



**Issue Date: 16 September 2014**

Case No.: 2014 LCA 7

In The Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION  
Prosecuting Party

v.

EFFICIENCY3 CORPORATION,  
Respondent

### **DECISION AND ORDER**

This case arises under the Immigration and Nationality Act (“Act” or “INA”), 8 U.S.C. § 1101 *et seq.*, as amended, and its implementing regulations at 20 C.F.R. Part 655, Subparts H and I. The INA allows employers to hire foreign workers under H-1B visas to work in specialty occupations on a temporary basis. Efficiency3 Corporation (“Employer” or “Respondent”) challenges the Determination Letter issued by the Administrator, Wage and Hour Division (“Administrator”) on March 4, 2014. The Administrator found, among other things, that Employer owed \$13,603.38 in back wages to Mr. Xiaosi Liu, an H-1B worker, for productive and non-productive time. Employer challenges this determination. For the reasons stated below, I affirm the Administrator’s determination and find that Respondent owes Mr. Liu \$13,603.38, 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. 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. § 655.731(a)(3). 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). As noted by counsel for the Administrator, the standard for payment during nonproductive periods is whether or not the H-1B worker is “ready and willing” to work. (Tr. at 43, 89-92).<sup>1</sup> If the worker is not “ready and willing” 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 (OALJ). 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.

## PROCEDURAL HISTORY

On March 4, 2014, the Administrator issued a Determination Letter, finding that Respondent failed to sufficiently compensate its H-1B employee. Respondent filed a timely request for a hearing before the OALJ to review the Administrator’s determination.

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<sup>1</sup> I will use the following abbreviations: Hearing Transcript (“Tr.”), Administrator’s Exhibit (“AX”), Respondent’s Exhibit (“RX”), and Administrative Law Judge Exhibit (“ALJX”).

I held a hearing in this case on July 1, 2014 in Washington, DC. I admitted Administrator's Exhibits 1 through 28, Respondent's Exhibits 1 through 34, and Administrative Law Judge Exhibits 1 through 2.<sup>2</sup> Both parties testified at the hearing and made closing arguments. Mr. Joseph Zaloom, CEO of Efficiency3 Corporation, testified *pro se* on behalf of Respondent.<sup>3</sup> The Administrator submitted a written brief on September 2, 2014; the Respondent submitted a written brief on September 3, 2014. On September 9, 2014, the Administrator submitted a Response to Respondent's post-Trial Brief.<sup>4</sup> The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

## FACTUAL BACKGROUND

Respondent is a private company focusing on Internet-based energy and utility management systems, and operates out of an office in Falls Church, Virginia (AX-26 at 15, 26).<sup>5</sup> On March 23, 2009, Respondent filed an LCA to obtain permission from DOL to employ a utility cost analyst (AX-26 at 19).<sup>6</sup> The LCA specified a prevailing wage rate of \$45,094 per year (*Id.*). Respondent simultaneously filed an I-129, Petition for a Nonimmigrant Worker, for Mr. Xiaosi Liu, a Chinese foreign national (AX-4). The I-129 form referenced the accompanying LCA for Mr. Liu. Respondent's H-1B petition was approved on April 9, 2009, authorizing Mr. Liu's employment as a utility cost analyst from October 1, 2009 until September 12, 2012 (AX-7).

On October 1, 2009, Mr. Liu began his employment with Respondent. He was paid \$1,916.66 bi-monthly, amounting to an annual salary of approximately \$49,970 (AX-8). From October 1, 2009 until December 15, 2009, Respondent paid Mr. Liu \$1,916.66 each pay period. *Id.* On December 15, 2009 and December 30, 2009, Respondent paid Mr. Liu a reduced amount of \$1,840.66 (*Id.*). On January 2010, Respondent resumed paying Mr. Liu \$1,916.66 on a bi-monthly basis before increasing his salary to \$1,974.17 on October 15, 2010. From October 15, 2010 to January 15, 2012, Respondent paid Mr. Liu \$1,974.17 bi-monthly, totaling to an annual salary of approximately \$51,469 (AX-8, 9, 10, 11).

