. He is an Architect and a Member of the American Institute of Architects and the Romanian Order of Architects. (Tr. 161.) He holds licenses in the states of New York and New Jersey. He testified that he came to the United States in 1978. He worked for several large architect offices in New York and New Jersey. He has been a Professor of Architecture at the New York Institute of Technology School of Architecture, Pratt Institute of Architecture, Slovakian Institute of Architecture, and the New Jersey Institute of Technology. He opened his own firm, Westfourth Architecture, and has been the President since 1991. (Tr. 162.)

Westfourth Architecture practices architecture internationally. For twenty years, Westfourth has done about seventy-five percent of its work abroad and twenty-five percent in the United States. The firm has won numerous international design awards, awards from the American Institute of Architects, and awards from other professional organizations in various countries. The firm designs various types of buildings including the Embassies of Canada in Bucharest and Lima. (Tr. 162.)

In addition to serving as President of Westfourth, Arsene is the Design Principal. His role is to bring in new projects, to negotiate with clients, and to provide the design orientation of the office. (Tr. 163.) Arsene's wife, Charny, has helped with the operations and administration of the office since Arsene's quadruple bypass operation in 2003. Westfourth does not have directors, vice presidents, or other officers. Charny primarily handles the financial administrative matters. (Tr. 195.) Charny worked with accountants on the tax issues and complicated issues related to reconciling payments from abroad. (Tr. 196.) Charny does not work full-time, works mostly from home, and in 2008, was infrequently in the office. (Tr. 197-198.)

Although Westfourth is a corporate structure legally, it operates as a design studio philosophically. (Tr. 194.) Many of the employees are Arsene's former students. They operate more informally than a typical corporation. Arsene travels extensively because most of the work is abroad. He is out of the country at least fifty percent of the time. He has a subsidiary office in Istanbul. (Tr. 163.)

In 2008, Westfourth had about eleven or twelve architects in New York and a total of sixteen architects firm-wide. At the time of the hearing, the firm had only four architects in New York and two architects in Istanbul. Arsene and his senior architect hire the new architects. (Tr. 163.) Arsene has been involved in all of the hiring decisions concerning architects since 1991. (Tr. 194.) Arsene has also made the decisions concerning salaries for all of the architects since 1991. (Tr. 195.) According to Arsene, they receive many applications, as the firm is world-

renowned. Sometimes, when they have time, they go through the applications and select the most interesting ones; sometimes they meet someone they want to hire. Other times, when they need something more specific, or when they find the existing applications unsatisfactory, they advertise in professional venues such as the American Institute of Architects. Complainant answered such an advertisement in late July, 2008. (Tr. 164.)

In general, it is not the firm's practice to hire "already made off the shelf" architects, because they want architects to work according to the firm's field works, systems, and methodologies. They advertised for a project architect in 2008, but Arsene was not looking to hire a full-fledged, fully experienced project architect. He was looking for a candidate who could grow into the position. (Tr. 164.) Complainant interviewed twice and Arsene found him to be a very nice person; Arsene considers how new hires would relate to the other people in the office as very important. He also thought Complainant was a talented architect. He did not have the experience of a true project architect, because his experience was mostly in interior design and doing academic work. Though he had not actually gone through the building process, Arsene saw Complainant as a good investment, someone who could gain experience and grow into the position. (Tr. 165.)

Westfourth is conservative in hiring and does not make hiring decisions without careful consideration. They also have very low turnover and invest in the growth of their hires. However, in 2008, "it was crazy." The real estate boom in Europe was peaking, generating an enormous amount of work for the firm. Arsene believes that they hired four people that year. (Tr. 165.)

After interviewing Complainant, they discussed salaries. Arsene offered him a salary of \$60,000 a year, which was one of the higher salaries in the office; however, Arsene was very optimistic and expected all salaries to grow in general. Arsene asked his senior architect to send Complainant an e-mail setting out the conditions of employment, such as vacation days and bonus. (Tr. 166; CX C.) Westfourth provides benefits to its employees, including full paid healthcare, sick days, vacation, personal days, and pension. (Tr. 204, 255.) Employees become eligible for healthcare benefits after three months of full employment and become eligible to use vacation after either nine months or one year of full employment. Employees may take sick days at any time. (Tr. 255.)

Since Arsene had to go abroad soon after hiring Complainant, he asked Complainant to come to the office. He told Complainant that he could not hire him full-time, but asked him to familiarize himself with Westfourth's procedures while in a probation period. (Tr. 167.) Around August 15, 2008, before Arsene left New York, he and Complainant discussed his need for a working permit. Arsene told Complainant that Westfourth would pay for the attorney and file the application. Charny handled the H-1B paperwork for Complainant. She discussed Complainant's hiring with attorneys and she reviewed and signed the papers because Arsene was not in the country. Arsene, however, prepared the letter in support of the petition because it described the professional responsibilities of the H-1B applicant. Arsene also reviewed the application and instructed his accountants to pay the fees related to Complainant's attorney and the application fees. (Tr. 169, 170, 200.) Arsene left the country on August 30 and returned at

the beginning of October. Arsene and the senior architect were out of the office the entire month of September. (Tr. 167.)

In August 2008, when Complainant came to the office, Arsene explained the systems and procedures to Complainant, and assigned him to work on a project involving a big complex in Sofia, Bulgaria. Because Complainant seemed competent, and in order to help Complainant since he had no income, Arsene offered him approximately \$1,600.00 in cash in advance of his future salary; this was not payment for work in the office. Arsene did not consider Complainant to be working full-time in August for Westfourth. Though Arsene was not in the office in September 2008, and did not tell Complainant to work full-time, he understood that Complainant came to the office often, met with other people, and discussed their projects. Arsene called once or twice and asked how Complainant was doing; he received positive responses that Complainant was very nice and capable of doing the work. (Tr. 168.)

Arsene explained that company policy for the past twenty years has been to put new hires on a three-month probation period. This affords Arsene the opportunity to monitor their progress, to decide if they are as talented as their portfolio implies, and to determine if they are able to understand company procedures and handle the workload. In 2008, when he hired Complainant, Arsene had three architects who were in their probation period. He considered them independent contractors working on a trial basis, and not full-time employees. (Tr. 207.) The three architects were Jair Leiter, Grace Chang, and Christopher Rowe. (Tr. 208.) Arsene testified that he understood that he could not hire an individual on an H-1B1 visa as an independent contractor. (Tr. 218.)

