

**U.S. Department of Labor**

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*Issue Date: 18 January 2013*

*In the Matter of:*

ADMINISTRATOR, WAGE AND HOUR DIVISION,  
UNITED STATES DEPARTMENT OF LABOR

Prosecuting Party

CASE NO: 2012-LCA-00039

v.

NORTH SHORE SCHOOL FOR THE ARTS  
Respondent.

Appearances: DAVID J. TANURY ESQ.  
For Administrator

EMI KELSEY ESQ.  
For Respondent

Before: STEPHEN M. REILLY  
Administrative Law Judge

**DECISION AND ORDER AWARDING BACKPAY**

This matter arises under the Immigration and Nationality Act H-1B visa program, 8 U.S.C. § 1101 (a)(15)(H)(i)(b) ("Act") and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I. North Shore School for the Arts (NSSA) challenges the Determination Letter issued by the Administrator, Wage and Hour Division (Administrator) on May 17, 2012. The Administrator found, among other findings, that NSSA owed \$16,800 in backwages to Natsuko Imai, an H-1B worker, for both productive and non-productive time. NSSA challenges this determination. For the reasons stated below, I find that NSSA owes Ms. Imai \$2,980.00 in backwages, plus interest accrued.

**Statutory Framework**

The H-1B visa program permits employers to temporarily employ non-immigrants to fill specialized jobs in the United States. The Act requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage. Under the Act, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must receive permission from the U.S. Department of Labor (DOL) before the alien may obtain an H-1B visa. 8 U.S.C. § 1184(i)(1). To receive permission from DOL, the Act requires an employer seeking permission to employ an H-1B worker to submit a Labor Condition Application (LCA) to the DOL. *See* 8 U.S.C. § 1182(n)(1).

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

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

20 C.F.R. § 655.731(c)(7)(i). However, if the H-1B worker voluntarily becomes non-productive, then the employer is not required to pay wages. The regulations continue:

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

20 C.F.R. § 655.731(c)(7)(ii). The Administrator defined the standard for payment during nonproductive periods stating that the issue is whether or not the H-1B worker is “ready, willing, and able” to work. (Tr. at 15).<sup>1</sup> If the worker is not “ready, willing, and able” to work, then wages are not due for non-productive periods.

If the Administrator finds that an employer has violated its obligation to pay wages to the H-1B worker, the Administrator may conduct an investigation with respect to suspected violations. 20 C.F.R. § 655.50. The Administrator may then issue a Determination Letter citing violations, requiring payment of wages, and imposing fines. 20 C.F.R. § 655.70. If an employer disagrees with the Determination Letter, the employer may appeal to the DOL, Office of Administrative Law Judges. In these proceedings, the Administrator is the Prosecuting Party and the employer is the Respondent. 20 C.F.R. § 655.71 (a). The Administrator therefore bears the burden of proof with regard to each violation in the Determination Letter.

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<sup>1</sup> I will utilize the following abbreviations: Transcript (Tr.), Administrator’s Exhibit (CX), and Respondent’s Exhibit (RX).

## Procedural History

On April 12, 2010, NSSA requested a prevailing wage determination from DOL in order to begin the process of applying for an H-1B visa for Ms. Natsuko Imai. DOL issued the determination on May 26, 2010 and found that the prevailing wage for the occupation requested was \$30.34. (CX-8). NSSA next filed a Labor Condition Application for employment of a piano/music teacher from September 1, 2010 to August 31, 2013. The LCA indicated a wage rate of \$40 per hour. It was signed by Emi Kelsey, NSSA's Executive Director, and was certified on August 4, 2010. (CX-1).

NSSA filed a Petition for a Nonimmigrant Worker on behalf of Ms. Imai. The petition stated that NSSA would employ Ms. Imai for 20 hours per week with the intended employment dates of September 1, 2010 to August 31, 2013. Proposed duties in the application included:

- Evaluation and instruction of piano students;
- Preparation of attendance records and end of semester progress reports;
- Parent meetings;
- Student preparation for recital performances;
- Report to supervising direction; [sic]
- Accompaniment of faculty at faculty at student body recitals; [sic]
- Attendance at faculty meetings;
- Design and performance at faculty recitals;
- Holiday concerts and outreach programs.

(CX-4). The Petition was approved on September 24, 2010. (CX-2).

