



Issue Date: 10 February 2015

CASE NO.: 2014-LCA-11

IN THE MATTER OF

**VICENTE CARLOS QUINTANILLA,
Prosecuting Party,**

vs.

**MYRIAD RBM, INC., D/B/A RULES BASED MEDICINE,
Respondent**

APPEARANCES:

**VINCENTE CARLOS QUINTANILLA
Pro Se Complainant**

**RICHARD M. MARSH, ESQ.
On Behalf of the Respondent**

**BEFORE: PATRICK M. ROSENOW
Administrative Law Judge**

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. The Act allows employers to hire foreign workers under H-1B visas to work in specialty occupations on a temporary basis. Vicente Quintanilla (“Complainant”) challenges the Determination Letter issued by the Administrator, Wage and Hour Division (“Administrator”) on 4 Mar 14. The Administrator found that Myriad RBM (“Respondent”) owed Complainant back wages totaling \$796.80 for failure to pay required wages in violation of § 655.731.

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.¹ To obtain permission from the DOL, the Act requires employers to submit a Labor Condition Application (LCA) to the DOL.²

The regulations specify how the H-1B worker must be paid. To calculate the prevailing wage, the employer may use any of the following methodologies: the Office of Foreign Labor Certification National Processing Center's Occupational Employment Statistics (OES)³, an independent authoritative source, or other legitimate sources of wage data.⁴ After the prevailing wage has been established, the H-1B employer must compare this wage with the actual wage rate for the specific employment in question at the place of employment and must pay the H-1B nonimmigrant at least the higher of the two wages.⁵

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 . . .⁶

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

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.⁷

¹ 8 U.S.C. § 1184(i)(1).

² See 8 U.S.C. § 1182(n)(1).

³ An employer who chooses to use this method to determine the prevailing wage must file a LCA on behalf of employee. Employer may choose to request, with the LCA, a prevailing wage determination and the National Processing Center will determine the arithmetic mean of wages of workers similarly employed in the area of intended employment. 20 C.F.R. §655.731(a)(2)(ii)(A)

⁴ § 655.731(a)(2)

⁵ § 655.731(a)(3)

⁶ § 655.731(c)(7)(i).

⁷ § 655.731(c)(7)(ii).

Whether there is a nonproductive periods depends on 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 United States Citizenship and Immigration Services (USCIS) that the employment relationship has ended; and (3) 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”. However, 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 An H-1B employer is responsible for the full payment of the required wage rate to the H-1B worker during all periods of productivity and nonproductivity from the onset of the initial wage obligation until the bona fide termination.

If the Administrator suspects that an employer has violated its obligation to pay wages to the H-1B worker, the Administrator may conduct an investigation.⁹ The Administrator may then issue a Determination Letter citing violations, requiring payment of wages, and imposing fines.¹⁰ If a party disagrees with the Determination Letter, that party may appeal to the DOL, Office of Administrative Law Judges.¹¹ In this proceeding, Respondent has complied with the Determination Letter. Complainant disagrees with the Determination Letter and has appealed. The Administrator has not taken part in the appeal, so Complainant is the Prosecuting Party and Respondent is the Respondent. Complainant bears the burden of proof with regard to each violation in the Determination Letter.

⁸ § 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).

⁹ § 655.50.

¹⁰ § 655.70.

¹¹ 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. § 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.” §655.715.

PROCEDURAL HISTORY

Complainant filed allegations with the Wage and Hour Division (“WHD”) that Respondent (1) failed to pay him the higher of the prevailing or actual wage, (2) failed to provide him with a copy of the LCA, and (3) failed to comply with a bona fide termination.¹² The Administrator investigated the allegations and found that Respondent failed to pay the required wage rate for nonproductive work resulting from Respondent’s failure to effect bona fide termination. He issued a 4 Mar 14 determination letter, finding that Respondent failed to pay wages as required in violation of 20 C.F.R. 655.731 and assessing back wages in the amount of \$796.80.

On 15 Apr 14, Complainant requested a hearing in this case. The parties agreed that because of the nature of the disputed issues, they would waive their right to appear in-person and submit the matter on the written record. On 2 Oct 14, Complainant filed his opening brief. Respondent filed his answer brief on 31 Oct 14 and on 14 Nov 14 Complainant filed his reply brief.