Arsene testified that he told Complainant in August that he could not hire him full-time until he had a visa, but that he was welcome to come into the office before that to become familiar with the office procedures. (Tr. 219.) Because Arsene would be out of office after August 30, he advised Complainant that August 15 through August 30 would be the best time for him to show Complainant how the office works. (Tr. 219.) The firm's policy is to track hours in order to bill clients, and employees track the hours and dates that they work on specific projects. However, because Arsene works internationally and bills on phases of work, there is no incentive for him to keep track of the hours employees are in the office; consequently, he is unsure of how many hours Complainant spent in the office in August. (Tr. 222-223.)

Arsene understood that Complainant could start working full-time on October 1. (Tr. 169.) Complainant was working the usual office hours of 10:00 a.m. to 6:00 p.m. when Arsene returned to the office in October. (Tr. 220.) Arsene testified that he found out later that Complainant's visa did not permit him to work until October 28. He also testified that it was an honest mistake on his part. (Tr. 169.) However, Arsene prepared the letter in connection with Complainant's visa application and dated it October 21, 2008. (Tr. 229.)

Westfourth paid Complainant as all of the other employees were paid. At that time, Arsene wrote the checks and called the accountants when he had new employees. He told the accountants the gross amount that the employee was going to earn. After asking questions regarding the employee's marital status and residency, the accountants told Arsene the net amount of the check; Arsene then wrote and signed the check for the net amount his accountants

advised. (Tr. 170; CX H.) Arsene's accountants were also responsible for filing the quarterly reports mandated by the wage reporting requirements for employees in New York City. (Tr. 210.) Arsene also assumed that his accountants were paying the proper withholding taxes for Complainant in 2008. He learned later that they had not, and at the time of the hearing, Westfourth still had not paid withholding taxes for Complainant. (Tr. 211.)

On September 26, 2008, Arsene issued a check to Complainant in order to help him because Complainant had no income and could not have waited for a check to come at the end of October, his first month of work. Thus, Arsene agreed to give Complainant a check in advance for the month of October, and instructed the accountants to write a check to Complainant as an advance. The check was for \$3,333.33 because the accountants told Arsene that this represented the net amount for an employee's salary of \$60,000. Arsene did this for every employee. (Tr. 171; CX H.)

On November 14, 2008, Arsene's accountant issued a check to Complainant for the same amount (\$3,333.33). The accountant issued the check because Arsene was out of town from October 14 until December. Arsene testified that the company "lost track" of the fact that he had been paid in advance in September. (Tr. 172; RX 2.) Westfourth also issued Complainant a check for November 2008. (Tr. 172; CX H.)

Complainant asked Arsene around October 20 for permission to take a week vacation to go to Chile for his brother's wedding.¹³ Arsene told him he did not think it appropriate to ask for vacation less than three weeks after he started employment since office policy required employees to work for nine months before they became eligible to take paid vacation. However, Complainant insisted and Arsene told him that he could have an unpaid leave of absence for one week. Ultimately, Complainant left for two weeks and Westfourth paid Complainant for the time that he was away. Due to his travel schedule and the beginning of the real estate market collapse, Arsene explained that he forgot to tell the accountants about Complainant's unpaid leave of absence. (Tr. 173.) The collapse in real estate was accelerated in the countries where Westfourth doing business, including Romania. (Tr. 174.)

Based on their signed contracts, Westfourth projected an income of about \$2,250,000.00 for the end of 2008 and 2009. Invoices for completed work amounted to about \$550,000. From the beginning of November through the beginning of December, Arsene testified that he lost all this income because most of Westfourth's clients went bankrupt. The first measure Arsene took was to reduce all the salaries in the office by twenty percent. Complainant was not present in the office when Arsene made that decision. (Tr. 175.) As a result, Westfourth reduced Complainant's salary by twenty percent in December 2008. (Tr. 183.)

Arsene returned from Bucharest on December 14, 2008 without any prospects for work in 2009. Arsene testified that most of the advisors that he met in Bucharest were forecasting an extremely bleak year. Consequently, he decided that he had to let Complainant go. (Tr. 185.) Arsene testified that he made the decision to terminate Complainant in December 2008, but did

¹³ Although Respondent characterized Complainant's return to Chile as a "vacation" which Complainant took in order to attend his brother's wedding, I also note that Complainant obtained his H-1B1 work visa during this trip to Chile.

not give Complainant any written notice of his decision to terminate Complainant's employment. (Tr. 239.) In January 2009, Arsene instructed his accountants to pay Complainant two weeks of severance pay, which totaled approximately \$1,600, half of \$3,333.00. (Tr. 188, 191, 239.)

In December, Arsene told Complainant that he could no longer employ him. Arsene felt sorry for Complainant because he was at the beginning of his career while Arsene was at the end of his own career. Arsene faced the possibility of losing everything that he had worked for over his lifetime. Arsene testified that he remembered when he first immigrated to New York and worked as a taxi driver while his wife sold things, similar to Complainant and his wife. Arsene deeply empathized with Complainant's situation; although he was unable to pay Complainant, Arsene endeavored to help Complainant as much as possible. In response, Complainant was always irrefragable and very gracious. (Tr. 186.)

The loss of his employment intensified the difficulties of Complainant's predicament, and Complainant returned to speak with Arsene a few days later. Complainant explained that he was required to leave the United States four weeks after the termination of his employment, which threatened his upcoming marriage and ability to obtain a green card. After asking for Arsene's help, Arsene and Complainant discussed the possibility of unpaid vacation so that Complainant could remain in the United States for a few months. Arsene told Complainant that he was willing to do anything as long as Complainant's immigration attorney verified that it was legal. At this time, the economic downturn was causing Arsene great stress and he also experienced heart trouble. In early January, Arsene had to return to Bucharest. (Tr. 187.) As he was leaving the country, Arsene instructed Complainant to contact his attorney and forward any information he received to Charny. Arsene told Charny that he had not informed the accountants of Complainant's termination. He explained that he felt very sorry for Complainant, and that they should try to help him as much as possible, as long as it was legal. (Tr. 188, 240.) Subsequently, Complainant went to his immigration attorney to discuss the possibility of unpaid vacation.

In the middle of February, when Arsene returned to the United States, he learned that Mr. Kong, Complainant's immigration attorney, had advised that the conditions of Complainant's visa precluded Westfourth from granting Complainant unpaid vacation. From that moment, Arsene felt that he could do nothing to help Complainant; he attempted to get work for Complainant from some of his friends, but all offices in New York were out of work. (Tr. 188-89; CX P.) Consequently, Arsene told Charny and the accountants to remove Complainant from the payroll, but he did not communicate this decision to Complainant. (Tr. 244-45.)

Arsene testified that the American Institute of Architects reported twenty percent of the labor force was lost between 2008 and 2009; 56,000 architects lost their jobs. Ninety-five percent of the architects hired in 2008 had lost their jobs by 2009. "Nobody had work. Everybody was laying off." (Tr. 189.) Arsene also terminated the three other architects who were on probation. Westfourth lost fifty percent of its workforce and continued to lose people in 2009. (Tr. 190.)