Ms. Imai was employed at NSSA from November 2, 2010 until March 28, 2011. Joint Pre-Trial Stipulations. In March 2012, Ms. Imai wrote to the Department of Labor complaining that she was an H-1B worker who had not received her pay. This began the investigation. (Tr. at 106). On May 17, 2012, the Administrator issued the Determination Letter in this case. In the Determination Letter, the Administrator found that NSSA had committed several violations under the H-1B provisions of the INA. Specifically, the Administrator found that NSSA failed to pay wages as required, required payment from the H-1B worker of the employer's fee for filing a petition, failed to make LCAs and public access documents available, and failed to maintain required documentation. The Determination Letter ordered NSSA to pay \$12,742.80 to Ms. Imai in backwages based upon the prevailing wage rate of \$30.34 per hour. (CX-9). On May 25, 2012, NSSA requested a hearing in this case. (CX-12). On July 30, 2012, the Administrator submitted a Motion to Amend the Determination Letter and asked that the backwage calculation be updated to \$16,800 based upon the wage rate of \$40 per hour.

I held a hearing in this case on August 17, 2012 in Chicago, Illinois. At the hearing, I granted the Administrator's Motion to Amend and updated the wage rate applicable in this case to \$40. (Tr. at 8). I admitted the Administrator's Exhibits 1-17 and Respondent's Exhibits 1-9 and 13 into evidence. Ms. Imai and Shirley Cheon, the DOL investigator in this case, testified on behalf of the Administrator. Ms. Kelsey as well as two teachers from NSSA, Mr. Carlos

Bendfeldt and Mr. George Radosavljevic, testified on behalf of NSSA. Both parties gave closing statements and the record was closed.<sup>2</sup>

### **Stipulations**

The parties submitted their Joint Pre-Trial Stipulation on August 7, 2012 and stipulated to the following facts. NSSA withdrew its request for hearing with respect to all violations, except for the failure to pay wages as required.<sup>3</sup>

Before acquiring an H-1B visa, Ms. Imai entered the United States on an F-1 Student Visa. Beginning in the summer of 2008 Ms. Imai was employed by NSSA as a piano teacher at a rate of \$40 per hour. NSSA took the necessary steps to apply for an H-1B visa for Ms. Imai and hired attorney John D. Colbert to represent NSSA with respect to the Petition. NSSA was notified on September 24, 2010 that it was authorized to employ Ms. Imai under the H-1B program from October 1, 2010 until August 31, 2013. Ms. Imai started as a piano teacher at NSSA under the H-1B program on November 2, 2010. NSSA terminated Ms. Imai's employment on March 28, 2011 after a total of 21 weeks of employment.

The actual wage for piano teachers at NSSA is \$40 per hour and has been \$40 per hour since 2008. Ms. Imai was employed as a part-time employee, and according to NSSA's Petition, authorized to work 20 hours per week. During her 21 weeks of employment, Ms. Imai taught 74.5 hours of piano lessons. Ms. Imai never received payment for either her productive or non-productive hours.

### **Factual Background**

#### ***Testimony of Ms. Natsuko Imai***

Ms. Natsuko Imai was born in Tokyo, Japan. Ms. Imai left Japan when she was 19 years old. In 1998, she studied English Language at Boston University. Then, Ms. Imai studied piano at Johns Hopkins University in 1999. After being accepted at Mannes College of Music, Ms. Imai moved to New York City to pursue a Bachelors of Music. She received her degree from Mannes in 2002. After graduation, Ms. Imai moved to Chicago to study at DePaul University. She received a Masters of Music from DePaul in 2004 and a Performance Certificate in 2006, also from DePaul. Both in 2004 and 2007, after studying at DePaul, Ms. Imai had a year of optional practical training. She next pursued a certificate at Roosevelt University until 2008. However, Ms. Imai never completed this program. (Tr. at 17-20, 53-58; CX-17).

During her certificate program at Roosevelt University, Ms. Imai had an F-1 visa. When asked whether she had worked while under this visa, Ms. Imai stated, "Yes, I was. I had, I had

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<sup>2</sup> On October 11, 2012, I received a facsimile from Ms. Kelsey. At the hearing, I indicated there would be no briefing (Tr. at 191) and I closed the evidentiary record. (Tr. at 198). Accordingly, I do not consider this letter for purposes of the decision in this case.

<sup>3</sup> The Administrator was not seeking any sanction for these violations. The Administrator was "only seeking back wages due to the H-1B employee." (Tr. at 9).

multiple employers.” (Tr. at 20). These jobs included work as a piano teacher at the Ward Music Company, work as a church pianist, and teaching for North Shore School for the Arts. (Tr. at 21). There is nothing in the record to indicate Ms. Imai sought or received authorization to work off campus while she was a full time student. *See* 8 C.F.R. § 214.2(f)(9)(ii).

