



Issue Date: 06 December 2013

Case No.: 2013-LCA-00021

In the Matter of:

PARTHIV BRAHMBHATT,
Prosecuting Party,

v.

THE TEMPLE GROUP, INC.,
Respondent.

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act H-1B visa program, 8 U.S.C. § 1101(a)(15)(H)(i)(B) (the “Act”), and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I. Mr. Parthiv Brahmbhatt (“Mr. Brahmbhatt”) challenges the Determination Letter issued by the Administrator, Wage and Hour Division (“Administrator”), on April 4, 2013. Mr. Brahmbhatt had previously submitted an ESA Form WH-4 alleging that The Temple Group, Inc. (“The Temple Group”) had made improper deductions from his wages and an ESA Form WH-31 stating that he requested reimbursement of legal fees associated with his H-1B visa processing and return air fare to his country of origin. The Administrator found that The Temple Group failed to pay wages as required and stated that The Temple Group had paid the back wage assessment of \$11,990.99 in full. The Administrator’s Determination Letter stated that Respondent was responsible for withholding legally required deductions such as income taxes from the back wage assessment. By letter dated April 15, 2013, Mr. Brahmbhatt appealed the Administrator’s decision on several grounds, most notably that taxes should not have been withheld from the \$11,990.99 assessment because it constituted a reimbursement of H-1B processing fees he paid, not back wages, and also that The Temple Group did not pay him return airfare to his country of origin. The Determination Letter did not address these issues.

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 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 defines 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. If the worker is not “ready, willing, and able” to work, then wages are not due for non-productive periods.

In order for there to be a “bona fide termination of the employment relationship” under the Act, there must be: (1) notice to the employee that the employment relationship has ended; (2) notice to the USCIS that the employment relationship has ended; (3) revocation of the LCA validity period during which the non-immigrant H-1B worker can remain in the United States to work for the specific employer; and (4) payment for transportation of the non-immigrant H-1B worker back to his/her last place of foreign residence “if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to Section 214(c)(5) of the Act” but payment of transportation of the alien is not required “if the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition

... [and thereby] has not been dismissed.” § 214(E)(5)(A) of the Act; 8 C.F.R. § 214.2(h)(4)(iii)(E). *See also, Pegasus Consulting Group v. Administrative Review Board, U.S. Department of Labor*, 2008 WL 920072 (D.N.J., Mar. 31, 2008) (unpub.); *Amtel Group of Florida, Inc. v. Rungvichit Yongmahapakorn*, ARB Case No. 04-087 (Sep. 29, 2006); *Mao v. George Nasser and Nasser Engineering & Computing Services*, ARB Case No. 06-121 (Nov. 26, 2008); *Administrator v. Avenue Dental Care, et. al.*, ARB Case No. 07-101 (Jan. 7, 2010); *Rajan v. International Business Solutions, Ltd.*, ARB Case No. 03-104 (Aug. 31, 2004); 8 C.F.R. §§ 214.2(h)(11)(i)(A), 214.2(h)(11)(ii), and 214.2(h)(4)(iii)(E).

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 a party disagrees with the Determination Letter, that party may appeal to the DOL, Office of Administrative Law Judges.¹ In this proceeding, Mr. Brahmhatt is the Prosecuting Party and The Temple Group is the Respondent. The Prosecuting Party bears the burden of proof with regard to each alleged violation.

Procedural History

Following a complaint filed by Mr. Brahmhatt with the Wage and Hour Division (“WHD”) alleging that The Temple Group made deductions from his wages for H-1B visa processing fees resulting in his wages falling below the required wage rate (Claimant’s Exhibit (“CX”)² 6), the Administrator issued a determination on April 4, 2013, finding that the Respondent failed to pay wages in violation of 20 C.F.R. § 655.731 and assessed the payment of back wages in the amount of \$11,990.99.³ (CX 1a). The Administrator’s determination did not address Mr. Brahmhatt’s allegation, made in his written Employee Personal Interview Statement dated December 6, 2012, that Respondent also failed to pay his return air fare to India. (CX 1a; CX 6).

On April 15, 2013, Mr. Brahmhatt requested a hearing in this case. I held a hearing in this case on July 23, 2013, in Washington, D.C., with The Temple Group’s Mr. Michael Osaghae appearing in person and Mr. Brahmhatt appearing by telephone.⁴ Mr. Brahmhatt testified on his own behalf and Mr. Osaghae testified on behalf of The Temple Group. At the hearing, I

¹ Parties may request a hearing under two circumstances. First, the complainant, or any other interested party, may request a hearing where the Administrator determines, after investigation, that there is no basis for finding that an employer has committed violations of the Act. Second, the employer, or any other interested party, may request a hearing where the Administrator determines, after investigation, that the employer has committed violations of the Act. 20 C.F.R. § 655.820(b). An “interested party” is defined as “a person or entity who or which may be affected by the actions of an H-1B employer or by the outcome of a particular investigation and includes any person, organization, or entity who or which has notified the Department of his/her/its interest in the Administrator’s determination.” 20 C.F.R. § 655.715.