Since that time, though Respondents replaced an architect who left the firm with a former H-1B employee who had returned from Germany, Westfourth has not hired any new architects.

In the last twenty years, about fifty percent of Arsene's employees were H-1B nonimmigrants. (Tr. 191.) Until 2008, Arsene never had occasion to terminate an H-1B employee. (Tr. 194.) He has never retained counsel for legal advice about H-1B employees since he pays for the employees to retain counsel. (Tr. 198.) He is, however, familiar with the H-1B requirements, such as the requirement that the LCA specify the salary to be paid. (Tr. 199.)

Complainant never worked for Westfourth again and Arsene is not considering rehiring him, or hiring anyone else. Given Complainant's wonderful job performance, Arsene encouraged Complainant to find employment elsewhere. Arsene believes that Complainant was just caught in an unfortunate economic situation. (Tr. 191.)

Arsene met with Complainant and Brown in August 2009.¹⁴ They told him that there was an issue related to their tax return, but Arsene did not understand what the problem was as he believed he had paid Complainant properly; nevertheless, he promised to tell his accountant to resolve the problem. (Tr. 192.) Arsene testified that he recalled that Complainant thought something was wrong with his W-2 Form, but that it was a "technicality." Much later on, he understood that Westfourth had issued Complainant the wrong form. However, at the time, Arsene only knew that he had paid Complainant the net amount representing the \$60,000 a year salary. He testified that he had worked with this accountant for twenty years and that he is "a very respectable guy." He did not see the tax problem as a major issue. (Tr. 193.) Arsene testified that the accountant is responsible for writing the check to the government paying the taxes due for employees. (Tr. 205.) He claims that he asked the accountant to correct the situation with Complainant in accordance with the law, and that he instructed the accountant to treat Complainant as a full-time employee. Arsene also told the accountant to help Complainant do his tax returns so that Complainant would not have to pay any taxes, as the taxes were already paid. He believed this action resolved Complainant's tax issues. (Tr. 213.) He further testified that Complainant was always very nice, courteous, and polite in his discussions of the tax issue. (Tr. 193.)

Stephanie Charny

Stephanie Charny has an undergraduate degree in economics and professional experience in commercial real estate. (Tr. 261.) She described her role at Westfourth as "the support branch of the company." She does whatever the president of the company, Arsene, directs as Arsene frequently travels outside the United States and has little time to focus on administration. Charny began working for Westfourth in the spring of 2003, when Arsene had emergency quadruple bypass surgery. After that this surgery, Arsene could no longer travel alone. (Tr. 259.) Accordingly, Charny accompanied Arsene whenever he traveled, and filled the roles of administrative assistant, secretary, nurse, mother, and sister. Initially, her role was reactive, just to keep the business going, but her role increased over time. (Tr. 260.) Charny testified that while

¹⁴ Although Complainant sent emails prior to the meeting in August 2009 raising the tax issue, Arsene testified that he did not recall them. He said that he instructed Charny to forward all issues related to Complainant's complaints regarding taxes to the accountant for resolution. (Tr. 240-50; CX R, S, T, U, V, W, X, Y, and Z.)

Arsene generally had full-time administrative help in the office, she took care of the issues that required someone Arsene could trust, including access to banking. (Tr. 260.)

Charny facilitated Westfourth's sponsorship of Complainant's visa application. Complainant's attorney, Mr. Kong, worked with Complainant. Charny ensured that Westfourth paid the attorney, and she looked at some of Westfourth's other H-1B records and signed the form. She generally signed forms when Arsene was out of the country. (Tr. 260; CX D, p. 8.) She testified that it is her general professional, and personal, practice to read any document she receives. To the best of her knowledge, Complainant's LCA application was accurate. However, she recalled that her review of the document caused her to question at least one issue; she asked Attorney Kong if Westfourth would be obligated for the entire three-year period mentioned in the LCA, from 2008 to 2011. Kong responded that the visa would be limited to one year. (Tr. 262.)

She did not meet Complainant in August 2008. Charny testified that she did not work much from August 15, 2008 through the end of the year, as she was recovering from her mother's sudden death in May. (Tr. 264.) She does know that she was in the office during the week of August 21, 2008 because her sister came into the office with her daughter and they had lunch on August 18, 2008. In September 2008, she travelled with Arsene. (Tr. 265.)

October 2008 was a "disaster" as the real estate market fell. When Arsene returned to the United States, they discussed preparing for a potential financial disaster by cutting salaries, cutting expenses, and potentially letting people go (who and in what order). Both Arsene and Charny's incomes had been tied to the firm since 2003 and Arsene wanted to avoid bankruptcy. He was also concerned about his employee Zzing, who had been with him for twenty years. It was clear to Charny that Complainant, whom Arsene had just hired, was going to be let go. (Tr. 266-267.) Arsene planned to handle the situation with his employees before he went away on December 20 for a family vacation. (Tr. 268.) Arsene planned to terminate Complainant and cut the salary of other people in the office across the board. (Tr. 269.)

In January of 2009, Complainant told Charny that Arsene had asked him to get in touch with Dominic Kong. Arsene and Charny were aware that Complainant, as an H-1B1, was in a different situation than regular H-1B employees, as his visa came through the embassy. (Tr. 269.) When she received the email from Complainant (RX 17), she understood that Complainant was not going to be working, which was not a surprise as Westfourth had laid him off. She did not think that Arsene offered to place Complainant on unpaid vacation. Although Arsene was trying to help Complainant, he would never do anything to jeopardize his ability to hire H-1B employees. Furthermore, without Kong's input, Arsene would not be aware of the implications of unpaid vacation status. (Tr. 270.) Charny did not respond to the email from Complainant because she knew that Westfourth was paying Complainant's lawyer to address the situation. (Tr. 271; RX 17.) She also did not recall speaking to Complainant before he wrote the January 29, 2009 email; Charny and Arsene were away from December 20, 2008 through January 13, 2009, during which time Arsene underwent emergency heart surgery. (Tr. 272, 273-75; CX P.) After the January 29, 2009 email, she knew that she needed to discuss Complainant's situation with Arsene, but was unable to communicate with him because he was out of the country. They

discussed Kong's advice upon Arsene's return in February. (Tr. 273.) Arsene told Charny, "Let me look at it. Let me think about it and let me figure out what to do." (Tr. 275.)

