

Respondent, his former employer. The Prosecuting Party, who was allegedly employed by the Respondent under a LCA from June 2013 to August 2013, asserted that the Respondent failed to pay “bench pay” (time the employee was not working) and failed to pay him for one week of productive work. See Prosecuting Party’s March 2015 Pre-Hearing Statement. He also alleged that the Respondent collected H-1B filing fees from the Prosecuting Party, failed to provide a copy of the certified LCA, and attempted to impose an illegal penalty, after the Prosecuting Party terminated the employment relationship. Id.

After an investigation, by letter dated February 3, 2015, the District Director, WHD, acting on behalf of the Administrator, determined that there was no violation. The WHD Determination Letter did not contain any additional information on the investigation or the reason for this determination. On February 26, 2015, through counsel, the Prosecuting Party requested a hearing. Under § 655.840(b), an Administrative Law Judge (“ALJ” or “Judge”) has the authority to affirm, deny, reverse, or modify, in whole or in part, the determinations of the Administrator.

On March 9, 2015, the case was assigned to me. I issued a Notice of Hearing on March 12, 2015, scheduling the hearing for April 1, 2015. By letter dated March 20, 2015, Respondent’s counsel requested a continuance of the hearing. I held a pre-hearing telephonic conference with the parties on March 25, 2015. At the conference, we discussed the granting of the Respondent’s continuance and submission of pre-hearing statements. By Order dated March 26, 2015, I rescheduled the hearing for April 13, 2015. On April 12, 2015, the Respondent filed a “Motion to Dismiss Appeal or Otherwise Impose Sanctions on Complainant for Failure to Comply with Discovery Obligations.”

The hearing was held before me on April 13, 2015, in Cherry Hill, NJ. At the hearing, I granted the Prosecuting Party an opportunity to respond to the Respondent’s Motion to Dismiss by May 5, 2015. Hearing Transcript (T.) at 238. I also directed the Respondent to submit: an index to the Respondent’s Exhibits (T. at 237) and the Prosecuting Party’s earnings statement from V-Soft Consulting Group, Inc. (“V-Soft”) (T. at 108). I designated the earnings statement as Respondent’s Exhibit 26. Id. I informed the parties that this exhibit will be admitted once it is received. T. at 108.²

At the hearing I admitted the Prosecuting Party’s Exhibits (CX) 1-7 and the Respondent’s Exhibits (RX) 1-25. T. at 9-10. I also received the testimony of Mr. Komakula, the Prosecuting Party, and Hari Nagumalla and Raj Alexander, officials of the Respondent company. On April 22, 2015, this office received the Respondent’s Exhibit Index and RX 26. Along with these documents, the Respondent submitted a United States Citizenship and Immigration Services (“USCIS”) receipt of an H-1B petition, filed by the Respondent on behalf of the Prosecuting Party, dated June 5, 2013. By Order dated May 5, 2015, I designated the USCIS receipt as RX 28.

² The Respondent also asked to admit Exhibit A to its Motion to Dismiss. At the hearing, I designated Exhibit A as RX 27 and admitted it into the record. The Respondent never submitted Exhibit A and during the hearing, both parties agreed that RX 27 is not relevant to the merits of the case. T. at 109. Thus, RX 27 is not included in the record.

On April 27, 2015, this office received the Prosecuting Party's "Response to Respondent's Motion to Dismiss and Counter Request to Impose Sanctions on Respondent for its Failure to Comply with Discovery Obligations." On May 5, 2015, I issued an Order Denying Respondent's Motion to Dismiss and Directing the Prosecuting Party to Comply with the Discovery Request by June 4, 2015. By cover of letter dated May 28, 2015, the Prosecuting Party submitted documents responding to the discovery request. On June 9, 2015, I issued an Order to Show Cause directing the Respondent to explain why sanctions should be imposed in light of the Prosecuting Party's document production. On June 24, 2015, the Respondent submitted a Motion for Proposed Sanctions, stating that the Prosecuting Party failed to submit all requested documents in its last document production. Along with its Motion, the Respondent submitted documents from V-Soft showing email communications between V-Soft and the Prosecuting Party. On June 25, 2015, the Prosecuting Party filed an objection to the Respondent's Motion for Proposed Sanctions.