² Mr. Brahmhatt’s exhibits were designated Claimant’s Exhibits at the hearing and remain so designated.

³ The Administrator calculated this figure by determining the amount of H-1B fees Mr. Brahmhatt paid and adding that amount to the deductions The Temple Group took from his pay, and then subtracting a holiday bonus and severance payments The Temple Group had paid Mr. Brahmhatt. *See infra* at 9-10 for details.

⁴ The parties agreed to this procedure during a June 18, 2013 conference call and again stated their consent at the hearing. (Tr. at 5-6).

admitted ALJ Exhibits 1-2, CX 1-6, and Employer's Exhibits ("EX") A-H. I provided both parties 15 days after the hearing to submit additional evidence and to submit post-hearing briefs. (Tr. at 6-7; 10-11; 12-14; 38; 43; 62-63). Respondent and Mr. Brahmbhatt both submitted post-hearing briefs and additional evidence pursuant to subsequent extensions, with the final submission received from Mr. Brahmbhatt on November 27, 2013. By Evidentiary Orders dated September 16, 2013, October 29, 2013, and December 3, 2013, I admitted CX 7-16, admitted EX I-O, and closed the record, respectively.

Issues

The parties agreed that the following issues are to be determined in this proceeding (Tr. at 7-8; 10):

1) Whether The Temple Group should have deducted taxes in the amount of \$5,242.27 from the \$11,990.99 paid to Mr. Brahmbhatt by check dated March 1, 2013 (and a related issue is what, if any, remedy is available in this proceeding);

2) Whether The Temple Group should have provided return airfare to India in the amount of \$725.30 to Mr. Brahmbhatt (and a related issue is what, if any, remedy is available in this proceeding);

3) Whether The Temple Group should have deducted a bonus in the amount of \$1,000.00 paid to Mr. Brahmbhatt in December 2010 from the wages due to him;

4) Whether The Temple Group should have deducted severance pay in the amount of \$2,307.70 paid to Mr. Brahmbhatt from the wages due to him;

5) Whether The Temple Group should pay second opinion legal fees (concerning Mr. Brahmbhatt's visa application) in the amount of \$850.00 to Mr. Brahmbhatt,⁵ and

6) Whether The Temple Group should pay an unknown amount in legal fees concerning Mr. Brahmbhatt's visa application to the Williams Mullen law firm.

⁵ In his post-hearing submission received November 27, 2013, Mr. Brahmbhatt states that the second opinion legal fees totaled \$1,000.00, not \$850.00, and cites to evidence he submitted on August 11, 2013. That evidence, CX 9, includes two credit card receipts in the amount of \$500.00 for a transaction on June 16, 2010, with the same authorization code (one receipt refers to it as an approval code, but the code is the same), and one handwritten receipt dated July 26, 2010, in the amount of \$350.00. At the hearing, Mr. Brahmbhatt submitted a letter from him dated July 14, 2013, stating, in relevant part, "at different stages of the filing we were required to have a second opinion from different attorneys which resulted in an additional cost of \$850" and attaching a copy of the handwritten receipt in the amount of \$350.00 and one of the two credit card receipts for the July 26, 2010 transaction. (CX 4). Given Mr. Brahmbhatt's July 14, 2013 letter and its attachments (CX 4), the second opinion legal fees at issue totaled \$850.00, not \$1,000.00.

Factual Background

Mr. Brahmbhatt's Testimony and Evidence

Mr. Brahmbhatt was employed by The Temple Group as a project engineer from March 22, 2010, to March 3, 2011. (CX 6). He was hired on an urgent basis by The Temple Group because an engineer on one of their projects was leaving and needed to be replaced immediately. (Tr. at 19). The Temple Group's Roland Barnes told him during the application process that he needed to pay the H-1B processing fees. (Tr. at 20; CX 6).

On March 1, 2013, Mr. Brahmbhatt received a payment in the amount of \$11,990.99 from The Temple Group, but taxes were deducted from it so the amount of the payment check was only \$6,748.72. (Tr. at 21-22; CX 1c.) Mr. Brahmbhatt stated that taxes should not have been deducted from this payment because it was not for wage income, but rather was the reimbursement of payments he made to the Department of Homeland Security and to attorneys for processing for his H-1B visa. (Tr. at 22). Mr. Brahmbhatt stated that Mr. Bruce Dory of WHD confirmed that taxes should not have been withheld from this payment and asked him to return the check and to have it reissued, but by that time, about a month and a half after receiving the check, Mr. Brahmbhatt had already deposited it. (Tr. at 22-23).