Charny next dealt with Complainant when she became aware that someone in the accountant's office had incorrectly issued him a 1099. (Tr. 275- 276.) Westfourth intended to correct the problem in order to comply with labor laws and to assist Complainant because Arsene always wanted to help him. Westfourth instructed the accountant, Gene Blumberg, to take whatever steps were necessary to redress the situation. Blumberg has been Westfourth's CPA for almost twenty years. (Tr. 277.) Charny understood that Complainant communicated with Blumberg, who was to prepare a W-2 Form that would reflect net payments to Complainant of \$3,300.00 over a certain period. The accountant's office was to pay the federal and state taxes. She believes the accountant filled out the W-2 to show no withholdings so that Complainant did not have to pay taxes. (Tr. 279.) However, if the accountant had shown withholdings, Complainant would have been entitled to a refund. The accountant felt that Complainant had been paid all the money that he was entitled to receive and that an income tax refund would constitute additional income to which he was not entitled. (Tr. 280; CX N; RX 4.)

On April 29, 2009, Charny sent an email to Complainant and copied a bookkeeper in the accountant's office. She asked if he had all the documents he needed and if he still needed to be on the payroll, as Westfourth had kept him on the payroll for January and February. (Tr. 285; CX S.) Charny wrote to Complainant because Blumberg had instructed his staff not to speak with Complainant directly. (Tr. 286.)

Charny testified that to her knowledge, Complainant did no work for Westfourth after December 31, 2008. (Tr. 289.) Westfourth did not notify USCIS that they had terminated Complainant's employment because they believed that to be Attorney Kong's responsibility. Charny also believed that they had no obligation to notify USCIS that they had terminated Complainant's employment because he was an H-1B1 employee. (Tr. 297.) Westfourth did not pay for a return ticket to Chile for Complainant because the law did not require it and Complainant never asked Westfourth for return airfare. Westfourth did retain a public access file with respect to Complainant after the immigration attorney prepared the file and instructed Westfourth to maintain the appropriate records. (Tr. 298.)

In 2008, Westfourth offered its architects fringe benefits including a health insurance plan (Westfourth paid 100 percent of the cost), a defined benefits pension plan fully funded by Westfourth, paid vacation and personal days, paid sick leave, and paid holidays. (Tr. 293.) Employees became eligible for health insurance after ninety days of employment. Enrollment in the defined benefits pension begins after one year of employment. (Tr. 294; RX 14.)

Charny testified that Complainant was due \$2,500.00 for his gross salary under the LCA in November 2008 because he left the country for two weeks. (Tr. 320.)

Jair Laiter, Christopher Rowe, and Grace Chang were not employees at Westfourth in 2008; they were independent contractors. (Tr. 343-344.)

III. ANALYSIS

A. Back Wages

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. § 655.731.¹⁵

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).

In this case, the issues are whether Respondents paid Complainant the prevailing wage of \$60,000.00, when Respondents' obligation to pay Complainant began and when Respondents' obligation to pay Complainant ended.

¹⁵ The regulations set forth in Subparts H and I of 20 C.F.R. apply equally to H-1B and H-1B1 employees with some designated exceptions. *See* 20 C.F.R. § 655.700(c)(4). The sections which do not apply to H-1B1 employees are delineated at 20 C.F.R. § 655.700(d).

1. What Wage Were Respondents Obligated to Pay Complainant?

According to the LCA Respondents obtained for Complainant, the prevailing wage was \$60,000.00 per year. Respondents paid its employees monthly (Tr. 22, 234, 322); thus, for each month that Respondent was obligated to pay Complainant, his full-time salary should have been \$ 5,000.00, less any deductions for taxes. Complainant submitted pay stubs showing payments in the following amounts:

9/26/2008	\$3,333.33
11/26/2008	\$3,333.33
1/23/2009	<u>\$1,333.33</u>
	\$7,999.99

(CX H). The record also includes a check to Complainant dated November 14, 2008 for \$3,333.33. (RX 2.) Adding this check to the paystubs included in Complainant's exhibits, evidence establishes that Respondents paid Complainant \$11,333.32 in 2008.

However, according to the Internal Revenue Service Wage and Income Transcript, Respondent reported paying \$12,666.65 in 2008, with no taxes withheld. (CX M.) In contrast, Copy C of Complainant's Form W-2 Wage and Tax Statement for 2008 shows gross payments to Complainant in 2008 of \$13,715.92, with withholdings for Social Security tax in the amount of \$850.39 and \$198.88 withheld for Medicare tax.¹⁶ (CX N, RX 1.) Complainant's own calculations of damages include an additional payment of \$1,666.66 for the pay period ending August 29, 2008 and a payment of \$2,666.66 for the pay period ending December 26, 2008. (CX AA.)

	DATE	AMOUNT		EXH OR TR. REF.
2008	8/29/2008 pay period	\$ 1,666.66		CX AA
	9/26/2008 pay period	\$ 3,333.33		CX H, AA
	11/14/2008 check date	\$ 3,333.33		CX AA, RX 2
	11/26/2008 pay period	\$ 3,333.33		CX H, AA
	12/26/2008 pay period	\$ 2,666.66		CX AA
	Total Received 2008		\$14,333.31	
2009	1/23/2009 pay period	\$ 1,333.33		CX H, AA
	Total Received 2009		\$ 1,333.33	
	Total Received		\$15,666.64	CX AA

Assuming Complainant would not have asserted receiving any pay that he did not actually receive, I find that Exhibit AA is the most reliable source of information regarding Respondent's

¹⁶ With the Social Security and Medicare withholdings set forth on this W-2, the net payment to Complainant would have been \$12,666.65, which is consistent with the Internal Revenue Service's Wage and Income Transcript.

payments to Complainant. I therefore find that between August 2008 and January 2009, Respondent paid Complainant \$15,666.64.

20 C.F.R. §655.731(c)(9)(i) allows an employer to reduce a nonimmigrant employee's pay for deductions required by law such as income tax or FICA. The record is clear that during the time Respondents were paying Complainant, Respondents failed to withhold federal income tax. (CX M; CX N; RX 1.) The parties did submit a copy of Complainant's W-2 for 2008 that suggests Respondents did withhold \$850.39 for Social Security (FICA) and \$198.88 for Medicare. Both of those deductions are allowable under §655.731(c)(9)(i).¹⁷

Therefore, on first glance, it appears that Respondents did fail to pay Complainant the \$5,000.00 per month wage promised in the LCA. Assuming that in 2008, Complainant began working for Respondents midway through August and continued working for Respondents until the end of December, Respondents should have paid Complainant \$22,500.00 less the legal deductions of \$1,049.27 for a total of \$21,450.73. Respondents would thus owe Complainant \$21,450.73 minus the \$14,333.31 actually paid, or \$7,117.42 in wages for 2008.