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<sup>2</sup> In an Evidentiary Order issued on August 4, 2014, I admitted AX-29, which consists of two pages of Respondent's deposition transcript that were referred to at the hearing. ALJX-1 is Administrator's Pre-Hearing statement, dated June 20, 2014. ALJX-2 is Respondent's Pre-Hearing Statement, dated June 19, 2014.

<sup>3</sup> Mr. Zaloom was joined by his colleague Michael Downey at the hearing; neither is a licensed attorney.

<sup>4</sup> After the hearing, a Wage and Hour technician, who was unaware that this matter was in litigation, contacted the Respondent for a status update on the back wages, and to explain the possible consequences of non-payment. On August 26, 2014, Mr. Zaloom submitted a "Motion to Restrain Mr. Christopher Silva from trying [sic] to extort Efficiency3 to pay off Mr. Xiaosi Liu while the above mentioned case is still going through the legal process." In a letter dated August 21, 2014, counsel for the Administrator stated that she had notified the technician that the case was in litigation, and that the technician would make no further contact with the Respondent while the case was pending. Counsel for the Administrator stated that she had contacted Mr. Zaloom to explain that the call was an error, apologize for any confusion, and to explain that the Respondent would not be subject to federal withholding for non-payment while a decision was pending. On August 21, 2014, Mr. Zaloom submitted a "rebuttal" to the Administrator's response, again requesting that I issue an order prohibiting Mr. Silva or "his associates" from contacting Respondent asking it to pay off Mr. Liu while the matter was pending. As I have no such authority, even if such an order were warranted, I have not granted Mr. Zaloom's request.

<sup>5</sup> In 2009, Respondent was operating as Utilities Management Corporation out of an office in Arlington, Virginia.

<sup>6</sup> The corresponding reference number for this LCA is ETA Case Number I-09073-4765301.

On January 2012, Mr. Zaloom told members of his staff that he was instituting a mandatory pay cut after losing a major business contract (Tr. at 109-110, 197-199). Mr. Liu's salary was also reduced: on January 15, 2012 he was paid \$1,250.00. On January 31, 2012 Mr. Liu received \$802.00. Between February 15, 2012 and June 29, 2012, he was paid \$1,026.00 bi-monthly (AX-16 at 2). On July 15, 2012, Respondent paid Mr. Liu \$1,100.00. Between July 31, 2012 and August 31, 2012, payments to Mr. Liu increased to \$2,497.75, \$2,000.00 and \$2,000.00. On September 17, 2012, Mr. Liu received the sum of \$775.00 (*Id.*).<sup>7</sup>

Mr. Liu testified that as a result of his salary reduction, he struggled to pay for living expenses: "I [had] to use my savings, and for some time I [had] to live on [a] credit card." (Tr. at 112). He even requested that Mr. Zaloom cancel his health insurance so that Mr. Liu could use his employee copayment to cover the cost of food (*Id.* at 112-13, 202, 244).

During the course of his employment, even following his salary cut, Mr. Liu maintained a full-time schedule. He testified that he worked forty hours a week and sometimes worked overtime between January and September 2012 (Tr. at 111). Mr. Zaloom confirmed that Mr. Liu was at the office eight hours a day "or even longer" during the relevant time period (Tr. at 184). Mr. Zaloom testified that Mr. Liu stayed late out of convenience in order to minimize the length of his commute (Tr. at 182-183).

After the Administrator received a complaint regarding nonpayment of wages, Christopher Silva, a Wage and Hour investigator, was assigned to investigate the allegation.<sup>8</sup> Mr. Silva researched the Respondent online, performed a site visit, and met with Mr. Zaloom during the visit (Tr. at 24). During the meeting, Mr. Silva asked for Respondent's public access file, which contains required information for every H-1B employee. Mr. Zaloom provided some of the required documents, including the I-129 and payroll records, but did not have the complete public access file. Even though absence of a public access file constitutes a violation under the regulations, Mr. Silva decided to give Respondent "the benefit of the doubt" and did not cite Mr. Zaloom for this violation (Tr. at 25).