Ms. Imai began working at NSSA in 2008 when she was still a certificate student at Roosevelt University. She saw an advertisement on Craigslist that stated that NSSA was looking for piano teachers, she sent her resume, received an interview and was offered the job. (Tr. at 21). During this time, Ms. Imai received \$40 per hour while still under her F-1 visa. She started with one student and eventually had a “studio” teaching ten students. (Tr. at 23).

When Ms. Imai’s F-1 visa was close to expiring, it appears that Ms. Imai was looking for a way to stay in this country. During the hearing, Ms. Kelsey asked “And you were trying to figure out a way to stay in this country,” to which Ms. Imai responded “Uh-huh.” (Tr. at 48.) Ms. Kelsey even suggested that Ms. Imai unsuccessfully tried to get her boyfriend to marry her to benefit her immigration status. Ms. Imai did not convincingly refute Ms. Kelsey’s suggestion. *See* discussion at Tr. at 47-48.

It is not clear whether Ms. Imai or Ms. Kelsey initiated the conversations regarding NSSA helping Ms. Imai with her strong desire to remain in the United States. Ms. Imai’s view was that Ms. Kelsey offered to assist in obtaining the H-1B visa by hiring her at NSSA.

She started asking me what are you going to do after graduating from the Roosevelt University. And it was, I had another year to graduate. So, at the time, I just said, I don't know because I wasn't really planning to do something afterwards. So, well, then, she, she starting asking me, like, you know, maybe she can help me with hiring me as, I don't know, she could help with immigration and because she's thinking about extending her school to Arlington Heights, in a Japanese community.

(Tr. at 24). Ms. Imai liked the concept of NSSA assisting with her immigration issues. She stated, “I was, I was sort of tired of being [a] student and I started enjoying working at that time. And I thought it was, it was a great idea.” (Tr. at 24). Ms. Imai dropped out of her certificate program at Roosevelt University in January 2010. (Tr. at 25). That caused her to be “out of status” losing her F-1 student visa upon withdrawing from school. Ms. Imai knew she did not “have any other options for staying in this country unless [she] got a different kind of visa.” (Tr. at 49). Ms. Imai returned to Japan for about a month, reentering the United States as a tourist. While a tourist in the United States, Ms. Imai worked at NSSA during which time they began the H-1B visa process. Ms. Imai admitted that she knew she was not allowed to work while in the country as a tourist.

Ms. Imai, through a friend, located an Immigration lawyer to assist with the process. Ms. Kelsey indicated she was willing to help Ms. Imai with her immigration issues as long as it did not cost her money.

I feel that all along my intent was to help Natsuko when she was out-of-status, and her boyfriend would not marry her. She was desperate, and she wanted to stay in the country. I was trying to help her. I was told she went out and got the lawyer, Mr. Colbert, and she had assured me that if I helped her it wouldn't cost me a penny. She swore that she would pay me back every cent. And that was the condition under which I said that I would try to help.

(Tr. at 168). Ms. Imai acknowledges that she agreed to repay the money expended for obtaining the H-1B visa. (Tr. at 27). Ms. Imai continued to work for NSSA, while in the United States as a tourist, between March 2010 and June 2010. At that time she returned to Japan waiting for the approval of her H-1B visa. NSSA did not pay Ms. Imai for her teaching during the March to June time-frame, and in Ms. Imai's view she was "technically repaying their lawyer's fee." (Tr. at 26.) Exhibit RX-1 purports to be an explanation of the amounts she should have received had she gotten paid. From the document and the testimony addressing this document, it is not clear if this exhibit addresses just the time she worked without authorization under the student visa or includes the time she worked under the H-1B visa.

As noted above, Ms. Imai departed the United States in June 2010, awaiting approval of the visa. The visa was approved September 24, 2010. (Tr. at 26-28). After the approval of her visa, Ms. Imai returned to the United States and started working for NSSA on November 2, 2010.

Once back in the United States, Ms. Imai initially lived with a friend, eventually moving in with Ms. Kelsey. Ms. Imai did not pay rent to the friend with whom she was living. Ms. Imai acknowledged that this living "arrangement was not going well" with the owner of the house. Also, she "did not have a good relationship" with the friend because neighbors were complaining about Ms. Imai's constant practicing and Ms. Imai complained to the friend that the friend's habits, including partying, were interfering with Ms. Imai's ability to practice. (Tr. at 63-64.) Ms. Imai also indicated that the commute was too long from this house to the school. Ms. Kelsey offered Ms. Imai a room in her house and Ms. Imai lived at Ms. Kelsey's house until Ms. Kelsey terminated her in March 2011. (Tr. at 38, 63). While living with Ms. Kelsey, Ms. Imai paid Ms. Kelsey about \$200 per month for groceries. She paid this from money that she made teaching students outside the NSSA umbrella and the authority of the H-1B visa. Ms. Imai's only chores in the house were taking out the recycling and taking out the trash. (Tr. at 39-40). Ms. Imai described that her relationship with Ms. Kelsey was "great in the beginning," but deteriorated over time. She considered Ms. Kelsey to be "verbally abusive." Ms. Imai described,

"For example, she knocks my door, like when I was practicing and I knew that she was going to start yelling at me so I told her that, you know, I cannot talk right now. And she said, well, if you cannot talk right now then you can just pack up and leave my house."