Our inquiry, however, does not end there. Respondents also set forth the following arguments: their obligation to pay Complainant did not begin until the effective date of the LCA, or October 31, 2008; any payments made prior to October 31, 2008 were "advances" and not paid for work Complainant actually did; and Complainant was not due wages for the entire month of October, in any event, as he took time off to return to Chile for his brother's wedding. Further, Respondents argue that all of their employees had salary reductions in December, due to the severe economic crisis occasioned by the collapse of the real estate market in 2008, thus Respondents treated Complainant no differently than any other employee that month.

2. When Did Respondents' Obligation to Pay Begin?

Respondents offered a position as project architect to Complainant by email dated August 12, 2008. (CX C.) The email does not include a start date. (*Id.*) Complainant testified that he started going to work at Respondents' office around August 15, 2008 and that he was working full-time from the beginning. (Tr. 22.) Respondents agree that Arsene asked Complainant to start coming to the office in August 2008, as Arsene was leaving the country soon. However, Respondents assert that Complainant was not there full-time as he was just supposed to familiarize himself with office procedures. Respondent Arsene characterized this as "a probation time." (Tr. 167.) Respondents also do not dispute that Complainant came to the office in September 2008; Respondents merely disagree that Complainant was "working" in September. Respondents characterized Complainant's activities as "just" meeting with people in the office and discussing their projects. (Tr. 168.) Respondents did not track the number of hours Complainant spent in the office in August and September 2008; Respondent Arsene testified that it is not his practice to track employees' hours. (Tr. 222-223.)

Respondent Arsene believed that Complainant became a full-time employee beginning October 1, 2008 and agreed that when Arsene returned to New York, Complainant was present

¹⁷ Respondents do not argue that they were entitled to reduce Complainant's wages for any other "authorized deductions" as allowed by 20 C.F.R. §655.731(c)(9)(ii), (iii).

in the office for the usual full-time hours of 10:00 a.m. to 6:00 p.m. (Tr. 169, 220.) However, Arsene did not send the letter requesting Complainant’s employment visa until October 21, 2008 and Charny signed the LCA on October 17, 2008. (Tr. 229; CX D, E.) The approval date on the LCA is October 31, 2008. (CX D.)

An employer must pay an H-1B employee the prevailing wage listed on the employee’s LCA starting on the date the employee “‘enters into employment’ with the employer.” 20 C.F.R. § 655.731(c)(6). An H-1B employee “‘enters into employment,’ when he/she first makes him/herself available for work or otherwise comes under the control of the employer.” 20 C.F.R. § 655.731(c)(6)(i). See also 8 U.S.C. § 1182(n)(2)(C)(vii)(1). “Thus, if an employee reports as available to work, whether it is for orientation, training, or to study for a licensing examination, the employer violates the Act if it does not pay the H-1B employee his LCA-specified wages.” Administrator, Wage and Hour Div. v. Greater Missouri Medical Pro-Care Providers, Inc., ARB No. 12-015, ALJ No. 2008-LCA-26 (ARB Jan. 29, 2014).

However, “entering into employment” presupposes that the nonimmigrant employee has a valid H-1B work visa at the time the employee enters into employment. An employee is “considered eligible to work for the employer upon the date of need set forth on the approved H-1B petition.” 20 C.F.R. § 650.731(c)(6)(ii). The validity period of an LCA does not begin until the application is certified. 20 C.F.R. § 650.750(a). Regardless of whether Complainant began working in Respondents’ office full-time in August, September or October, he did not have an approved employment visa and LCA until October 31, 2008. (CX D, E.) Thus, I find that Complainant’s entitlement to the wages set forth in the LCA does not begin until October 31, 2008.

I further find that the first payment that Complainant received for time worked as a nonimmigrant H-1B1 employee is the check dated November 14, 2008 for \$3,333.33. Respondents paid Complainant the following wages for his work beginning October 31, 2008:

	DATE	AMOUNT		EXH OR TR. REF.
2008	11/14/2008 check date	\$ 3,333.33		CX AA, RX 2
	11/26/2008 pay period	\$ 3,333.33		CX H, AA
	12/26/2008 pay period	\$ 2,666.66		CX AA
	Total Received 2008		\$ 9,333.32	
2009	1/23/2009 pay period	\$ 1,333.33		CX H, AA
	Total Received 2009		\$ 1,333.33	
	Total Received		\$10,666.65	CX AA

Complainant began working for Respondents, pursuant to a valid H-1B1 visa, on November 4, 2008. (Tr. 27, 32, CX G.) He last worked in Respondents’ office on January 15, 2009. (Tr. 41.) Based on the salary of \$60,000.00 per year set forth in the LCA, between

November 4, 2008 and January 15, 2009, Respondents should have paid Complainant \$12,500.00 gross.¹⁸

Respondents argue that the payments made prior to the attainment of the LCA were “advances” on Complainant’s future salary and should be credited towards Respondents’ obligations under the LCA. I find this argument not credible. The payments made before November 2008 were for the same amount as the payments made after Complainant’s visa became effective (\$3,333.33). Respondents do not dispute that Arsene invited Complainant to come to the office to learn the workings of the office before Respondent Arsene left for Europe. (Tr. 219.) Arsene also knew that Complainant often came to the office in September, met with other employees and discussed their projects. (Tr. 168.) I find that the testimony establishes that Complainant was working for Respondents prior to the time he obtained a visa, and that the payments made to Complainant prior to the November 14, 2008 check were wages for work and not advances toward future salary. Thus, Respondents are not entitled to a credit for any monies paid to Complainant prior to November 4, 2008.

3. Were Respondents’ Deductions from Complainant’s Paychecks Legitimate?

a. *Taxes*

Under the terms of the LCA, Respondents were obligated to pay Complainant \$60,000.00 per year, or \$5,000.00 per month. “The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(3) of this section may reduce the cash wage below the level of the required wage.” 20 C.F.R. § 655.731(c)(1). Section 655.731(c)(9) defines the criteria for “authorized deductions.” Authorized deductions include legally mandated deductions such as income tax and FICA, deductions authorized by collective bargaining agreements, and deductions made in accordance with a voluntary written authorization by the employee for matters principally for the benefit of the employee, which do not recoup the employer’s business expense and are for amounts which do not exceed fair market value of the matter covered. 20 C.F.R. § 655.731(c)(9). In this case, Respondent argues that it reduced Complainant’s pay from \$5,000.00 a month to \$3,333.33 to account for tax withholdings, in accordance with § 655.731(c)(9)(i).