Mr. Brahmbhatt stated that at the time The Temple Group issued the March 1, 2013 payment, they were complying with the Department's instructions, which as reflected in the April 4, 2013 Administrator's Determination, were that "[t]he employer is responsible for withholding the legally required deductions (*e.g.*, federal and state income tax and FICA) and paying these amounts and the employer's contributions to the appropriate entities." (Tr. at 24; CX 1a). He stated that the requirement that The Temple Group withhold taxes from this payment "was probably a mistake from the Department of Labor end" because "[t]his [wa]s, again, a reimbursement and not an income or salary." (Tr. at 24).

A certified public accountant, Charles E. Sila, reviewed Mr. Brahmbhatt's pay records from The Temple Group as well as the March 1, 2013 payment and concluded:

Mr. Brahmbhatt's claim was and is that The Temple Group, Inc. took improper deductions by deducting the costs of processing his H-1B from his paychecks. This deduction was from after tax income.

The reimbursement from The Temple Group, Inc. includes payroll tax deductions as if this were a payroll issue. The result of this treatment is that his reimbursement for an improper deduction from after tax income is being taxed again.

The proper handling would be to issue a check for the full amount claimed with no deductions and no payroll reporting.

(CX 1b (emphasis omitted); Tr. at 25). Mr. Brahmbhatt seeks payment of the amount withheld from the \$11,990.99 payment – \$5,242.72. (Tr. at 25).

Mr. Brahmbhatt stated that he “was laid off... terminated” on March 3, 2011. (Tr. at 21; CX 6). After he was terminated, he returned to India on April 28, 2011. (CX 6). The Temple Group did not provide him return air fare to India, which was \$725.30. (Tr. at 26-27; CX 2; CX 2c).

Mr. Brahmbhatt stated that he believed a \$1,000.00 Christmas bonus he was paid in December 2010 was an automatic bonus that everyone received and provided a statement from a former employee of The Temple Group stating that every year that employee received a bonus “around \$1000” for Christmas. (Tr. at 28; CX 3; CX 3a). Mr. Brahmbhatt also stated he received severance pay in the amount of \$2,307.70 and that severance pay was given to all former Employees of The Temple Group. (Tr. at 28; CX 3; CX 3a). On cross-examination, Mr. Brahmbhatt stated that he did not have access to The Temple Group’s payroll records on bonuses and severance, and thus was not making a statement of fact that all employees automatically received severance and bonuses, but rather based his statement on conversations with other employees. (Tr. at 45-46). When DOL calculated the total amount due Mr. Brahmbhatt from The Temple Group, it deducted the \$1,000 bonus paid in December 2010 and severance payments totaling \$2,307.70 (comprised of two separate payments of \$1,153.85) from the amount Mr. Brahmbhatt had paid in fees or had deducted from his pay, resulting in the \$11,990.99 assessment amount. (Tr. at 28; CX 1a; CX 3; CX 3b).

Mr. Brahmbhatt stated that he paid the \$2,500 retainer paid to Williams Mullen, the law firm that prepared his H-1B application. (Tr. at 38). Mr. Brahmbhatt stated The Temple Group signed the contract and issued the checks to that law firm, but Mr. Brahmbhatt had payroll deductions made so that he paid “each and every cent” for these fees back to The Temple Group. (Tr. at 46).

Mr. Brahmbhatt testified his H-1B application had to be submitted three times. (Tr. at 30-31). He provided evidence that the application was ultimately approved on August 19, 2010, with a petition validity period from August 18, 2010, to November 27, 2011. Mr. Brahmbhatt provided evidence that he was required to pay legal fees for a second opinion on the third application in the total amount of \$850.00 (one payment of \$350.00 on July 26, 2010, and a second payment of \$500.00 on June 16, 2010). (Tr. at 40; CX 4-4b). Mr. Brahmbhatt stated that an attorney at Williams Mullen recommended obtaining a second opinion from other attorneys to ensure that they made the best case for his visa application; although Mr. Brahmbhatt stated he believed The Temple Group should have paid this fee, he stated he paid it himself because The Temple Group did not agree with obtaining the second opinion and because the attorneys billed him directly. (Tr. at 30-31). Mr. Brahmbhatt also stated, however, that the second opinion was recommended by The Temple Group’s human resources department as well as Williams Mullen. (Tr. at 40). Mr. Brahmbhatt stated that he informed DOL of these fees but that when he received the decision letter, one of DOL’s investigators told him the employer was not liable for them. (Tr. at 31-32).