By Order dated June 29, 2015, I acknowledged the Respondent's Motion for Proposed Sanctions and directed the Prosecuting Party to submit all emails and documents showing communications between the Prosecuting Party and V-Soft. On July 7, 2015, the Prosecuting Party submitted a letter responding to my June 29, 2015 Order. In his letter, the Prosecuting Party stated that its last document production contained all electronic communications between the Prosecuting Party and V-Soft. He wrote that he requested all electronic communications from V-Soft, which V-Soft promised to mail and was in the process of doing so. The Prosecuting Party asked to hold the Respondent's Motion for Proposed Sanctions in abeyance, to allow the Prosecuting Party to review the V-Soft emails and affirm whether or not he had them in his possession during the discovery process. On July 14, 2015, I issued an Order granting the Prosecuting Party time to review the V-Soft emails and directing him to respond by August 21, 2015. On July 21, 2015, the Prosecuting Party filed a response to my Order. Along with his response, the Prosecuting Party submitted an Attestation, stating that the Prosecuting Party did not possess any of the additional emails that V-Soft submitted for review. Accordingly, the Prosecuting Party asked that the Respondent's Motion for Proposed Sanctions be dismissed.

On October 19, 2015, I issued an Order Denying the Respondent's Motion to Dismiss but found that the Prosecuting Party failed to comply with discovery. As a remedy, I re-opened the record and allowed both parties to request admission of any documents provided to the Respondent by V-Soft or other entities. I also found the Prosecuting Party's employment with V-Soft established effective August 21, 2013 (based on an email dated September 30, 2013 discussing pay pro-rated from August 21, 2013). Therefore, I found that the Respondent does not owe any back wages to the Prosecuting Party as of that day. I informed the parties that I would consider evidence as to whether the Respondent's liability for back wages to the Prosecuting Party ended prior to August 21, 2013. Pursuant to this Order, briefs were due by December 15, 2015.

On October 30, 2015, the Respondent filed a Motion requesting to admit several documents which it submitted along with its June 24, 2015 letter.³ The Respondent also asked to admit documents that it obtained from ClearBridge Technology Group ("ClearBridge"), attached

³ The Respondent asked to admit the following exhibits: CM-B, CM-C, CM-D, CM-F. I designate these exhibits as RX 29, RX 30, RX 31, and RX 32 respectively.

to the Motion.⁴ On November 4, 2015, the Prosecuting Party filed a Motion to Direct Respondent to Produce Additional Documentation. By Order dated December 9, 2015, I granted the Respondent's Motion to Admit Documents and denied the Prosecuting Party's Motion. On December 14, 2015, the Respondent requested a three day extension to file briefs and the Prosecuting Party filed an opposition to the Respondent's request. By Order dated December 16, 2015, I granted the Respondent's request for extension of time. On December 18, 2015, both parties filed closing briefs. On December 21, 2015, the Prosecuting Party filed an Objection/Request to Disregard Statement Contained in Respondent's Post-Hearing Brief.

II. ISSUES

Based on the assertions the parties made at the hearing and the parties' filings, including their post-hearing briefs, I find the issues to be determined are as follows:

- 1) Whether the Respondent violated the Act by requiring the Prosecuting Party to pay H-1B filing fees;
- 2) Whether the Respondent failed to provide the Prosecuting Party with a copy of his certified LCA in violation of 20 C.F.R. §655.805(a)(5);
- 3) Whether the Respondent violated 20 C.F.R. §655.731(c)(10) by its attempt to require the Prosecuting Party to pay a \$10,000 early termination penalty; and
- 4) Whether the Prosecuting Party is entitled to back wages and if so, whether he is entitled to interest on those back wages.

III. DOCUMENTARY EVIDENCE

The Prosecuting Party's Exhibits are summarized as follows:

- CX-1: The Prosecuting Party's March 19, 2015 Pre-Hearing Statement
- CX-2: April 7, 2015 Supplement to Pre-Hearing Statement
- CX-3: Prosecuting Party's Exhibits Volume 1
 - a-d: V-Soft's H-1B Approval Notice, H-1B Petition, certified LCA, and H-1B support letter
 - e, x: the Prosecuting Party's Affidavit detailing the violation of his H-1B
 - f, l, z: Artech Information Systems, LLC ("Artech") pay stubs for the Prosecuting Party from February 16, 2013 through May 10, 2013
 - g: Premium Processing Receipt Notice I-797C, converting the Respondent's previously filed H-1B to premium processing
 - h: Respondent's Letter of Offer
 - i-j: Emails between the Prosecuting Party and the Respondent
 - k: Artech's Extension of Status receipt notice dated April 9, 2013
- CX-4: Prosecuting Party's Exhibits Volume 2
 - a-u: emails between the Prosecuting Party and Respondent, marketing the Prosecuting Party for a position
 - v: Prosecuting Party's paychecks, W-2, and Tax Return for 2013

⁴ I designate the ClearBridge documents as RX 33.