The flaw in Respondents’ argument is that the evidence establishes that Respondents did not actually withhold income taxes from Complainant. In fact, if Respondents had properly withheld taxes and issued a W-2 Form for 2008, this case may never have arisen. Complainant assumed that he was paid \$3,333.33 rather than \$5,000.00 because Respondents were withholding income taxes. (Tr. 34.) He only began to question his pay when he received a 1099 Form¹⁹ rather than a W-2 Form for 2008. (Tr. 48; CX L.) When he questioned Respondents

¹⁸ Below, I discuss whether Respondents’ “deductions” from Complainant’s paycheck were legitimate deductions and whether Respondents owe Complainant wages for any time after January 15, 2009.

¹⁹ Form 1099 is issued to independent contractors and self-employed persons to report income earned.

about the 1099, Respondents had their accountant issue a W-2 Form. However, the W-2 Form revealed that Respondents had not paid any income tax on Complainant's behalf. (Tr. 49; CX N; RX 1.) Complainant eventually obtained a transcript from the Internal Revenue Service that confirmed that Respondents paid no federal income taxes for Complainant. (CX M.) Respondent Arsene took no responsibility for the failure to pay taxes. He testified that he relied on his accountant to withhold the proper taxes. (Tr. 205, 211). He testified that he did not remember any emails from Complainant about taxes²⁰ and that he relied on Charny and the accountant to handle the tax issues. (Tr. 240-50.) However, he also testified that he instructed his accountant to help Complainant do his tax returns so that he would not have to pay any taxes. (Tr. 213.) He admitted that at the time of the hearing, Respondent still had not paid withholding taxes. (Tr. 211.)

Respondents apparently never issued a W-2 Form for 2009, so Complainant eventually filed a substitute W-2 with the IRS, which included wages from Respondents of \$1,333.33 for January 2009. (CX K.) I note that the W-2 Form for 2008 that Respondents offered into evidence is actually the Form W-2 for 2011, but someone crossed out 2011 and handwrote 2008, suggesting that this Form was not prepared until 2011. (RX 1.)

I find that the evidence establishes that Respondents made no authorized deductions for federal, state, or local income tax, and thus should not have reduced Complainant's pay from the amount set forth in the LCA. However, the W-2 Form that Respondents eventually issued to Complainant does show withholdings of \$850.39 for Social Security tax and \$198.88 for Medicare taxes. (CX N; RX 1.) Complainant presented no evidence that Respondent failed to pay the Social Security and Medicare taxes. I will credit Respondent with those authorized deductions from Complainant's pay. Respondents are entitled to subtract the authorized deductions of \$850.39 for Social Security tax and \$198.88 for Medicare taxes.²¹

b. Reduction in Salary for Economic Hardship

Arsene testified that, after the collapse of the real estate market, in December 2008 he decided to reduce all the salaries in the office by twenty percent. (Tr. 175.) In December, rather than paying Complainant the \$5,000.00 required under the LCA, or even the \$3,333.33 Respondents had been paying Complainant, Respondents paid Complainant \$2,666.66.²² (CX AA.) Respondents have presented no legal basis for his argument that Respondents were entitled to reduce Complainant's salary under the LCA because Respondents reduced the salaries of all

²⁰ Respondent Arsene was copied on the emails from Complainant regarding taxes. (CX R, S, T, U, V, W, X, Y, and Z.)

²¹ As there is no evidence that Respondents paid any Social Security or Medicare taxes for the paycheck in January 2009, I limit the authorized deductions to those shown on the 2008 W-2 Form.

²² This amount is a twenty percent reduction of the \$3,333.33 that Respondents had been paying, not a twenty percent reduction of the gross amount that Respondents were obligated to pay under the LCA.

employees. While I understand that Respondents were in a very difficult financial position at the end of November 2008, there is no provision in the law allowing Respondents to unilaterally change the agreed upon and U.S. Department of Labor-approved terms of the LCA.

From the time the LCA authorized Complainant to work for Respondents until January 15, 2009, Respondents should have paid Complainant \$12,500.00. Respondents could not unilaterally reduce this salary for financial hardship reasons. Respondents were also not entitled to reduce the salary for federal, state, or local taxes that Respondents did not pay. However, Respondents may subtract the authorized deductions of \$850.39 for Social Security tax and \$198.88 for Medicare taxes shown on Complainant's 2008 W-2 Form. (RX 1.) Respondents should have paid Complainant \$11,450.73 net. Respondents actually paid Complainant \$9,333.32 in 2008. Respondents therefore owe Complainant **\$2,117.41 for 2008** wages.

4. When Did Respondents' Obligation to Pay Complainant End?

a. *Did Respondents Effect a Bona Fide Termination of Complainant?*

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). This regulation specifically applies to H-1B1 employees. ("For the purposes of this section, 'H-1B' includes 'E-3 and H-1B1' as well." 20 C.F.R. § 655.731.)

The H-1B regulations provide

If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (*e.g.*, because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA. ... In all cases, the H-1B nonimmigrant must be paid the required wage for all hours performing work within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

20 C.F.R. § 655.731(c)(7)(i). The regulations further specify:

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). As already noted, the provisions of § 655.731 apply to H-1B1 employees.

i. Maintaining Complainant on their Payroll

The testimony establishes that in December 2008, Respondents decreased Complainant's salary, and in January 2009, Respondents ceased paying Complainant any wages. Respondents also told Complainant not to report to the office and it is undisputed that Complainant did not report to the office after January 15, 2009. (Tr. 38-39, 41.) The parties do not dispute that Respondents made the decision that Complainant should not report to work, and that Respondents stopped paying Complainant because of a situation unrelated to Complainant's ability to continue fulfilling his obligations as an employee.

Respondents contend that Complainant knew, as of January 15, 2009, that his employment had been terminated, and that their liability to him ended at that point. The record suggests that Complainant did not understand that Respondents had terminated him. Email correspondence from Complainant to Respondents around this time establishes that Complainant was unclear about his actual status as an employee, and that he ardently wanted to avoid termination, because he did not want to leave the country. (See, e.g., CX P, email dated January 29, 2009, where Complainant wrote, "... my availability to stay in the country *in case my work ends* at W4 and also explains the case *if I change my condition* with W4 from full time position to part time-position" (emphasis added).) From Complainant's wording in this email, I find that Complainant did not believe he had been terminated.

When Respondents advised that they could not continue to pay Complainant, Complainant proposed that he go on an extended unpaid vacation. However, after checking with Attorney Kong, he informed Respondents that an unpaid vacation would be viewed as impermissible benching. (CX P.) Nevertheless, Respondents continued to carry Complainant on their payroll, despite giving him no work to do and paying him no salary. (See CX S, email from Charny to Complainant on April 29, 2009, asking if he still "needed to be kept on payroll" and admitting that Respondents had retained him on the payroll for January and February.)