Mr. Brahmbhatt stated there is an unknown amount in legal fees in his name with Williams Mullen and that he is unable to pay it. (Tr. at 33-34). In his post-hearing submission

received November 27, 2013, however, Mr. Brahmhatt stated that Williams Mullen has waived any pending charges and there is no amount due.

The Temple Group's Testimony and Evidence

Mr. Osaghae stated that The Temple Group hired Williams Mullen, the law firm that prepared Mr. Brahmhatt's H-1B application, and paid a retainer of \$2,500.00. (Tr. at 38). The Temple Group provided a copy of an engagement letter between it and Williams Mullen that it signed on March 26, 2010; this letter stated that the firm required an advance deposit of \$2,000.00. (EX O).

Mr. Osaghae stated there were three applications for Mr. Brahmhatt's H-1B visa: on the first, The Temple Group paid \$2,320.00 in fees, which are not at issue in this case because they were not on the WH-55 spreadsheet DOL used to calculate the back wage assessment (EX C). (Tr. at 53). Mr. Osaghae said the same applied for the second filing, and the amounts at issue concerning the assessment of back wages (other than the payment of premium processing fees) are related to what Mr. Osaghae described as the third filing. (Tr. at 53-54). The Temple Group submitted evidence of the first application submitted on or about April 15, 2010 (EX K), the second application submitted on or about April 30, 2010 (EX L), and evidence that Williams Mullen planned to submit the third filing in early August 2010 (EX F).

With respect to the third filing, an attorney at Williams Mullen informed The Temple Group on July 26, 2010, via e-mail that she needed "four checks made payable to 'U.S. Department of Homeland Security' in the following amounts: \$320 (filing fee), \$500 (anti-fraud fee), \$1500 (training fee) and \$1000 (premium processing fee)." (EX F). On August 5, 2010, that attorney informed The Temple Group via e-mail that she "would file the new H-1B petition without charging any legal fees (usually a \$2,500 charge) [but that she would] need checks from [T]he Temple Group to cover the filing fees [as provided in the July 26, 2010, e-mail quoted above]." (EX F). In that same e-mail, the attorney stated that Mr. Brahmhatt "has agreed to pay the costs associated with the Request of Evidence \$5353.00." (EX F).

Mr. Osaghae testified that The Temple Group paid two fees referenced in the July 26, 2010 e-mail (EX F) on behalf of Mr. Brahmhatt: the \$320.00 filing fee and the \$1,500.00 training fee. (Tr. at 51). On August 16, 2010, The Temple Group issued two checks to the U.S. Department of Homeland Security – one for \$1,500.00, the other for \$320.00. (EX E). Mr. Osaghae also testified that an employee of The Temple Group told Williams Mullen that The Temple Group was not going to pay the premium processing fee because The Temple Group did not believe it was necessary. (Tr. at 51). Mr. Osaghae stated that Mr. Brahmhatt "went behind our backs and paid it directly to the attorneys." (Tr. at 52). Mr. Osaghae also stated that Mr. Brahmhatt paid premium processing fees for all three applications to the law firm directly, that "at no time did we [The Temple Group] authorize it [payment of premium processing fees] with the attorneys," and that The Temple Group "had no knowledge of those fees, the premium processing fees ... [we] did not require them, did not request them, and only heard of them [in the July 26, 2010, e-mail quoted above]." (Tr. at 54).

The Temple Group provided evidence that DOL's online H-1B advisor states that "[t]he premium processing fee is an optional employer business expense where the employer requests that its petition request be processed within 15 days. In rare instances, an employer may be able to demonstrate to the satisfaction of the WHD that the premium processing was requested specifically at the behest of the nonimmigrant for compelling personal reasons." (EX D). Mr. Osaghae also testified that the attorney handling the third filing stated she would not charge The Temple Group for the premium processing fee "because we refused to accept it ... when she discussed it with [an employee of The Temple Group]," and that The Temple Group was unaware of the first two premium processing fees until they received the WH-55 spreadsheet. (Tr. at 55). Specifically, Mr. Osaghae testified that the premium processing fees were listed in three entries on the WH-55 spreadsheet used to calculate the assessment – \$1,000.00 in the week ending May 8, 2010, \$1,025.00 (including \$25.00 for FedEx fees) in the week ending May 22, 2010, and \$1,000.00 of the \$3,320.00 listed in the week ending August 14, 2010. (Tr. at 56; EX C).