My decision is based upon the entire record, which consists of the following:¹³

Appendices 1-15 to Complainant’s original complaint
Exhibits 1-6 from Complainant’s reply to Respondent’s
Attachments 1-23 to Complainant’s opening brief
Attachments 1-5¹⁴ to Complainant’s reply brief
Appendices A-J to Respondent’s original answer
Exhibits A-E to Respondent’s answer brief.

FACTUAL BACKGROUND

Complainant worked as a Research Associate for Respondent from February 2009 until his termination on 24 Aug 12. In February 2012, Complainant applied for H-1B status and on 9 Feb 12, the application was approved. From 9 Feb 12 until his termination on 24 Aug 12, Complainant held H-1B status. For compensation purposes, Respondent classified Complainant’s job as Level I, based on the Employment and Training Administration Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (ETA PWDPG). Respondent eventually terminated Complainant for serious work performance issues. Complainant filed his complaint to WHD, which investigated and ordered Respondent to compensate Complainant \$796.80 for back wages due to him from the time of his termination until Respondent notified U.S. Citizenship and Immigration Services (USCIS), a requirement of

¹² Complainant’s Original Complaint to WHD.

¹³ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

¹⁴ For clarification purposes, Complainant’s attachments with his reply brief will be numbered 24-29, keeping in sequence with the attachments he submitted with his opening brief.

bona fide termination. Respondent accepted that decision, but Complainant argues he is entitled to more.

ISSUES IN DISPUTE & POSITION OF THE PARTIES

The parties agreed that the following issues are to be determined in this proceeding:

- 1) What the required wage rate is for Complainant based on the classification of his employment;
- 2) Whether Respondent timely provided Complainant with a copy of the LCA; and
- 3) Whether Respondent complied with the DOL's *bona fide* termination requirements.

EVIDENCE

Complainant's records state in pertinent part:¹⁵

Complainant has a degree in pre-medicine, a Bachelor's degree of science in microbiology with a minor in biochemistry, and a thesis-based Master's degree of science with an emphasis in molecular biology. He has publications in scientific journals and he taught at both the undergraduate and graduate level. He started working for Respondent in February 2009 as a Research Associate. Midway through that year, he acquired TN status¹⁶ in order to continue working for Respondent. Respondent requested that he changed his TN status to H-1B status due to the merger of RBM and Myriad Genetics. The H-1B petition that Respondent filed on his behalf in February 2009, Respondent described him as "extremely well qualified for the position".¹⁷ On 9 Feb 12, the Department of Homeland Security approved his application for H-1B status, with an expiration date of 19 Dec 14.¹⁸ Complainant's position as a Research Associate was a Level I position pursuant to ETA PWDPG for compensation purposes. The occupational wage determination provided by ETA PWDPG is based on education, experience, and nature of work.

From the start of his H-1B status on 9 Feb 12 until 1 Jul 12, Respondent compensated him at an hourly rate of \$17.69¹⁹, 59 cents above the prevailing wage at that time. The prevailing wage rate scale changed on 1 Jul 12 to \$24.21 an hour. Respondent adjusted their pay scale on 1 Jul 12 to raise his hourly wage to \$18.20²⁰, an increase of 51 cents.

¹⁵ I considered Complainant's original complaint, reply to Employer's answer, opening brief, reply brief, Appendices 1-15, Exhibits 1-6, and Attachments 1-29.

¹⁶ The North America Free Trade Agreement recognizes what is called TN status for nonimmigrants working in professional occupations.

¹⁷ Complainant's Appendix 4.

¹⁸ Complainant's Attachment 1.

¹⁹ Complainant's Appendix 10.

²⁰ *Id.*

He was prematurely terminated by Respondent on 24 Aug 12. The IRS standard mileage rate for 2012 was 55.5 cents and the trip from Austin, TX to Mexico City, Mexico is 947 miles.

The Notice of Action states in pertinent part:²¹

On 9 Feb 12, the I129 Petition for a nonimmigrant worker filed by Respondent on behalf of Complainant was approved. Complainant's H-1B status ran from 9 Feb 12 through 19 Dec 14.