- w: Artech's May 6, 2013 email terminating the Prosecuting Party's employment effective May 3, 2013
- y: V-Soft's executed employment agreement with the Prosecuting Party
- CX-5: Prosecuting Party's Exhibits Volume 3
 - a: Respondent's H-1B petition, LCA, employment agreement, and offer letter
 - b: Respondent's reply to WHD's investigation
 - c: Emails between the Prosecuting Party and the Respondent
 - d: Prosecuting Party's counsel's October 14, 2013 email informing the Respondent of the intent to file a complaint
 - e: Raj Alexander's October 15, 2013 email response to complaint letter
 - f: October 4, 2013 letter from Prosecuting Party's counsel detailing the Prosecuting Party's complaints of H-1B violations
 - g: The Prosecuting Party's reply dated November 14, 2013 to the Respondent's October 22, 2013 letter denying violations
 - h: Respondent's former counsel's October 22, 2013 letter
 - i: Artech's pay stubs, H-1B petition and related documents
 - j: Contractor Agreement between ClearBridge and the Respondent
 - k: June 25, 2013 Request for Evidence from USCIS to the Respondent

The Respondent's Exhibits are summarized as follows:

- RX-1: Artech emails regarding end of service (March 13-May 3, 2013)
- RX-2: May 6, 2013 Artech email confirming end of service
- RX-3: Respondent's internal emails regarding the Prosecuting Party (May 8)
- RX-4: The Respondent's June 3, 2013 H-1B petition with attachments
- RX-5: V-Soft H-1B petition (Notice Date December 20, 2013)
- RX-6: The Prosecuting Party's August 16, 2013 Affidavit
- RX-7: Executed ClearBridge Independent Contractor Agreement with the Respondent (July 17, 2013)
- RX-8: ClearBridge Contractor Agreements with V-Soft for the Prosecuting Party's employment
- RX-9: V-Soft's executed Employment Agreement with the Prosecuting Party
- RX-10: Emails between ClearBridge and Prosecuting Party (May 16-June 27)
- RX-11, 12: Emails between the Prosecuting Party and the Respondent regarding self-marketing and payroll
- RX-13-RX 17: Emails between ClearBridge, the Respondent and the Prosecuting Party regarding Hitachi Colorado Position
- RX-18: ClearBridge Contractor Agreement with the Respondent (July 17)
- RX-19: Email from the Respondent to ClearBridge Re: request to ClearBridge to sign agreement (August 7)
- RX-20: Email from the Prosecuting Party to ClearBridge and V-Soft stating that V-Soft is his new employer (August 8)
- RX-21: Email from ClearBridge to the Prosecuting Party re: timesheet for August 5, 2013 (August 13)

- RX-22: Email from the Prosecuting Party to ClearBridge re: timesheet for August 12, 2013 (August 19, 2013)
- RX-23: Emails between the Respondent and the Prosecuting Party re: trying to contact the Prosecuting Party (August 21-September 4, 2013)
- RX-24: Letter from David Piver to the Respondent (October 4, 2013)
- RX-25: DOL interview statement by Hari Nagumalla (July 16, 2014)
- RX-26: The Respondent's Earning statement from V-Soft (October 31, 2013)
- RX-27: Not submitted
- RX-28: The Respondent's USCIS receipt for H-1B petition (June 5, 2013)
- RX-29: Emails between the Prosecuting Party and V-Soft re: H-1B petition (August 2-14, 2013)
- RX-30: Emails between Prosecuting Party and V-Soft July 2- August 3
- RX-31: V-Soft's payment to Prosecuting Party for ClearBridge (August 12-18)
- RX-32: The Prosecuting Party's emails with V-Soft before June 3, 2013
- RX-33: The Prosecuting Party's emails with ClearBridge (July- September)

In this Decision, I have considered all the evidence of record, including the documentary evidence, whether or not I have specifically discussed the item of documentary evidence at issue. I also have considered the testimonial evidence, and the post-hearing arguments of the parties.