Based on his review, Mr. Silva determined that Respondent underpaid Mr. Liu in December 2009 (Tr. at 27-35). Mr. Silva explained that at the start of his employment in 2009, Mr. Liu was paid \$1,916.66 bi-monthly. As there were no employees with a similar job title, this wage became Mr. Liu's required prevailing wage (Tr. at 33).<sup>9</sup> Based on the 2009 required wage, Respondent underpaid Mr. Liu by \$152.00 (AX-16; Tr. at 38).

Mr. Silva also determined that Respondent underpaid Mr. Liu from January 15, 2012 to September 17, 2012. As of November 2010, Mr. Liu's compensation increased to a rate of \$1,974.17 bi-monthly, and this higher amount effectively became the required wage (AX-16; Tr.

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<sup>7</sup> After September 2012, Mr. Liu's full-time LCA expired and he was converted to part-time status. As a result, Respondent was no longer "under the restrictions of that prevailing rate and that salary" (Tr. at 42).

<sup>8</sup> As of March 2014, Mr. Silva has been promoted to Assistant District Director of the Arlington, Virginia Office of the Wage and Hour Division.

<sup>9</sup> Based on the LCA, Mr. Silva determined that the prevailing wage for a utility cost analyst is an annual salary of \$45,094. As Mr. Liu's bi-monthly compensation was higher than this minimum amount, totaling to about \$49,970 annually, the latter became the default required wage (Tr. at 33, 37).

at 39). This amount applied through September 2012, at which point Mr. Silva calculated that Mr. Liu was underpaid by \$13,451.38 (Tr. at 40-42). Adding up the deficiencies in 2009 and 2012, Mr. Silva concluded that Respondent underpaid Mr. Liu a total of \$13,603.38 (*Id.*). Following an unsuccessful attempt to schedule a final conference with Respondent, the Administrator issued a Determination Letter with these findings.

Respondent does not deny that it underpaid Mr. Liu. According to Mr. Silva, when he asked Mr. Zaloom about the compensation deficiencies, Mr. Zaloom informed him that the company was having financial difficulties due to losing a major contract (Tr. at 43). At the hearing, Mr. Zaloom confirmed that he underpaid Mr. Liu on December 2009. He also conceded to the 2012 wage deficiency as a result of business difficulties:

- Q. And you had to reduce Mr. Liu's salary because of the loss of the Architect of the Capital contract?
- A. Yeah. This was a small company losing \$25,000 a month in revenue.
- Q. And you could not maintain his salary after the loss of the contract?
- A. Yes, I could not.

(Tr. at 179-180).<sup>10</sup> Although he concedes the underpayment, Mr. Zaloom argues that Mr. Liu coerced him into participating in a “payroll manipulation scheme.” Mr. Zaloom also contends that he was forced to keep Mr. Liu on staff because Mr. Liu refused to release company passwords and other sensitive information (Tr. at 203-205, 223-226).<sup>11</sup>

Respondent contacted the U.S. Citizenship and Immigration Services (“USCIS”) by correspondence dated April 9, 2013, specifying that Mr. Liu “has effectively resigned from my company” (AX-20).<sup>12</sup> At the hearing, Mr. Zaloom testified that he knew he needed to contact USCIS in order to effectuate a *bona fide* termination of Mr. Liu (Tr. at 170).

## DISCUSSION

As discussed above, the INA allows U.S. employers to hire H-1B nonimmigrants on a temporary basis. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. Under the INA’s “no benching” provisions, the employer must pay the employee for time he does not work if his absence from work is due to a decision by the employer. 20 C.F.R. § 655.731(c)(7)(i). However, if the employee’s decision not to work is voluntary or is not employment-related, the

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<sup>10</sup> The Administrator called Mr. Zaloom as an adverse witness during this exchange.