The Employment and Training Administration Prevailing Wage Determination Policy Guidance states in pertinent part:²²

The difference between Level I and Level II wage rates are as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Level 2 (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.²³

In order to determine the appropriate wage level, the NPWHC compares "the particulars of the employer's job offer to the requirements for similar (O*NET) occupations."²⁴ NPWHC provides a step-by-step process to complete a worksheet to determine the wage level result.²⁵ All prevailing wage determinations start at Level I.

²¹ Complainant's Appendix 1.

²² Complainant's Appendix 2, 6.

²³ *Id.*; *Employment and Training Administration Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs, Revised November 2009, p. 7.

²⁴ *Id.*

²⁵ See Complainant's Appendix 6.

Respondent's Description of Complainant's job states in pertinent part:²⁶

The job function and purpose is to plan, perform, evaluate, and propose experiments within a project(s) to provide valid and needed information.

Some principle responsibilities include to: (1) conduct assigned experiments and assisting in their designs; (2) follow directions and laboratory procedures as assigned by supervisor; (3) analyze, interpret, and report results; (4) make necessary recommendations on possible course of action to supervisor; (5) help complete projects on time; (6) serve as an expert in area of specialization in relations with other scientific personnel; and (7) provide reviews of literature project proposals as assigned by supervisor.

The Research Associate reports to a Supervisor, Senior Scientist, or Director. The position requirements include an MS degree or a BS degree with 1-5 years of appropriate experience. If the applicant is non-degreed, more than 5 years of laboratory experience is required. The applicant must be able to design experiments and possess testing and statistical analytical skills of an advanced quality.

Email communications between Complainant and DOL state in pertinent part:²⁷

Everard Quintanilla is a WHD DOL investigator assigned to Complainant's case. From 31 May 13 through 27 Jun 13, they discussed by email Respondent's responsibility to pay return transportation costs. Complainant was referred to 8 C.F.R. 214.2(h)(4), 214.2(h)(4)(iii)(E), 214.2(h)(11), 20 C.F.R. 655.731, and a link to a DOL fact sheet on the issue.

Respondent's records state in pertinent part:²⁸

It retained an immigration attorney to assist with determining the prevailing wage and to conduct the H-1B filing process and she determined Complainant's position should be classified as Level I. She used the NPWHC step-by-step worksheet to come to her determination that Complainant's position is Level I. She sent Complainant a copy of the LCA on 20 Sep 11.²⁹

On 22 Aug 12, a couple days prior to the termination of Complainant, Cheryl Harper contacted Jayne Hart to tell her that as an H-1B employee, Complainant would be entitled to transportation costs back to Mexico City.³⁰ On 24 Aug 12, Respondent terminated Complainant and offered to pay for his transport back to Mexico.³¹ Complainant did not affirmatively accept the offer and never requested payment from the appropriate people at Respondent.³² Respondent assumed by not accepting their offer for payment to transport him back to Mexico, Complainant effectively

²⁶ Complainant's Appendix 3 and Attachment 2, Employer's Appendix A.

²⁷ Complainant's Exhibit 6.

²⁸ I considered Employer's original answer and subsequent supplement, answer brief, Appendices A-J, and Exhibits A-E.

²⁹ Employer's Appendix B.

³⁰ Declarations of Cheryl Harper, Mauricio Gamboa, and Jayne Hart.

³¹ *Id.*

³² *Id.*

denied the offer and instead indicated he wanted to stay in the U.S. to continue in school.³³ Complainant started working for Incycle Electronics in Austin, Texas sometime later in 2012 after his termination from Respondent.³⁴

In December 2013, Complainant left a voicemail for Kathy Oyler, an employee of Respondent, requesting payment for travel expenses. She responded via email requesting documentation of the expenses so Respondent could reimburse him.³⁵ He never responded to her email. That was the only time since his termination on 24 Aug 12 that Respondent heard from him requesting reimbursement for travel. Respondent never received any notice or documentation from Complainant that he returned to Mexico City.

The Declaration of Cheryl Harper states in pertinent part:³⁶

She was a Human Resources Manager for Respondent from March 2009 until February 2013, working on employee discipline and termination. She participated in the process of terminating Complainant on 24 Aug 12. Mauricio Gamboa told her that Complainant was not following operating procedures and there were issues with his time clock punches. Once Respondent chose to terminate Complainant, Cheryl contacted Jayne Hart to discuss that as an H-1B visa employee, Complainant would be entitled to an offer by Respondent to pay for travel expenses back to Mexico. In a meeting with Complainant and Mauricio, she communicated this offer to Complainant. He acknowledged the offer but did not inform them of his intentions. She never received any follow-up requests from Complainant concerning the costs for transport.