I am sympathetic to Respondents' dilemma. Respondents are a small architectural firm. The 2008 international real estate market put the firm in difficult financial straits. Respondents cut salaries. Respondents got rid of employees. Complainant was the most recent hire, so it makes sense that he would be first in line for a lay off. Respondents also sympathized with Complainant's position. Respondent Arsene liked him; he was a good employee. (Tr. 186, 191.) Respondent knew that Complainant was engaged to marry an American citizen and that he wanted to remain in the country until his wedding. Respondents also knew that once they ended his employment, his visa would end and he would have to return to Chile. Respondents wanted to help the young architect.

However, this is, perhaps, an instance of “no good deed goes unpunished.” By not clearly terminating Complainant’s employment and by maintaining him on their payroll, albeit unpaid, Respondents violated the regulations, and, as Attorney Kong advised in his letter of January 27, 2009, they illegally benched him.

ii. Failure to Notify USCIS of Complainant’s Termination

Respondents assert that H-1B1 employers are not required to notify USCIS upon termination of an H-1B1 employee, using the logic that since H-1B1 employees apply directly to the embassy for their visas, rather than to USCIS, there is no requirement to notify USCIS of the termination of employment. However, Respondents point to no legal authority for this contention, and in fact, my reading of the regulations suggests the contrary.

As discussed, § 655.731 specifically states that its provisions apply to H-1B1 employees and employers. Furthermore, § 655.731(c)(7)(ii) provides, “DHS regulations require the employer to notify the DHS that the employment relationship has been terminated.” The DHS regulations on revocation of approval of a petition state:

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.

8 C.F.R. § 214.2(h)(11)(i)(A). Nothing in the DHS regulation suggests that H-1B1 employees are treated differently.

Further, 20 C.F.R. §655.700 sets out which portions of the regulations do not apply to H-1B1 employees:

The following sections in this subpart and in subpart I of this part do not apply to E-3 and H-1B1 nonimmigrants, but apply only to H-1B nonimmigrants: §§ 655.700(a), (b), (c)(1) and (2); 655.710(b); 655.730(d)(5) and (e); 655.735; 655.736; 655.737; 655.738; 655.739; 655.760(a)(7), (8), (9), and (10); and 655.805(a)(7), (8), and (9). Further, the following references in subparts H or I of this part, whether in the excluded sections listed above or elsewhere, do not apply to E-3 and H-1B1 nonimmigrants, but apply only to H-1B nonimmigrants: references to fashion models of distinguished merit and ability (H-1B visas, but not H-1B1 and E-3 visas, are available to such fashion models); *references to a petition process before USCIS (the petition process applies only to H-1B, but not to initial H-1B1 and E-3 visas unless it is a petition to accord a change of status)*; references to additional attestation obligations of H-1B-dependent employers and employers found to have willfully violated the H-1B program requirements (these provisions do not apply to the H-1B1 and E-3 programs); and references in § 655.750(a) or elsewhere in this part to the provision in INA section 214(n) (formerly INA section 214(m)) (8 U.S.C. 1184(n)) regarding increased portability

of H-1B status (by the statutory terms, the portability provision is inapplicable to H-1B1 and E-3 nonimmigrants).

20 C.F.R. §655.700(d)(1) (emphasis added). The regulations exclude initial H-1B1 visas from the petition process before USCIS, but do not exclude H-1B1 petitions for a change of status. Revocation of employment before the LCA term ends is a change of status. Respondents could not effect a bona fide termination of Complainant without notifying USCIS.

I note that Attorney Kong gave Respondents incorrect advice from regarding Respondents' obligations to notify USCIS and to pay for Complainant's return airfare. (See RX 12, November 21, 2011 email from Charny to Investigator Petricevic.) Respondents have not raised advice of counsel or ignorance of the law defenses in this matter; however, I have considered the applicability of these defenses given the inaccuracies conveyed to Respondents by Attorney Kong regarding termination requirements.

While "[i]gnorance of the law is not usually a defense . . . ignorance of the law may be a defense in certain circumstances, such as when specific intent to violate the law is an element of the crime." Ventry v. United States, 539 F.3d 102, 111-12 (2d Cir. 2008).²³ Consequently, in order for the advice of counsel defense to be applicable, the cause of action must contain an element of intent, *i.e.* it must be a scienter-based violation. See *e.g.*, United States v. Stevens, 771 F. Supp. 2d 556, 566 (D. Md. 2011) (holding that "the advice of counsel 'defense' negates the defendant's wrongful intent, and therefore demonstrates an absence of an element of the offense"); see also Department of Enforcement v. McCrudden, 2010 FINRA LEXIS 25, at *22-23 (2010) (explaining that "[a]s an initial matter, the pleaded cause of action in this case was not a scienter-based violation, which means that the advice of counsel defense is not available"). Here, Respondents' failure to notify USCIS to effect a bona fide termination and pay Complainant's return airfare is not a scienter-based violation under the Act. Accordingly, the advice of counsel defense is inapplicable.

Even assuming, *arguendo*, that the failure to notify USCIS were a scienter-based violation, the advice of counsel defense is inapplicable to Respondents. There are four prerequisites that the party seeking to invoke the defense must satisfy: (1) a complete disclosure to counsel; (2) a request for counsel's advice as to the legality of the contemplated action; (3) receipt of advice that it was legal; and (4) reliance in good faith on that advice. Zacharias v. SEC, 569 F.3d 458, 467 (D.C. Cir. 2009). However, courts imply another initial requirement into these prerequisites that Respondents cannot satisfy: the party must rely on the advice of counsel with whom they share an attorney-client relationship. See United States v. Carr, 740 F.2d 339, 347 (5th Cir. 1984) (finding insufficient evidence to justify an advice of counsel defense were there was "little, if any, evidence that [the attorney] was ever asked, or gave, advice in the context of an attorney-client relationship"); see also In re Barkate, 2004 SEC LEXIS 806, at *14 n.19 (2004) (explaining that the advice of counsel defense "does not help [the appellant] here because . . . [c]ontacting the office of an attorney who represents another party, as

²³ As the parties are located in New York, the law of the U.S. Court of Appeals for the Second Circuit applies to this matter.

[appellant] did, does not constitute advice of counsel”); Williamson v. US, 207 U.S. 425, 453 (1908) (noting that the defense of counsel may be invoked where the party “fully and honestly lays all the facts before his counsel”). Here, the record indicates that Attorney Kong was hired to represent Complainant as Complainant’s immigration attorney, regardless of the fact that Respondents compensated him. Because Attorney Kong did not represent Respondents, they are precluded from invoking the advice of counsel defense.