Mr. Osaghae testified that in withholding taxes from the \$11,990.99 payment it made to Mr. Brahmbhatt on March 1, 2013, The Temple Group was complying with DOL's request. (Tr. at 59). Mr. Osaghae also testified that the WH-55 spreadsheet erroneously listed a \$720.00 payroll deduction for legal fees the week of April 10, 2010, and thus overstated the amount withheld from Mr. Brahmbhatt's pay as \$6,860.00 instead of \$6,140.00. (Tr. at 56). Mr. Osaghae stated that these deductions were from after-tax dollars. (Tr. at 59).

The Temple Group provided documentation showing that taxes and payroll contributions were withheld from the \$1,000.00 bonus The Temple Group paid Mr. Brahmbhatt on December 23, 2010, and also from the \$2,307.69 severance payment it paid him on March 18, 2011. (EX A).

Discussion

Issue 1 - Whether The Temple Group should have deducted taxes in the amount of \$5,242.27 from the \$11,990.99 paid to Mr. Brahmbhatt by check dated March 1, 2013 (and a related issue is what, if any, remedy is available in this proceeding).

I find that taxes should not have been deducted from the \$11,990.99 The Temple Group paid Mr. Brahmbhatt by check dated March 1, 2013. There is no dispute that the amounts The Temple Group deducted from Mr. Brahmbhatt's pay for legal fees were taken from after-tax dollars. (Tr. at 59). Mr. Brahmbhatt's accountant presented a compelling case that taxes should not have been withheld from the amount The Temple Group paid him on March 1, 2013. In short, because the improperly deducted amounts were from after-tax income, withholding taxes from the March 1, 2013, payment meant that taxes were withheld twice from the amounts covered – first before the improper deductions were made from Mr. Brahmbhatt's pay, and then again when The Temple Group paid the \$11,990.99 that accounted for both the improper deductions from Mr. Brahmbhatt's pay and the fees Mr. Brahmbhatt paid directly. (CX 1b). Although the accountant did not specifically discuss the impact of withholding taxes from the March 1, 2013, payment on the amounts that Mr. Brahmbhatt paid directly, I apply his reasoning equally to the amounts Mr. Brahmbhatt paid directly because I conclude that taxes were withheld

from the paychecks that Mr. Brahmhatt received that were the source of the amounts he paid directly.

Having determined that taxes should not have been withheld from the \$11,990.99 The Temple Group paid to Mr. Brahmhatt, the next issue is what, if any, remedy is available at this stage. Pursuant to 20 C.F.R. § 655.840, an administrative law judge's decision and order may, in relevant part, "modify, in whole or in part, the determination of the Administrator; the reason or reasons for such order shall be stated in the decision." Here, the Administrator's Determination stated that "[t]he employer is responsible for withholding the legally required deductions, (*e.g.*, Federal and State income tax and FICA) and paying these amounts and the employer's contributions to the appropriate entities." (CX 1a). The record shows that The Temple Group withheld taxes from the \$11,990.99 payment as a result of this language, as The Temple Group believed it was "complying with DOL's request." (Tr. at 59). As explained above, taxes should not have been withheld from the \$11,990.99 payment. Given the particular circumstances of this case, I therefore modify the Administrator's Determination by deleting the following sentence that caused The Temple Group to deduct taxes from the payment: "[t]he employer is responsible for withholding the legally required deductions, (*e.g.*, Federal and State income tax and FICA) and paying these amounts and the employer's contributions to the appropriate entities."⁶

The Administrator calculated the \$11,990.99 assessment using a WH-55 spreadsheet which, in relevant part, reflected the following amounts Mr. Brahmhatt paid for legal fees through money orders (and checks), legal fees he paid directly, deductions from his pay for legal fees, and amounts DOL credited against the amount due (as further explained below, the entries in italics were in error):⁷

⁶ While I modify the Administrator's Determination to delete this sentence given the unique circumstances of this particular case, I recognize that this sentence in the Administrator's Determination did not direct The Temple Group to withhold taxes from the \$11,990.99 payment. Rather, it merely informed The Temple Group that it had to withhold "legally required deductions" from the payment and gave as examples of such deductions "Federal and State income tax and FICA" (the "*e.g.*" abbreviation used in the sentence stands for the Latin *exempli gratia* and means "for example"). By listing these taxes only as examples of deductions that might be legally required, this sentence did not definitively state that withholding of Federal and State income taxes and FICA was in fact legally required in this particular case.

⁷ This chart contains relevant entries from the WH-55 prepared in this case. (CX 3b; EX C). It is not a complete copy of the WH-55. In addition to putting in italics entries from the WH-55 that I have determined were erroneous, I have reordered the "Bonus Credit" and "Payroll Deduction for Legal Fees" columns to better show that the amount calculated as due was the sum of the "Legal Fees Paid w/Money Orders," "Legal Fees Paid Attorney," and "Payroll Deductions for Legal Fees" columns minus the "Bonus Credit" column.