The Declaration of Mauricio Gamboa states in pertinent part:³⁷

Mauricio has worked for Respondent since September 2002 as a Senior Manager. He supervises employees and supervised Complainant. For Complainant's position, they usually hire someone with a bachelor's degree and some experience. However, since extensive training on Respondent's machines and protocols is usually required, Respondent does hire applicants with a bachelor's degree and no experience.

He talked with Cheryl in August 2012 about Complainant's poor work performance and concluded terminating him was the best option. He attended the termination meeting on 24 Aug 12 with Cheryl and Complainant and heard Cheryl clearly communicate to Complainant that Respondent would pay for his transport back to Mexico as required. Later that day, Complainant told Mauricio that he intended on going back to school to finish his PhD at Texas State University. He assumed that meant Complainant did not want to return to Mexico and thus, declining Respondent's offer to pay for travel expenses. He has not heard from Complainant since 24 Aug 12.

³³ Declaration of Gamboa.

³⁴ Employer's Appendix C.

³⁵ Employer's Appendix G, Complainant's Attachment 15 (both Employer and Complainant agree that the email was sent to an incorrect email address. Employer believed it to be the email of Complainant, but no such email address exists).

³⁶ *Id.*

³⁷ *Id.*

The Declaration of Jayne Hart states in pertinent part:³⁸

Jayne Hart began working for Respondent in May 2011 and continues to today as Executive VP of HR. She has 25 years of experience in HR. On 22 Aug 12, she spoke with Cheryl about terminating Complainant. She mentioned and wrote down that because of his H-1B visa status, Respondent would have to offer to pay for his return trip.³⁹ Since his termination, she has not spoken with Complainant nor has she received any requests for travel expense reimbursement.

Respondent's H-1B Narrative states in pertinent part that:⁴⁰

Complainant alleged that Respondent did not pay him the prevailing wage for the profession under the H-1B program and did not pay for his transportation costs upon termination. When Complainant began working for Respondent, his wage was \$17.68 an hour (beginning 12 Aug 11), while the prevailing wage was \$16.82 per hour.

Respondent admits it failed to pay Complainant the prevailing wage from the time he was terminated until the notification to USCIS was confirmed. The WHD ordered Respondent to pay \$796.80 for that failure.

Respondent noted that it offered Complainant the cost of his return trip as a requirement of a bona fide termination of an H-1B employee, but he declined.

ANALYSIS

Complainant argues that with his credentials, educational background, and tasks performed, he should have been classified as Level II. Complainant points to the description of jobs at a Level I wage level, including terms such as “research fellow,” “worker in training,” or an “internship.” He argues his position qualified as none of those terms, but instead was more complex. He also points to the phrase “under close supervision” in the Level I description and argues that he worked the night shift with no one supervising his work. Finally, he asserts that the Level I description required “only a basic understanding of the occupation,” whereas he had extensive experience. Complainant maintains that the Level II wage category was more appropriate because of his educational background. He also argues that the H-1B petition that Respondent filed demonstrated the advanced and complex nature of his position and capabilities.

³⁸ *Id.*

³⁹ Employer's Exhibit A.

⁴⁰ Employer's Exhibit B.

Respondent answers that the experience and education requirements listed in the job description are not as rigorous as those found under the DOL's position, "Medical Scientist, Except Epidemiologist."⁴¹ Consequently, the wage level should not be elevated under Steps 2 and 3. Respondent similarly argues that Step 4 should not be elevated because Complainant's position did not require any special skills or licenses. Finally, Respondent notes that Complainant's position was not supervisory in nature and Step 5 should not elevate the wage level.

Complainant then argues that Respondent violated 20 C.F.R. 655.730(d)(1)(i-ii) by failing to pay the greater of the prevailing wage (\$24.21/hr) or the actual wage (\$18.20/hr). Complainant submits that after 1 Jul 12, Respondent compensated him \$6.01 an hour less than the prevailing wage.