(Tr. at 40). Ms. Imai moved out of Ms. Kelsey's house in March 2011. (Tr. at 38).

During the time Ms. Imai was working at NSSA, November 2, 2010 through March 28, 2011, Ms. Imai indicated she had eight students and taught about five or six hours per week on average. However, she stated that she was always at NSSA practicing piano. "I was there pretty much all day long, every, almost every day. So, I, I'm not exactly sure, but average of 50 hours, at least 50 hours per week . . . I was practicing the piano." (Tr. at 30). Ms. Imai also applied for doctoral programs in 2010. (Tr. at 51). Although Ms. Imai was constantly practicing piano, she stated that she was always available to teach lessons.

Mr. Tanury: While you were practicing piano, were you available to teach piano lessons?

Ms. Imai: Oh yes, absolutely.

Mr. Tanury: And why weren't you teaching piano lessons?

Ms. Imai: Because there was not enough students.

Mr. Tanury: Did you ever ask North Shore School for the Arts for additional students?

Ms. Imai: Yes, I told, I told Ms. Kelsey that I need more students.

(Tr. at 30-31). While at the school, Ms. Kelsey asked Ms. Imai to help answer the phone for the school, but Ms. Imai eventually refused.

" . . . Ms. Kelsey asked me to pick up the phone and so I did . . . And I think, someone who called the school got mad, mad at me. So, I felt really bad and I told her that I'm not good answering phones and I cannot do it."

(Tr. at 35). Ms. Imai stated that she never received payment for her work. (Tr. at 32). She stated that she worked a total of 74.5 hours over 21 weeks. (Tr. at 30).

In addition to the students that she taught at NSSA, Ms. Imai also taught four students outside of the school and one student that she shared with the school. She taught one student through the school where she received \$60 in cash per lesson and paid \$30 of this \$60 to NSSA. These lessons totaled \$320 and Ms. Imai received \$160. (Tr. at 95-96, 101). Two of the four other students used to go to NSSA, but Ms. Imai stated that they asked to be taught privately. Ms. Imai said that in order to take these students into her private studio, she "asked Ms. Kelsey if that's okay and she said it's okay." Ms. Imai stated that Ms. Kelsey "was not happy in the beginning and, well, I was telling her what was going on . . . and at the end she said . . . you can take those students." Ms. Imai stated that she did not "steal these students from NSSA." (Tr. at 34). Ms. Imai made \$250 from these two students and \$240 from two other students for a total of \$490. (Tr. at 35). Ms. Imai stated that she knew that taking these students was against the terms of both her H-1B and student visa. She also admitted that she never reported this income for tax purposes. (Tr. at 59; 79).

Ms. Imai did not participate in marketing activities for the school or in activities to build her studio. Ms. Kelsey suggested ways for Ms. Imai to build her studio and get more students. However, Ms. Imai rejected these ideas.

She, she suggested a lot of things. But none of them seemed reasonable. For example, she told me to, I don't know, play at the, in a temple so hopefully you will get students or joining a music association and, well, I guess I was not really interested or it didn't seem to [be] possible. [A] lot of things she suggested didn't seem possible to me. But, she did suggest. She gave me a lot of suggestions.

(Tr. at 36). Specifically, Ms. Kelsey suggested that Ms. Imai move to Arlington Heights or play at the Buddhist Temple in order to recruit students. Ms. Imai disliked these ideas, stating, “. . . I came with H-1B visa and I, well, I used to work at the temple and it takes probably a year to get some students . . . I was expecting to work only for the school, so to speak.” (Tr. at 78-79).

Ms. Imai stated that she was aware that her bilingual skills were among the special skills listed on her visa. (Tr. at 61-62). On one occasion, Ms. Kelsey and Ms. Imai went to the Japanese School in Arlington Heights to recruit students. The secretary at the school did not speak English, so Ms. Imai spoke to the secretary who stated that the principal of the school was unavailable. Ms. Kelsey directed Ms. Imai to follow up with the principal at the school. Ms. Imai stated, “I don't remember following up . . .” (Tr. at 67-68).