The Parties' Arguments

The Prosecuting Party asserts that he was the Respondent's employee and the Respondent impermissibly "benched" the Prosecuting Party from June 3, 2013 until December 20, 2013. Accordingly, the Prosecuting Party states that the Respondent violated the Act and is obligated to pay back wages for that employment period. The Prosecuting Party also asserts that he was required to pay H-1B filing fees in violation of the Act. Finally, the Prosecuting Party asserts that the Respondent committed other regulatory violations by failing to provide the Prosecuting Party with his certified LCA and imposing an early termination penalty.

In its brief, the Prosecuting Party states that his employment with the Respondent began on June 3, 2013, the date that he accepted the Respondent's employment and began performing services for the Respondent. He argues that his employment for the Respondent ended on December 20, 2013, the date that USCIS approved V-Soft's H-1B transfer petition. Alternatively, the Prosecuting Party argues that his employment for the Respondent ended on the date that the Respondent executed a bona fide termination.

In its brief, the Respondent asserts that there was no employment relationship between the Prosecuting Party and the Respondent. The Respondent wrote that the Prosecuting Party had intended to work for V-Soft since May 2013 and did not expect to be paid for the time that he was with the Respondent. The Respondent did not address whether it violated the Act and its regulations by receiving H-1B filing fees from the Prosecuting Party, failing to provide a copy of the LCA, or imposing an early termination penalty.

IV. FACTUAL BACKGROUND

A. Stipulated Facts

In their pre-hearing statements, the parties stipulated to the following facts: 1) Artech was the Prosecuting Party's employer before the Respondent filed an H-1B transfer petition; 2) Artech had an H-1B petition pending when the Prosecuting Party approached the Respondent for H-1B transfer; 3) the Respondent filed an H-1B petition on behalf of the Prosecuting Party on June 3, 2013; 4) the Prosecuting Party paid \$4,000 to the Respondent; and 5) the Prosecuting Party paid a \$1,225 USCIS premium processing fee. I find these stipulated facts are supported by the evidence of record, and I accept the parties' stipulations.⁵

B. Facts According to the Evidentiary Record

In addition to the facts stipulated above, I make these additional findings of fact based upon the evidence submitted by both parties:

The Prosecuting Party worked for Artech under H-1B status from May 2012 to April 2013.⁶ CX 1e; CX 5i. On April 9, 2013, Artech timely filed an H-1B extension petition. CX 1k. USCIS issued a Request for Evidence ("RFE") on the pending H-1B extension petition, requesting an end-client letter. CX 1e. On May 3, 2013, Artech informed the Prosecuting Party, via email, that it will be terminating his H-1B employment effective immediately due to "a Cost Reduction effort by the client." RX 1. By email dated May 6, 2013, Artech notified the Prosecuting Party that his employment with Artech has been terminated as of May 3, 2013 and Artech will revoke his H-1B petition effective May 17, 2013. RX 2.

The Respondent filed an H-1B petition on behalf of the Prosecuting Party for a period of employment from June 1, 2013 through May 31, 2016.⁷ RX 4. The SOC occupation title was "computer programmer" with a SOC (ONET/OES) code of 15-1131 and rate of pay of \$65,000. Id. USCIS received the H-1B petition on June 5, 2013. RX 28. On June 3, 2013, the Prosecuting Party signed the Respondent's Letter of Offer, dated May 31, 2013, for the position of "computer programmer" with a base compensation of \$93,600. CX 5a. The bonus/bench pay was listed as "quarterly up to 70% of the billing with applicable deductions of tax and base compensation." Id.

USCIS converted the Respondent's H-1B petition to a premium processing case on June 17, 2013. CX 5e. On June 25, 2013, USCIS issued an RFE to the Respondent's H-1B transfer petition. CX 5k. On July 17, 2013, the Respondent signed an Independent Contractor Agreement with ClearBridge Technology to perform work for Hitachi Data Systems from August 5, 2013 to August 8, 2014. RX 7. On August 13, 2013, V-Soft signed an Independent Contractor Agreement with ClearBridge for the Prosecuting Party to perform work from August 14, 2013 to August 8, 2014. RX 8. On August 19, 2013, V-Soft filed an H-1B petition on behalf

⁵ Based on the Respondent's H-1B USCIS receipt, the Respondent actually filed the petition on June 5, 2013, and not June 3, 2013 as stipulated by the parties. I find that the difference between the parties' stipulation and the actual date is inconsequential.