Respondent disagrees that Complainant's hourly wage should be adjusted annually with the DOL OFLC prevailing wage. Instead, Respondent argues that they were only required to pay the prevailing wage at the time the application was filed according to 20 C.F.R. 655.731(a)(2) and that they are under no obligation to refile the LCA annually to adjust the prevailing wage.

Finally, Complainant argues that Respondent did not satisfy the fourth requirement of a bona fide termination pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(E), which is necessary when a H-1B worker is terminated prior to the conclusion of the authorized period of stay. He argued that Respondent failed to pay for his transportation back to his last place of foreign residence. He claimed he never received any type of payment for transportation to his last place of foreign residence, but that he has been seeking payment for transportation since the day he was terminated.

Complainant seeks reasonable costs of \$525.58 for transportation back to Mexico City. He maintains that since there was no bona fide termination, he is owed back wages from 24 Aug 12 until all the requirements of a bona fide termination occur or the expiration of his H-1B status.

Respondent argues a bona fide termination of Complainant occurred no later than 7 Sep 12 and maintains that the offer made to Complainant to pay for his travel expenses was sufficient to satisfy the fourth requirement of a bona fide termination.

Complainant lastly argues that Respondent failed to provide him with a copy of the LCA as required by 20 C.F.R. 655.734.

⁴¹ Parties stipulated the occupational classification for Complainant's job with Employer was "19-1042.00 Medical Scientist, Except Epidemiologist."

1. Appropriate Wage Level Category

The employer of an H-1B worker must pay him the greater of the actual wage rate or the prevailing wage.⁴² In this case, the parties agree that the prevailing wage rate can be determined using the OES step-by-step checklist. They also agree that Complainant's position according to O*NET is "Medical Scientists, Except Epidemiologists." All prevailing wage determinations begin with a Level I determination. Four steps must then be considered to determine if the wage level should be increased further.

Experience

The first step compares the overall experience described in the O*NET classification with the experience required by the employer. OES explains that for an occupation in Job Zone 5 (Complainant's job in this case), if the employer's experience requirement is *at or below* the level of experience and Specific Vocation Preparation (SVP) range of the O*NET classification, then the wage level should not be elevated. In this case, the O*NET classification requires extensive skill, knowledge, and experience and usually requires more than five years of experience.

Respondent's job description requires one to five years of experience if the applicant has an MS or BS degree, but more than five years of experience if the applicant is non-degreed. Also, the O*NET classification has a high SVP level, noting that *some* on-the-job training may be necessary, but most positions assume that the applicant will already have the required skills and training. In Respondent's job description, there is no mention of training once on the job. While Complainant argued that preparation and training was necessary based on Respondent's comments⁴³, there is no evidence to support that it required *more* SVP than the O*NET classification.

Complainant argued that Gamboa's testimony that Complainant's position required extensive training demonstrated that Level II was the appropriate classification. However, this training occurs after hire and therefore, falls squarely within the definition of a Level I wage category. No such training is required prior to hire. Thus, because Respondent's experience requirement and SVP level are at or below those required by the O*NET classification, based on this factor the wage level remains at Level I.

⁴² 22 C.F.R. § 655.731(a).

⁴³ Gamboa stated that Research Associates like Complainant often require specific on the job training for Respondent's machines and protocols. Declaration of Mauricio Gamboa.

Education

The second step compares the education requirements of the O*NET occupation and the employer's job offer. If the employer's job offer requires a higher level of education than the level generally required by the O*NET classification, the wage level increases. According to the O*NET classification, most of these occupations require graduate school and some may require a graduate degree. Respondent requires an MS or BS degree and will consider non-degreed applicants who have five or more years of experience. Complainant argued that Respondent cannot hire a non-degreed applicant for an H-1B visa because all applicants must possess at least a bachelor's degree. The fact that H-1B visa applicants must generally possess at least a bachelor's degree or its equivalent does not change the fact that Respondent only required the applicant to have an MS or BS degree, which is at or below the level of education required by the O*NET classification. Respondent's job offer did not require a higher level of education than the level generally required by the O*NET classification. Thus, based on this factor, the wage level remains at Level I.