Ms. Imai believes she was terminated because she had “paid back” all of the fees and costs related to obtaining her H-1B visa. She stated, “Well, that was right after I repaid all the debt and at that, I think that was the time that I asked her for money. And I, I was, she told me that she had to let me go and I could work for another two months if I want to, but I, I just said no.” (Tr. at 42). Ms. Imai last worked at NSSA on March 28, 2011. (Tr. at 91).

Ms. Imai stated that she last applied to a doctoral program in December 2011. She was accepted to the program, but had decided not to go. (Tr. at 58, 91). As of the hearing, Ms. Imai was in the US on a B-1/B-2 visa. Under this visa, the visa holder is not permitted to be employed in the United States. Ms. Imai stated that she was not working. (Tr. at 81-82).

### ***Testimony of Ms. Emi Kelsey***

Ms. Emi Kelsey testified that she intended to assist Ms. Imai with her immigration issues, but did not understand the process and did not wish to assume costs related to the process of obtaining an H-1B visa. “. . . [M]y intent was to help Natsuko when she was out-of-status, and her boyfriend would not marry her.” (Tr. at 168). Ms. Kelsey stated that she agreed to assist with the visa under the condition that Ms. Imai would pay her back. “She swore that she would pay me back every cent. And that was the condition under which I said that I would try to help.” (Tr. at 168). Ms. Kelsey stated that she was applying for the H-1B visa “basically as a favor for Natsuko.” However, Ms. Kelsey did not know that she was the one who would be responsible for the lawyer fees and H-1B processing fees.

“. . . at that time, I didn't know that I was responsible for paying. I said well, would you like me to, you know, pay it, and you can pay me back? And I honestly didn't know that it was my responsibility.”

When Ms. Imai returned under her H-1B visa, Ms. Kelsey was very disappointed in her performance as an employee. Ms. Kelsey picked 40 students as the goal for Ms. Imai, because Ms. Kelsey thought it was attainable as she had 36 students at one point while being the administrator of the school. (Tr. at 136). This did not work out for a variety of reasons. Although most students begin music lessons in September, because of her visa, Ms. Imai did not arrive until the middle of the semester. This made obtaining students for her difficult. Ms. Kelsey also testified that since Ms. Imai had been away in Japan, the school had to redistribute her previous students causing some to use other teachers. (Tr. at 170-71). When Ms. Kelsey contacted Ms. Imai stating that she was worried about the delay in starting lessons, Ms. Kelsey stated that Ms. Imai suggested lying to parents and telling them that she had a “family emergency” in Japan that was delaying her return. (Tr. at 175).

Ms. Kelsey tried to give Ms. Imai some additional students to fulfill her hours but instead, Ms. Imai took these students into her own private studio. (Tr. at 177). Ms. Kelsey also stated that Ms. Imai was uncooperative in working to get more students. Ms. Kelsey testified that she helped other teachers obtain students and build their studio, “and I was trying to help Natsuko, but she wouldn't do anything.” (Tr. at 181-82). On several occasions, Ms. Kelsey took Ms. Imai on visits to locations for expansion of the music school, but Ms. Imai was not interested in the visits. (Tr. at 171-72).

Ms. Imai was accepted to the State University of New York for a doctoral program this year. Ms. Kelsey believes that Ms. Imai was evasive about her application for graduate programs by saying “she had no plan for graduate school.” However, Ms. Kelsey believes this was Ms. Imai's plan all along. (Tr. at 180). Ms. Kelsey also suspected that Ms. Imai refused to put in extra effort to work because she knew she would get the same amount of money whether or not she worked the hours or not under the H-1B visa program. (Tr. at 171-73).

Ms. Kelsey was very disappointed with the deterioration in her personal relationship with Ms. Imai. Ms. Kelsey stated that she gave Ms. Imai room and board at her home because she did not want Ms. Imai to be a “burden to the society” after Ms. Imai had had issues in her previous living situation. (Tr. at 177). Ms. Kelsey originally did not intend to charge rent but Ms. Imai insisted she should pay something so they settled on \$50 per week for food. Ms. Imai would pack her meals and stay at NSSA for 12 hours practicing piano to try to get into graduate school. (Tr. at 178). Ms. Kelsey also asked Ms. Imai to do a few chores such as taking out the trash and recycling. However, Ms. Imai did not do the chores consistently. (Tr. at 179).

Ms. Kelsey testified that she was confused about the entire H-1B process and how it would fit with her business. Once Ms. Kelsey employed Ms. Imai as an H-1B worker, she stated that there was a delay in paying her because she could “not figure out how to do it honestly.” (Tr. at 174). All of the other teachers at the school are independent contractors. (Tr. at 183). Ms. Imai was the only employee teacher.