Week ending	Legal Fees Paid w/Money Orders	Legal Fees Paid Attorney	Payroll Deductions for Legal Fees	Bonus Credit
4/10/10			\$720.00	
4/17/10			\$720.00	
4/24/10			\$360.00	
5/1/10			\$360.00	
5/8/10		\$1,000.00	\$360.00	
5/15/10			\$360.00	
5/22/10		\$1,025.00	\$360.00	
5/29/10			\$360.00	
6/5/10			\$360.00	
6/12/10			\$360.00	
6/19/10			\$360.00	
6/26/10			\$360.00	
8/14/10	\$3,320.00		\$455.00	
8/21/10			\$455.00	
8/28/10			\$455.00	
9/4/10			\$455.00	
10/2/10	\$1,593.50			
10/2/10	\$500.00			
10/16/10		\$500.00		
12/25/10			(\$1,000.00)	(\$1,000.00)
1/1/11		\$500.00		
3/12/11			(\$1,153.85)	(\$1,153.85)
3/19/11			(\$1,153.85)	(\$1,153.85)
Subtotals:	\$5,413.50	\$3,025.00	\$6,860.00	\$3,307.87 ⁸

Based on these entries, the Administrator calculated that Mr. Brahmhatt was due the \$5,413.00 in the “Legal Fees Paid w/Money Orders” column plus the \$3,025.00 in the “Legal Fees Paid Attorney” column plus the \$6,860.00 in the “Payroll Deductions for Legal Fees” column, minus the \$3,307.87 in the “Bonus Credit” column, which equals \$11,990.13. (The WH-55 states the total due was \$11,990.97, which appears to be a minor computational error. The record does not establish why the Administrator’s Determination Letter stated the amount due was \$11,990.99.)

During the hearing and in its post-hearing submission, The Temple Group stated that the Administrator erred in calculating the assessment. The record establishes that the Administrator’s assessment of \$11,990.99 overstated the amount due Mr. Brahmhatt. Specifically, the WH-55 spreadsheet used to calculate the assessment contains the following errors:

(1) The WH-55 indicates \$720.00 was deducted from Mr. Brahmhatt’s pay for legal fees the week ending April 10, 2010, and again the week ending April 17, 2010. In fact, the payroll records establish the correct amount of deductions was only \$360.00 for each of these two

⁸ The WH-55 incorrectly lists the \$1,000.00 bonus paid the week ending December 25, 2010, as a deduction instead of a credit in the “Bonus Credit” column but correctly lists it as a credit in the “Total Due” column, not reproduced here. (CX 3b; EX C).

weeks. (EX A). This error in the WH-55 overstated the amount in the “Payroll Deductions for Legal Fees” column by \$720.00.

(2) The WH-55 indicates Mr. Brahmhatt paid \$3,320.00 in legal fees with money orders the week ending August 14, 2010. This entry reflects two errors:

(a) \$1,820.00 of these fees were paid by The Temple Group and were then deducted from Mr. Brahmhatt’s pay in a \$910.00 deduction on August 20, 2010, and in another \$910.00 deduction on September 3, 2010 (these two \$910.00 deductions are reflected on the WH-55 as four \$455.00 deductions the weeks ending August 14, 2010, August 21, 2010, August 28, 2010, and September 4, 2010). (EX A; EX C; EX E). This \$1,820.00 was thus double-counted both as fees paid by Mr. Brahmhatt and as amounts deducted from his pay. This error in the WH-55 overstated the amount in the “Legal Fees Paid w/Money Orders” column by \$1,820.00.

(b) \$1,000.00 of these fees reflect Mr. Brahmhatt’s payment of premium processing fees to the Department of Homeland Security on August 9, 2010. (CX 12). The record establishes that The Temple Group objected to the payment of this premium processing fee and refused to pay it. (Tr. at 55). I thus conclude that given The Temple Group’s refusal to pay the fee, “the premium processing was requested specifically at the behest of the nonimmigrant for compelling personal reasons” (EX D), and that this fee should not have been counted as an expense required to be paid by the employer. This error in the WH-55 overstated the amount in the “Legal Fees Paid w/Money Orders” column by \$1,000.00.⁹

(3) Due to an apparent computational error, the total amount of bonus credit on the WH-55 was computed as \$3,307.87. In fact, the record establishes that the total amount of bonus credit was \$3,307.70. This error overstated the amount in the “Bonus Credit” column by seventeen cents.