Special Skills and Requirements

The third step compares the special skills and requirements of the O*NET occupation with the employer's job offer. If the employer's requirements in terms of tasks, work activities, and knowledge are encompassed by the O*NET description of the position, the wage level remains the same. Simply because a specific skill is not listed in the O*NET description does not necessarily mean a point should be added. If any of the employer's job offer requirements are indicators of skill beyond those of an entry level worker, *consideration should be given to* adding a point in the wage level column.

In this case, most tasks described in Respondent's job description fall within the O*NET description. Specifically, both require the worker to conduct experiments, analyze data, present findings, possess complex and innovative testing skills, possess good oral and written communication skills, and possess critical thinking skills. Complainant argued that one of the principle responsibilities in Respondent's job description, "serve as expert in area of specialization in relations with other scientific personnel," demonstrated this is not an entry-level position. However, the O*NET classification encompasses this responsibility. Specifically, tasks under the O*NET description such as writing and publishing articles in scientific journals, conducting research and presenting findings to the scientific audience, and planning and directing studies all require a level of scientific expertise. I find there is not sufficient evidence to support that this is not an entry level, Level I position.

Complainant also argued that the Respondent's job description standing alone was sufficient to show this was a Level II position. However, to calculate the appropriate prevailing wage level using the OES worksheet, the job description must be compared to the equivalent O*NET occupation. In this case, there are no special skills or requirements in Respondent's job description that are not encompassed by the O*NET description and thus, the wage level remains at Level I.

Supervisory Duties

The final step to determine the proper wage level is whether the worker has any supervisory role. Both parties agree that Complainant's position was not supervisory and therefore, this factor does not elevate the wage level.

The proper wage level is determined after every step is completed. In this case, none of the four steps elevated Complainant's wage level beyond Level I.

Miscellaneous Arguments to Raise the Wage Level

Complainant pointed to the specific language in the definition of Level I to support his argument that the Level II category is more appropriate. He argued that he is not an intern, research fellow, or worker in training, all of which are examples of a Level I wage category. He suggested that unlike a Level I wage category position, he was not under close supervision, he performed tasks that required his judgment, and he had a more than basic understanding of the position. However, in applying the OES procedure for determining the prevailing wage, I must follow the checklist and cannot arbitrarily point to certain parts of the definition of Level I to show that his position better fits within Level II.⁴⁴

Complainant also argued that Respondent's visa application stated he was an "extremely well qualified candidate," thus demonstrating a Level II position. That fact that Complainant is extremely well qualified for a Level I position does not automatically mean he is in a Level II position.

Complainant did not present sufficient evidence at any step in the OES checklist to elevate his wage level. His attempts to raise his wage level through phrases used by Respondent and certain parts of Level I and II definitions are inapposite and unpersuasive. The proper wage level for Complainant's position is Level I.

2. Change in Pay Scale

On 1 Jul 12, the Level I prevailing wage rate scale changed from \$17.10 an hour to \$24.21 an hour. From the time he began working for Respondent (February 2011) through 1 Jul 12, Respondent paid Complainant \$17.69 an hour, 59 cents above the prevailing wage rate. However, when the prevailing wage rate changed to \$24.21 an hour, Respondent paid him \$18.20 an hour (\$6.01 *below* the prevailing wage rate).

⁴⁴ Complainant argued that his position was not a Level I position because it required extensive training and he was extremely qualified to perform the tasks of his job. He used the definition of a Level I position to show that *unlike* the definition, his position required more than a basic understanding of the occupation, he was not under close supervision, and he was not an intern, research fellow, or worker in training. However, what Complainant fails to understand is that even if certain aspects of his position are above Level I, that does not automatically place him at Level II. Further, the purpose of using OES is to go through the checklist and use the definitions of each Level as a guiding, but not controlling, factor.

If pay scale adjustments are made during the LCA period, the Respondent must retain documentation to show that after the adjustments, “the wages paid to the H-1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation and area of intended employment.”⁴⁵ In this case, Respondent raised Complainant’s hourly wage to \$18.20 an hour on 1 Jul 12. Respondent argued that paying Complainant \$18.20 an hour was above the median salary (\$17.69 an hour) of other Research Associates.