Although Investigator Cheon suggested to Ms. Kelsey that she should have fired Ms. Imai earlier, Ms. Kelsey stated that this would have had a negative effect on the reputation of NSSA. Ms. Kelsey had already had to scramble to reassess Ms. Imai's students when she had

returned to Japan. Firing her would have further contributed to the fact that there was “no consistency and stability” with the students. (Tr. at 175-76).

Currently, NSSA is having significant financial trouble and is likely to close. (Tr. at 185).

### ***Testimony of Carlos Bendfeldt***

Mr. Carlos Bendfeldt has a master’s degree in guitar performance from the Julliard School. He has taught at NSSA for over ten years. (Tr. at 128-29). Mr. Bendfeldt testified about his experience as a teacher and the practices at NSSA. He enjoys teaching at the school and stated, “It’s great to work under Emi. She’s helped me.” (Tr. at 140). Mr. Bendfeldt stated that teachers were responsible for developing their own studios and getting their own students. He described this process.

Be very flexible to students. Speak to their parents . . . When they miss a lesson, try to make up that lesson, because if you're mean to the parents they don't come back . . . You know, give recitals. They were never mandatory at school, but I was one of the teachers that always had like two or three recitals . . . in order to show the students and the parents the progress of the students. That's how I work.

(Tr. at 130-31). He would also go in on Sundays to allow makeup lessons. Mr. Bendfeldt had 54 students in his studio at one time. (Tr. at 133). He now gets about 90 percent of his students on his own. (Tr. at 134). At the time of the hearing, Mr. Bendfeldt had about 30 students, because he is also going to school to study pre-medicine. This is the most students of any teacher at the school. (Tr. at 129, 141).

Mr. Bendfeldt further described his practices with regard to the school. When at the school, Mr. Bendfeldt stated that he answered the telephone when he was not teaching and even when he was teaching because “we need to get more students.” (Tr. at 134, 145). Although he had been asked by parents to teach students from the school outside of the school, Mr. Bendfeldt stated that this would be in breach of his agreement with the school. He stated that if he took students from the school into his private studio, Ms. Kelsey would “fire me.” He has never taken any students into his own private studio. (Tr. at 139). Mr. Bendfeldt does not do any specific marketing activities except for his interactions with parents, giving recitals in school, giving occasional free lessons to students, and being a “nice person.” (Tr. at 141). Mr. Bendfeldt only gets paid for the hours spent giving lessons. (Tr. at 143). He was always paid for the time that he taught. Mr. Bendfeldt received \$42 per hour for his work because he received a raise after three years at the school. He is “trying to see if something works out” so that he can purchase NSSA. (Tr. at 147).

Mr. Bendfeldt would see Ms. Imai practicing five or six hours per day during his time at the school. At one point, he recalled that she was preparing for some sort of competition. Mr. Bendfeldt would ask Ms. Imai to play piano for him in order to “take the nerves off the competition jitters.” (Tr. at 144).

### ***Testimony of George Radosavljevic***

Mr. George Radosavljevic has known Ms. Kelsey since 1990. He is a professional pianist with a master's degree. He met Ms. Kelsey while he was a professor at the American Conservatory and Ms. Kelsey was his student. Ms. Kelsey continued as his student when he started an independent studio. He also worked as her employee at NSSA for two years. (Tr. at 151-52). Mr. Radosavljevic stated that Ms. Kelsey referred performance opportunities to him such as performance with the Lincolnwood Chamber Orchestra. (Tr. at 160).

Mr. Radosavljevic testified concerning the practices of the school and pianists in general. He stated that teachers were paid based upon a monthly time sheet that they prepared which listed the students and number of lessons that they taught. Teachers received pay based upon these time sheets at a rate of \$40 per hour. Although Mr. Radosavljevic participated in marketing activities, he never received payment for these activities. In terms of the participation of NSSA in finding students, Mr. Radosavljevic testified, "In the ideal circumstance, you would work together. I mean, the school would be trying to get students for you. You would be trying to get students for yourself . . ." (Tr. at 157, 165-66).

Mr. Radosavljevic testified concerning practice habits of pianists and the typical payment method for music teachers. In response to a question concerning the feasibility of practicing eight hours per day, Mr. Radosavljevic stated, "Well, eight hours a day is, I would say it's a lot. I wouldn't say it's impossible . . . If I have to teach or commute or whatever I have to do, eight hours a day is a lot." (Tr. at 154). He also testified that it would not be typical to pay music teachers on a salary basis outside of the university or school setting. (Tr. at 158).