Regarding ignorance of the law as a defense, I note that violations of the INA are civil, not criminal, matters. Regarding civil actions, the Supreme Court has cited the “common maxim that ignorance of the law will not excuse any person, either civilly or criminally.” Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 574 (2010) (where debtor brought action against debt collector, alleging violations of the FDCPA and of state law); see also Utermehle v. Norment, 197 U.S. 40, 55 (1905) (explaining, in the context of an estate probate contest, “We know of no case where mere ignorance of the law, standing alone constitutes any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto. There are cases, undoubtedly where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of fact relating thereto, will be regarded as a defense, but there must be some element, other than a mere mistake of law, which will afford an excuse”).

In sum, Respondents’ reliance on Attorney Kong’s inaccurate advice does not excuse their violation of Section 655.731(c)(7)(ii). Section 655.731(c)(7)(ii), in combination with DHS regulation 8 C.F.R. § 214.2(h)(11)(i)(A), clearly requires the employer to notify USCIS when the employment relationship is terminated and pay for return airfare. These provisions apply equally to H-1B and H-1B1 employees. Thus, Respondents’ ignorance of these regulations does not excuse their violation.

As I have found that Respondents continued to maintain Complainant on its payroll at least through March 2009, and that Respondents failed to effect a bona fide termination by failing to notify USCIS of Complainant’s change in status, Respondents remain liable for Complainant’s wages past January 15, 2009. Therefore, I must determine when Respondents’ liability ended.

b. When Would Complainant’s Employment Have Terminated?

Complainant argues that Respondents owe him wages for three years (the period during which his visa was valid). In support of his argument, Complainant offers the LCA, which the U.S. Department of Labor certified for a period running from October 31, 2008 until October 31, 2011 (CX D) and Complainant’s visa, which is valid from October 24, 2008 until October 30, 2011. (CX I, J.) I note, however, that in Respondents’ letter in support of Complainant’s visa, Respondents only contemplated a one-year term of employment. (CX E.)

While the H-1B regulations contemplate and allow for a three-year term of employment, the H-1B1 regulations differ. 8 U.S.C. § 1184(g)(8)(C) provides that “[t]he period of authorized admission as a nonimmigrant under section 1101(a)(15)(H)(i)(b1) of this title shall be 1 year, and may be extended, but only in 1-year increments.” The statute specifically sets a one-year term

for the admission of a nonimmigrant worker under H-1B1. The evidence also suggests that Respondents would not have extended Complainant's employment beyond the initial one-year period. Respondents' letter in support of Complainant's visa asked for approval of a one-year term of employment. (CX E.) Respondent Arsene testified that the firm never fully recovered from the real estate crash in 2008 and had not replaced the architects laid off that year. (Tr. 190-191.)

The H-1B1 regulations contemplate an initial one-year term of employment, and the evidence suggests that Respondents would not have renewed Complainant's employment in October 2009 as the firm's economic situation had not improved. Thus, I find that Complainant is only entitled to wages until October 30, 2009, when his initial H-1B1 term of employment would have expired under the statute.

Thus, in addition to the back wages discussed *supra*, Respondents owe Complainant the following wages:

Month	Owed	Paid	Remainder Owed
January	5,000.00	1,333.33	\$3,666.67
February	5,000.00	0.00	\$5,000.00
March	5,000.00	0.00	\$5,000.00
April	5,000.00	0.00	\$5,000.00
May	5,000.00	0.00	\$5,000.00
June	5,000.00	0.00	\$5,000.00
July	5,000.00	0.00	\$5,000.00
August	5,000.00	0.00	\$5,000.00
September	5,000.00	0.00	\$5,000.00
October	5,000.00	0.00	\$5,000.00
TOTAL	\$50,000.00	\$1,333.33	\$48,666.67

c. *Do Respondents Owe Complainant for Benefits?*

Complainant also argues that he is entitled to the value of the employee benefits he should have received under the terms of his employment agreement. According to 20 C.F.R. § 655.732(a):

The second LCA requirement shall be satisfied when the employer affords working conditions to its H-1B nonimmigrant employees on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees. Working conditions include matters such as hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules. The employer's obligation regarding working conditions shall extend for the longer of two periods: the validity period of the certified LCA, or the period during which the H-1B nonimmigrant(s) is(are) employed by the employer.

Respondents' job offer to Complainant promised a salary of \$60,000, a bonus at the end of each year, Oxford Medical Insurance coverage after three months as a full time employee, two weeks of paid vacation per year after nine months full time, another paid week between Christmas and New Year's, when the office would be closed, and visa expenses. (CX C.) Charny testified that in 2008, Respondents offered their architects fringe benefits including a health insurance plan, a defined benefits pension plan, paid vacation and personal days, paid sick leave, and paid holidays. (Tr. 293; RX 13.) Employees became eligible for health insurance after ninety days of employment. Enrollment in the defined benefits pension begins after one year of employment. (Tr. 294; RX 14.)

As Complainant's employment would have ended at the end of his first full year of employment, Respondents do not owe him any pension plan benefits. However, he would have become eligible for health insurance benefits at the end of January 2009. Respondents must reimburse Complainant for health insurance benefits from February 1, 2009 through October 31, 2009. Respondents offered no evidence regarding the value of the health benefits. Complainant testified that he valued the lost health benefits at \$800.00 per month. (Tr. 58; CX AA.) With no other testimony on the value of health benefits, I find that Respondents owe Complainant \$800.00 per month for nine months, or \$7,200.00.

The regulations also require an employer to pay the cost of return airfare to the employee's home country. Respondents owe Complainant the return airfare from New York to Chile. Complainant testified that return airfare to Chile would have cost \$1,152.78. (Tr. 61; CX AA.) Respondents offered no evidence to rebut that amount. I therefore find that Respondents owe Complainant \$1,152.78 to cover the cost of return airfare.

In sum, Respondents owe Complainant the following:

\$ 2,117.41	2008 wages
\$ 48,666.67	2009 wages

\$ 7,200.00	health benefits
\$ 1,152.78	airfare
\$ 59,136.86	TOTAL

B. 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, I find that 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.

ORDER

For the foregoing reasons, I find that Respondents violated the H-1B1 wage laws. It is hereby ORDERED:

- 1) Respondents must pay \$49,006.08 in back wages to Complainant.
- 2) Respondents must pay Complainant \$7,200.00 towards the healthcare benefits to which he would have been entitled, had not Respondent illegally benched him.
- 3) Respondents must pay \$ 1,152.78 for Complainant's return airfare to Chile.
- 4) Respondents are responsible for pre-judgment compound interest on the aforementioned back wage assessments. I also find they are responsible for post-judgment interest on all back wage assessments, until satisfied.

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. To be effective, such petition shall be received by the Board within thirty (30) calendar days of the date of this Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. The Board's address is:

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

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