Respondent is required to pay the greater of the prevailing wage rate and the adjusted actual wage rate. There is no support for Complainant’s argument that the prevailing wage must be recalculated annually. The prevailing wage “must be determined as of the time of filing the [LCA]” and the “LCA is valid for the period certified by ETA.”⁴⁶ The regulation provides no basis upon which to conclude that employers are required to increase pay mid-contract because of a subsequent prevailing wage determination.⁴⁷ Therefore, Complainant’s LCA was valid from 15 Oct 12 at least through Oct 2012, and the prevailing wage for that time period was \$17.10 an hour. Complainant was paid more than the prevailing wage rate from the start of his employment until his termination.

Complainant also argues that the actual wage rate of \$17.69 an hour that Respondent argues it paid other Research Associates was not properly calculated. Respondent maintains that the range of salary paid to other Research Associates was \$27,000 to \$49,191 a year, with a median salary of \$35,428.89. As the most qualified employee in his position, Complainant argued his actual wage rate should have been \$49,191 a year. However, Respondent showed that the salary depended on the experience and qualifications of the individual. Specifically, there were other Research Associates who had 13, 11, and 8 years of experience compared to Complainant’s 4 years. Complainant answers that he had more than 4 years of experience outside of his work with Respondent, he had the most extensive educational background of all Research Associates, he had a deep understanding of the work he performed, and many of the employees included in the pay range were inexperienced and from other departments. I find that Respondent properly adjusted Complainant’s actual wage to be commensurate with his qualifications and experience. As an employer of 46 Research Associates, Respondent determined each individual’s actual wage by weighing each person’s background, education, qualifications, and experience. The evidence supports Respondent’s proffered wage range.⁴⁸

Thus, Complainant was properly paid \$17.69 an hour from February 2012 until 1 Jul 12 and \$18.20 an hour from 1 Jul 12 through his termination. During the term of his employment, Complainant was paid the higher of the prevailing wage rate (\$17.10) and the actual wage rate (\$17.03).

⁴⁵ 22 C.F.R. 655.731(b)(2).

⁴⁶ 22 C.F.R. 655.731(a)(2).

⁴⁷ 22 C.F.R. 655.731 (a)(2)(viii).

⁴⁸ 20 C.F.R. § 655.731(a)(1).

3. Copy of LCA to Complainant

Complainant argues he did not receive a copy of the LCA as required by the DOL WHD upon the start of his employment with Respondent. He insists that he never received a copy of it from Attorney Olsen, who filed the LCA on his behalf. Respondent provided evidence of a letter from Olsen stating a copy of the LCA was sent to Complainant prior to the start of his employment. Complainant argued the letter merely stated his name, not his physical address. He pointed out that any information he received concerning the LCA went through Respondent's office. However, Olsen stated that it is customary for her to send a copy of the LCA directly to the employee (Complainant in this case) and she does not believe she would deviate from such practice. Both parties agree that a violation of this rule does not result in a penalty against Respondent. The burden is on Complainant to show that Respondent did not provide a copy; I find he did not carry that burden.

4. Bona Fide Termination

When an H-1B worker is terminated prior to the expiration of the work authorization, the Respondent must take three steps to establish a bona fide termination and end its obligation to pay wages: (1) provide or obtain clear written notice of termination, (2) notify USCIS of the separation of employee, and (3) offer the H-1B worker return transportation home if employer terminates him prior to the end of period of authorized stay. Until all three steps are satisfied, the employer is obligated to pay the H-1B worker for productive and nonproductive time.⁴⁹

Both parties agree that Respondent complied with steps 1 and 2 of a bona fide termination. The final requirement of transportation is at issue. Respondent argued that *offering* to pay for Complainant's return transportation back to Mexico was sufficient to satisfy step 3. Complainant argued there was no offer, but, even if there was, it alone was not enough.

The sworn affidavits of Harper and Mauricio support the argument that on 24 Aug 12, they extended an offer to pay for Complainant's return trip to Mexico. Also, Respondent presented Hart's handwritten note stating that an offer to Complainant must be made. The weight of the evidence shows that Respondent was aware of its obligations and tried to arrange to pay for Complainant's transportation home. However, he did not accept the offer.⁵⁰

⁴⁹ 20 C.F.R. § 655.731(c)(7)(i)-(ii).