Taking into account these errors, the information on the WH-55 used to calculate the assessment is corrected as follows:

⁹ The Temple Group argues that the Administrator erred in determining that Mr. Brahmhatt’s payment of two other premium processing fees totaling \$2,025.00 (reflected in the WH-55’s “Legal Fees Paid Attorney” column as a \$1,000.00 entry the week ending May 8, 2010, and a \$1,025.00 entry the week ending May 22, 2010). In contrast to the premium processing fee Mr. Brahmhatt paid on August 9, 2010, where it is absolutely clear that The Temple Group refused to pay the fee, however, the record is insufficient to demonstrate that these other premium processing fees were requested specifically at Mr. Brahmhatt’s request for compelling personal reasons. I thus decline to find that the Administrator erred in counting these fees as expenses required to be paid by the employer.

Week ending	Legal Fees Paid w/Money Orders	Legal Fees Paid Attorney	Payroll Deductions for Legal Fees	Bonus Credit
4/10/10			\$720.00 \$360.00	
4/17/10			\$720.00 \$360.00	
4/24/10			\$360.00	
5/1/10			\$360.00	
5/8/10		\$1,000.00	\$360.00	
5/15/10			\$360.00	
5/22/10		\$1,025.00	\$360.00	
5/29/10			\$360.00	
6/5/10			\$360.00	
6/12/10			\$360.00	
6/19/10			\$360.00	
6/26/10			\$360.00	
8/14/10	\$3,320.00 \$500.00		\$455.00	
8/21/10			\$455.00	
8/28/10			\$455.00	
9/4/10			\$455.00	
10/2/10	\$1,593.50			
10/2/10	\$500.00			
10/16/10		\$500.00		
12/25/10				(\$1,000.00)
1/1/11		\$500.00		
3/12/11				(\$1,153.85)
3/19/11				(\$1,153.85)
Subtotals:	\$5,413.50 -\$2,593.50	\$3,025.00	\$6,860.00 \$6,140.00	\$3,307.87 \$3,307.70

Based on these corrected entries, I conclude that Mr. Brahmhatt is due the \$2,593.50 in the “Legal Fees Paid w/Money Orders” column plus the \$3,025.00 in the “Legal Fees Paid Attorney” column plus the \$6,140.00 in the “Payroll Deductions for Legal Fees” column, minus the \$3,307.70 in the “Bonus Credit” column, which equals \$8,450.80.

The errors in the WH-55 used to calculate the assessment thus resulted in the Administrator overstating the amount due from The Temple Group to Mr. Brahmhatt by \$3,540.19. While The Temple Group has already paid the Administrator’s \$11,990.99 assessment, Mr. Brahmhatt has only received \$6,748.72 from The Temple Group due to the erroneous tax withholding. The Administrator’s error in overstating the amount due to Mr. Brahmhatt by \$3,540.19 does not require Mr. Brahmhatt to refund any overpayment he received. Rather, the Administrator’s error can be corrected by merely modifying the Administrator’s assessment of the amount due Mr. Brahmhatt from The Temple Group. Subtracting the Administrator’s \$3,540.19 error from the Administrator’s assessment of \$11,990.99, I find that the Administrator’s Determination should be modified to reflect that \$8,450.80 is due Mr. Brahmhatt from The Temple Group.

Issue 2 - Whether The Temple Group should have provided return airfare to India in the amount of \$725.30 to Mr. Brahmbhatt (and a related issue is what, if any, remedy is available in this proceeding).

One of the requirements of a bona fide termination of employment of an H-1B non-immigrant employee is for payment for the transportation of the worker back to his or her last place of foreign residence “if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to Section 214(c)(5) of the Act” but payment of transportation of the alien is not required “if the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition ... [and thereby] has not been dismissed.” 8 U.S.C. § 214(E)(5)(A); 8 C.F.R. § 214.2(h)(4)(iii)(E). Administrative law judges may order payment of return airfare in H-1B cases. *See, e.g., Kumar v. Samuha, Inc.*, 2012-LCA-00005, slip op. at 4-5 (ALJ Feb. 28, 2013).

In this case, the record establishes that Mr. Brahmbhatt’s employment with The Temple Group was cut short prior to the expiration of the petition’s validity period, November 27, 2011. Because the record does not establish that Mr. Brahmbhatt voluntarily terminated his employment with The Temple Group before that time, The Temple Group is not excused from its obligation to pay for his return transportation to India. Accordingly, I find that The Temple Group must reimburse Mr. Brahmbhatt \$725.30 for his return transportation expenses (in addition to the modified assessment of \$8,450.80 discussed above).

Issue 3 - Whether The Temple Group should have deducted a bonus in the amount of \$1,000.00 paid to Mr. Brahmbhatt in December 2010 from the wages due to him.