### ***Letter from Dr. Susanne Baker***

Dr. Susanne Baker submitted a letter dated August 1, 2012. Dr. Baker stated that she is a faculty member at DePaul University and has known Ms. Imai for three years. Dr. Baker stated, "It was my understanding that Natsuko had planned to attend graduate school as a doctoral student. I wrote several recommendations for her to various institutions after she completed her Masters' [sic] degree." (RX-9).

### ***Testimony of Investigator Shirley Cheon***

Investigator Shirley Cheon testified concerning her wage and hour investigation. Investigator Cheon has been an investigator for about 17 years. She stated that Ms. Imai sent a written complaint which initiated the investigation in this case. After this, Investigator Cheon sent a letter setting up an investigative meeting with Ms. Kelsey. At the first meeting, Ms. Kelsey did not have any of the required documentation, but at a second meeting, Ms. Kelsey presented the LCA and Form 797. (Tr. at 104-08). Investigator Cheon determined that Ms. Imai was ready, willing, and able to work based upon an interview with Ms. Imai in which Ms. Imai stated that she had been at the school for at least the 21 weeks in question and had been asking for more students. (Tr. at 118).

## ISSUES

1. Whether Natsuko Imai was ready, willing, and able to work during the time period from November 2, 2010 to March 28, 2011.
2. Whether North Shore School for the Arts owes Natsuko Imai backwages.

## DISCUSSION

Under the H-1B visa program, Ms. Imai can recover backwages for productive and non-productive time. Employers must pay the H-1B worker for hours worked when the wages are due. 20 C.F.R. § 655.731(c)(1). If the H-1B worker is non-productive during work hours, if this non-productivity is due to the fault of the employer, employers must still pay the H-1B worker for the non-productive hours. 20 C.F.R. § 655.731(c)(7)(i). However, if the H-1B worker is voluntarily non-productive, employers do not have to pay wages to the H-1B worker for the non-productive hours. 20 C.F.R. § 655.731(c)(7)(ii).

### **I. Was Natsuko Imai Was Ready, Willing, and Able to Work**

As the prosecuting party, the Administrator has the burden of demonstrating each violation in the Determination Letter, including that wages should have been paid for non-productive hours. Wages are paid for non-productive time if the employee is ready, willing and able to work. The Administrator relies on the testimony of Ms. Imai for the evidence whether Ms. Imai was, in fact, ready, willing, and able to work.

Mr. Tanury:	Did you make the determination as to whether or not Natsuko Imai was available to work as a piano teacher?
Ms. Cheon:	Yes.
Mr. Tanury:	How did you make this determination?”
Ms. Cheon:	With interviewing her, she was there at the school, at least for the 21 weeks she was there the whole time, asking for more students. That’s how we made the determination.

(Tr. at 119). The Administrator finds that because Ms. Imai states that she was present at the school, she was ready willing and able to work. I find the question is not so straightforward.

Ms. Imai was not a credible witness. Her testimony was rife with evasiveness, equivocation and forgetfulness. Her demeanor during testimony raised questions regarding her truthfulness.

Ms. Imai’s willful disregard of the law is troubling. She admitted to working while on an F-1 student visa. (Tr. at 20). She worked outside NSSA while she was an H-1B worker despite the fact that this was a violation of the terms of the visa. (Tr. at 59). Ms. Imai also admitted that she did not report income for tax purposes. (Tr. at 79). She admitted to knowing such actions

were against the law (Tr. at 59), but she did them anyway. Such dishonesty raises questions regarding her trustworthiness.

Ms. Imai's answers to questions frequently were evasive. As an example, when questioned about her interest in obtaining a doctoral degree she stated ". . . going to [a] doctoral program was not my plan." (Tr. at 50). However, in response to a question from me, she acknowledged that she applied to doctoral programs, (Tr. at 51) and sought and obtained several recommendations for admission to these programs. (RX-9, Tr. at 50 - 52). Ms. Imai's testimony is inconsistent and is contradicted by the evidence of record. I therefore give her testimony little weight.

Furthermore, the evidence strongly suggests that, although she spent long hours at the school, Ms. Imai was not willing to work. Her focus was on practicing for auditions. At times, Ms. Imai even refused to respond and talk to Ms. Kelsey when she was practicing. (Tr. at 40). In addition, she refused to perform tasks, such as outreach, which were specifically enumerated as job duties in the Petition for a Non-Immigrant Worker. (CX-4). For instance, Ms. Kelsey suggested that Ms. Imai perform at the Buddhist Temple. Ms. Imai refused. Ms. Kelsey brought Ms. Imai to the Japanese School but Ms. Imai did not pursue this opportunity or follow up with this contact, (Tr. at 67-68), even though one of the reasons Ms. Kelsey hired Ms. Imai was to perform outreach to the Japanese community. (Tr. at 169). Ms. Imai testified that such outreach programs would be an opportunity to get private students. (Tr. at 80). I find that Ms. Imai did not make herself available to perform her job duties.