<sup>11</sup> In the course of this proceeding, Mr. Zaloom has repeatedly claimed that his company is a victim of widespread fraud and conspiracy, and that the Wage and Hour Division has participated in, and failed to acknowledge his allegations of extortion, false statements, and other criminal activity. Indeed, Mr. Zaloom has claimed that Mr. Silva targeted him, conducted a biased investigation, and engaged in extortion; he has referred to Mr. Silva as a “criminal suspect,” and claimed that he has engaged in criminal activities. On multiple occasions, the first during a May 7, 2014 telephonic status conference and again repeatedly at the hearing, I advised Mr. Zaloom that this case is purely a civil matter and that as an Administrative Law Judge I do not have the authority to review any of his allegations of criminal conduct (Tr. at 233-238). I informed Mr. Zaloom that he was free to initiate separate complaints of criminal activity with any other agencies he feels are appropriate (*Id.*). As of the date of issuance of this Decision and Order, Mr. Zaloom has a pending investigation with the DOL’s Office of Inspector General.

<sup>12</sup> On April 1, 2013, Respondent offered Mr. Liu a five-month employment contract to perform research and development. Mr. Liu declined this offer (Tr. at 189).

employer is not obligated to pay him/her. § 655.731(c)(7)(ii). For instance, an employer is not required to pay an H-1B worker who takes time off to tour the United States, care for a sick relative, is on maternity leave, or is temporarily incapacitated due to an automobile accident. *Id.* Furthermore, if the employer effectuates a *bona fide* termination of the employment relationship prior to the end date specified in the LCA, it is no longer obligated to pay the employee. *Id.*

Based on the evidence before me, I find that Respondent underpaid Mr. Liu during the active periods of the H-1B employee's full-time LCA. The only question in this case is whether the underpayment constitutes a violation under the regulations.

Neither of the two statutory exceptions to an employer's obligation to pay the required wage is triggered here. First, there is no evidence in the record that Mr. Liu voluntarily decided not to work or was unavailable to work for non-employment-related reasons such as vacation or disability. In fact, Mr. Liu continued to work forty hours a week, and even some overtime, during the periods when Respondent lowered his salary.<sup>13</sup> Second, it is undisputed that Respondent did not effectuate a *bona fide* termination before the expiration of Mr. Liu's full-time LCA. Respondent contacted the authorities regarding Mr. Liu's resignation on April 9, 2013, almost seven months *after* the end of the original LCA. As a result, Respondent is obligated to pay the required wage for the duration of the employee's LCA.

The Respondent's defense appears to be based on Mr. Zaloom's claim that Mr. Liu "manipulated" the Respondent's payroll, and prevented the Respondent from being able to fire him by holding computer passwords and system procedures hostage. Even assuming that this would constitute a valid defense to his underpayment of Mr. Liu, Mr. Zaloom's own testimony contradicts such a claim. At the hearing, Mr. Zaloom acknowledged that he was in charge of the payroll, and that the threat of Mr. Liu leaving the Respondent without turning over necessary computer information and procedures was "implicit" – Mr. Liu never made such an explicit threat (Tr. 207-230). In fact, when Mr. Liu became "H-1B part-time" in September 2012, Mr. Zaloom was able to obtain this documentation from him (Tr. 215). And apparently these "manipulations and threats" did not deter Mr. Zaloom from offering Mr. Liu a five-month employment contract, to perform research and development, on April 1, 2013.

In short, the Respondent did not satisfy either of the two requirements for excusing the failure to pay the required wage. Mr. Liu was available to work during the relevant time period, and the Respondent did not make any attempt to terminate his employment.

## CONCLUSION

Based on the foregoing discussion, I find that Respondent underpaid Mr. Liu a total of \$13,603.38. As none of the applicable exceptions apply, Respondent's underpayment constitutes a violation of the regulations.

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<sup>13</sup> Mr. Zaloom's argument that there was not enough work to be done at the office and that Mr. Liu stayed late for his own convenience is immaterial. The regulations specify that this exception applies to an employee's unavailability that is *unrelated* to employment. As Mr. Liu was "ready and willing" to work, a reduction in workload, loss of business clients, or any other *employment-related* justification does not shield Respondent from paying the required wage.

## ORDER

Based on the foregoing, the Administrator's determination is **AFFIRMED**. **IT IS HEREBY ORDERED** that Respondent, Efficiency3 Corporation, pay back wages of \$13,603.38, plus interest accrued.

**SO ORDERED.**

LINDA S. CHAPMAN  
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.