Once bonuses or similar compensation have been paid to an employee, they satisfy an employer’s required wage obligation if they were recorded and appropriate taxes and contributions were withheld and paid. 20 C.F.R. § 655.731(c)(2)(v). Here, the record shows that the \$1,000.00 bonus The Temple Group paid Mr. Brahmbhatt on December 23, 2010, was recorded and taxes and contributions were withheld and paid from it. (EX A). Accordingly, I find that this \$1,000.00 bonus was properly deducted from the amount due Mr. Brahmbhatt.

Issue 4 - Whether The Temple Group should have deducted severance pay in the amount of \$2,307.70 paid to Mr. Brahmbhatt from the wages due to him.

As with the bonus payment discussed in Issue 3, here the record shows that the \$2,307.69 severance payment The Temple Group paid Mr. Brahmbhatt on March 18, 2011, was recorded and taxes and contributions were withheld and paid from it. (EX A).¹⁰ Accordingly, I find that this \$2,307.69 in severance pay was properly deducted from the amount due Mr. Brahmbhatt.

¹⁰ This bonus is reflected on the WH-55 as two credits of \$1,153.85, one the week ending March 12, 2011, and the other the week ending March 19, 2011. (CX 3b; EX C).

Issue 5 - Whether The Temple Group should pay second opinion legal fees (concerning Mr. Brahmhatt's visa application) in the amount of \$850.00 to Mr. Brahmhatt.

The record does not establish that The Temple Group should pay \$850.00 in second opinion legal fees. The regulation states that “attorney fees and other costs connected to the performance of H-1B program functions required to be performed by the employer (e.g. preparation and filing of LCA and H-1B petition)” are not authorized deductions for purposes of meeting the employer’s required wage obligation. 20 C.F.R. § 655.731(c)(9)(iii)(C). Accordingly, if a cost is not required to be performed by the employer, the regulatory prohibition on considering it an authorized deduction does not apply.

Here, Mr. Brahmhatt admitted that The Temple Group did not agree with paying the second opinion fees and that he paid them because the attorneys billed him directly. (Tr. at 30-31). While Mr. Brahmhatt also stated that The Temple Group’s HR department, in addition Williams Mullen, recommended obtaining a second opinion (Tr. at 40), his latter statement is inconsistent with his earlier admission that The Temple Group did not agree with paying those fees. Moreover, the second opinion letter dated June 15, 2010, is addressed to Mr. Brahmhatt and begins, “[p]ursuant to your [Mr. Brahmhatt’s] request” and much of it contains legal advice concerning Mr. Brahmhatt’s personal situation unrelated to his H-1B petition concerning his work for The Temple Group. (CX 9). The record thus does not establish that the second opinion legal fees were H-1B petition fees and costs that are required to be paid by The Temple Group.

Issue 6 - Whether The Temple Group should pay an unknown amount in legal fees concerning Mr. Brahmhatt's visa application to the Williams Mullen law firm.

This issue is moot because Mr. Brahmhatt has stated in a post-hearing submission that Williams Mullen has waived any pending charges and there is no amount due. Accordingly, I need not address it further.

CONCLUSION AND ORDER

Based on the foregoing, I conclude the following:

1. Taxes should not have been withheld from The Temple Group’s payment of the \$11,990.99 assessment imposed by the Administrator, and, given the circumstances of this particular case, the Administrator’s Determination is modified to delete the following sentence: “The employer is responsible for withholding the legally required deductions, (e.g., Federal and State income tax and FICA) and paying these amounts and the employer’s contributions to the appropriate entities.”
2. The Administrator erred in calculating the assessment of \$11,990.99 by overstating the assessment by \$3,540.19. Accordingly, the assessment, which is for improper deductions and not for back wages, is modified to \$8,450.80.
3. The Temple Group failed to pay for Mr. Brahmhatt’s travel back to India in the amount of \$725.30 after terminating his employment.

4. By check dated March 1, 2013, The Temple Group has already paid Mr. Brahmhatt \$6,748.72. This amount was composed of the \$11,990.99 assessment imposed by the Administrator minus \$5,242.27 in taxes withheld from that amount.

5. The Temple Group is **ORDERED** to pay Mr. Brahmhatt \$2,427.38, plus interest accrued on this amount since March 1, 2013. The Administrator shall calculate the accrued interest. The amount of \$2,427.38 is composed of the modified assessment of \$8,450.80 plus \$725.30 for Mr. Brahmhatt's travel to India, minus the \$6,748.72 Mr. Brahmhatt has already received from The Temple Group.

6. Except as addressed in paragraphs 1-3 above, I **AFFIRM** the Administrator's determinations.

SO ORDERED.

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.

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).