Ms. Kelsey is not totally blameless here. She is a licensed attorney (albeit she just recently reinstated her license and has not practiced.) She entered a complex regulatory environment with her good intentions trumping a practical review of the situation. Ms. Kelsey is somewhat naïve and gullible but truly wished to assist Ms. Imai with her immigration issues. Perhaps Ms. Kelsey's greatest failure here is her total misunderstanding of the H-1B visa system and her inability to shoehorn the music teaching industry dominated by independent contractors into the visa system demanding guaranteed pay, even if hours are not worked. Ms. Kelsey volunteered to assist Ms. Imai remain in the country legally, but was unclear about who would pay for the process, whether it would be okay to charge Ms. Imai for fees related to obtaining an H-1B visa, or even how to pay Ms. Imai her salary. (Tr. at 168-69, 174, 188).

Ms. Kelsey's willingness to help Ms. Imai allowed Ms. Imai to manipulate Ms. Kelsey during the process. Ms. Kelsey allowed Ms. Imai to live in her home for minimal room and board. (Tr. at 179). Ms. Kelsey allowed Ms. Imai to select the immigration lawyer to be used. Ms. Imai was willing to say almost anything to stay in the United States. Ms. Kelsey was blinded to reality.

I give Ms. Imai's testimony little weight. She disregarded United States law, demonstrated that she was willing to take advantage of Ms. Kelsey, testified to facts that were contradicted by other testimony or evidence, and demonstrated an overall lack of trustworthiness as a witness. Ms. Imai's testimony was evasive and equivocating. Her demeanor during testimony raised questions regarding her truthfulness. Because Ms. Imai was not a credible witness, her testimony cannot support the position that she was ready, willing, and able to work.

As the prosecuting party, the Administrator has the burden of proving that Ms. Imai was ready, willing, and able to work and that NSSA violated the law by not paying Ms. Imai for non-productive hours. 20 C.F.R. § 655.71 (a). The Administrator failed to meet his burden, because he relied on the testimony of Ms. Imai who was not a credible witness. I find that the Administrator has not met its burden of showing that Ms. Imai was ready, willing, and able to perform her job duties and has failed to show that Ms. Imai's non-productive hours are compensable.

## **II. Does North Shore School for the Arts Owe Ms. Imai Backwages**

The Administrator requests \$16,800 in backwages. This included productive and non-productive time at \$40.00 per hour, for 20 hours a week, for 21 weeks from November 2, 2010 through March 28, 2011. I found that the Administrator did not meet his burden to show Ms. Imai was ready, willing, and able to perform her job duties. Therefore, I find that NSSA is not responsible for payment of non-productive time. NSSA is responsible for payment of time Ms. Imai actually worked from November 2, 2010 through March 28, 2011. The parties have stipulated that during this time Ms. Imai taught piano for 74.5 hours and the payment rate was \$40 per hour.

I decline to consider payment of time actually worked when Ms. Imai was in the United States on an F-1 student visa or in the United States as a tourist. Ms. Kelsey admitted three violations:

- 1) NSSA admitted that it required or accepted from an H-1B worker payment for fees incurred in the filing of the H-1B petition;
- 2) NSSA admitted that it failed to make available for public examination, the LCA and other documents as required; and,
- 3) NSSA admitted that it failed to maintain documents as required.

I do not order any sanction for the document violations and I do not order reimbursement of any payment made to NSSA by Ms. Imai for repayment of fees and cost of obtaining the H-1B visa. The Administrator stated "We were not seeking repayment of those funds. As far as, we were only seeking back wages due to the H-1B employee." (Tr. at 9).

NSSA is responsible for payment of 74.5 hours of work at the rate of \$40.00 per hour for a total of \$2, 980.00

## **ORDER**

North Shore School for the Arts shall pay Ms. Natsuko Imai \$2,980.00 in backwages for the period November 2, 2010 through March 28, 2011, plus interest accrued.

**SO ORDERED.**

**STEPHEN M. REILLY**  
Administrative Law Judge

## **NOTICE OF APPEAL RIGHTS**

To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within thirty (30) calendar days of the date of issuance of the administrative law judge’s decision. *See* 20 C.F.R. § 655.845(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

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

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