⁵⁰ Complainant pointed to identical statements made by both Harper and Mauricio concerning what occurred in the 24 Aug 12 meeting to show that their answers were questionable and unreliable. He also argued the statements were taken two years after the meeting, questioning the accuracy of their memories. I have no evidence supporting the argument that either Harper or Mauricio are unreliable witnesses and it is the nature of these proceedings that statements may be taken well after the incident. That fact alone does not discount the witnesses' credibility.

Complainant suggests a valid offer must be accompanied with written documentation. Complainant misunderstands the law with this argument. The regulations do not require Respondent to retain written documentation of an offer to provide return transportation. They do state that it is *important* to document each step as evidence of proper termination.⁵¹ Thus, Complainant confuses a recommendation to maintain written records for evidentiary purposes with a substantive requirement that a transaction be done in writing.

Complainant further argued that even if an offer was made, Respondent is not allowed to *assume* that Complainant declined the offer for return transportation and is still obligated to pay. However, based on the credible evidence, I find that a reasonable person in Respondent's position would have concluded that Complainant had no interest in accepting the offer and returning to Mexico. Indeed, after his termination, Complainant did not contact Respondent about anything until December 2013.⁵² He also began working for another U.S. employer, Incycle, later in 2012 after his termination.⁵³

There is nothing in the law to suggest that after having an offering to pay declined, Respondent must continue to offer until the H-1B worker accepts. Indeed, such an interpretation would allow a worker to delay his bona fide termination by refusing to accept the offer.

Finally, Complainant argued that on 13 Mar 13 he returned from Mexico and Respondent did not provide transportation costs.⁵⁴ Respondent argued it did not have notice of Complainant's trip and Complainant never provided any documentation requesting reimbursement for the costs. After extending the offer on 24 Aug 12, Respondent was not obligated to continue offering Complainant payment for his return to Mexico. I find no reason to disbelieve that it was ready, willing, and able to pay for return transportation costs had Complainant contacted Respondent.

I find that to satisfy step 3 of a bona fide termination, the employer is only required to make a good faith offer of payment for return transportation. In this case, Respondent offered on 24 Aug 12 and based on the evidence, Complainant did not accept the offer. Respondent is under no continuing obligation to pay Complainant wages simply because Complainant will not accept Respondent's offer. Therefore, as of 7 Sep 12, when USCIS was notified of Complainant's termination, all three steps for a bona fide termination were satisfied and Respondent was no longer liable to Complainant for wages.

⁵¹ *Pegasus Consulting Group v. Administrative Review Board, U.S. Department of Labor*, 2008 WL 920072 (D.N.J., Mar. 31, 2008) (unpub.).

⁵² Complainant contacted Employer about a check for \$796.90 he received as a result of the DOL WHD determination. He also contacted Oyler about return costs and Oyler responded via email asking for documentation of expenses so Employer could reimburse him. Although the email address was inaccurate, Employer's intent to repay Complainant is clear. Complainant did not call Employer back to ask for reimbursement. After the initial offer was made, it was Complainant's responsibility to contact Employer for reimbursement. I also note that Complainant's Exhibit 6 email communications with Everard Quintanilla do not support his argument that transportation costs were not provided by Employer since Everard Quintanilla is a DOL WHD investigator and not an employee of Employer.

⁵³ Respondent recognized that it ultimately may have been mistaken as to Complainant's subjective desires, but was reasonable in assuming otherwise. Complainant's argument that no conversation took place with Gamboa who testified that he assumed Complainant was declining the return transportation offer to Mexico because he wanted to return to Texas State to work on his Ph.D. is not highly significant.

⁵⁴ Complainant's Exhibit 5.

ORDER

1. Based on the OES prevailing wage category checklist, Complainant was a Level I H-1B worker as a Research Associate for Respondent.
2. Respondent properly paid Complainant the higher of the prevailing wage rate and the actual wage rate during the time of his employment (February 2011 through 24 Aug 12).
3. Respondent supplied Complainant with a copy of the LCA prior to the start of his employment.
4. An offer to pay for Complainant's return transportation costs back to Mexico upon termination from Respondent is sufficient to satisfy the third requirement of a bona fide termination.
5. Respondent satisfied all three requirements for a bona fide termination of Complainant by 7 Sep 12 and Complainant is not due any back wages for his failure to accept Respondent's offer for return transportation costs made on 24 Aug 12.

ORDERED this 10th day of February, 2015 at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

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.