⁶ Artech's H-1B visa for the Prosecuting Party was due to expire on April 30, 2013. CX 5i.

⁷ Mr. Nagumalla signed the H-1B petition on May 25, 2013. The H-1B application contains a copy of an LCA, which was certified on May 16, 2013. RX 4.

of the Prosecuting Party effective from December 19, 2013 through August 21, 2016. RX 5. On August 22, 2013, the Prosecuting Party signed V-Soft's employment agreement. On October 2, 2013, USCIS denied the Respondent's H-1B petition by reason of abandonment.⁸ On October 22, 2013, the Prosecuting Party filed a complaint with the WHD.

C. Testimonial Evidence

Jaipal Komakula Testimony

The Prosecuting Party, Jaipal Komakula, testified on his own behalf. He stated that he worked at Artech for approximately 12 months, performing work for IBM, an end client. His project for IBM ended on May 3, 2013 and Artech terminated his employment on May 31, 2013. Artech sent the Prosecuting Party an email letting him know that Artech will revoke his H-1B effective May 17, 2013. After he received the email, the Prosecuting Party called Artech and asked for an extension of an additional two weeks. According to the Prosecuting Party, Artech agreed to extend the deadline. T. at 23-35. On cross-examination, the Prosecuting Party confirmed that Artech extended his H-1B petition until May 31 but said that he does not have an email to prove this fact. He said that his last paycheck from Artech had an end date of May 10. T. at 67-68.

After his termination, the Prosecuting Party reached out to other companies, including V-Soft and the Respondent, seeking to transfer his H-1B petition. V-Soft did not offer the Prosecuting Party a position because it required an end client project in order to sponsor his H-1B. V-Soft told the Prosecuting Party that it will only offer him a job if the Prosecuting Party receives an end client. T. at 23-35, 67.

The Prosecuting Party considered himself to be the Respondent's employee as of June 3, 2013. No one at the Respondent company ever told him that he would get paid only after the H-1B petition was approved. In fact, the Prosecuting Party said that he was authorized to start working for the Respondent at an end client site before his H-1B petition was approved. The Prosecuting Party testified that he went on interviews trying to find an end client with the Respondent. He said that the Respondent was his H-1B employer in July when he was marketing himself to companies. The Prosecuting Party confirmed that he did not look for any other H-1B employer at this time. He started looking for other H-1B employers around July 15, 2013 because the Respondent was not paying him and because he was afraid that his H-1B would not be approved.⁹ However, even though the Prosecuting Party was looking at other employers, he continued to market himself for the Respondent. Later on, Raj Alexander asked the Prosecuting Party not to market himself anymore because the Respondent could get a better rate by marketing the Prosecuting Party. T. at 46-63.

The Prosecuting Party started working at an end client, ClearBridge, on August 5, 2013 and worked there for five days. T. at 41-46. The Prosecuting Party said that from July 17th, when he was hired for the Hitachi project, until August 5th, when he started working for the

⁸ USCIS email to the Department of Labor dated January 15, 2015.

⁹ The Prosecuting Party testified that he was "so afraid with Aqua, for, I don't know that I can get H-1B with them as a project."

project, he was on standby. The Prosecuting Party did not work on any other projects or for any other clients at that time. T. at 121. The Prosecuting Party informed ClearBridge that he switched his employer to V-Soft the first week of August. T. at 87-90.

On cross-examination, the Prosecuting Party acknowledged that he never told the Respondent that he was leaving as its employee. He reiterated that he reached out to V-Soft about transferring sometime in mid-July or beginning of August. Prior to June 3, 2013, the Prosecuting Party applied for other companies, and he acknowledged that he told end clients that his employer was V-Soft even though he was not employed by V-Soft at that time. The Prosecuting Party said that he did not see the bonus/bench pay term on the Respondent's offer letter which states that he will get 70 percent of the client billing. T. at 64-80. He did not know where the 70-30 split term came from and did not understand what the term meant. He said that he expected to get paid \$45 per hour by the Respondent. T. at 112.

The Prosecuting Party testified that he was asked to pay an H-1B processing fee of \$4,000 and was later asked to pay the H-1B premium processing fee. The Prosecuting Party said that he spoke with Hari Nagumalla on the phone, who told him that the Prosecuting Party has to pay \$4,000 for the H-1B filing. T. at 37-38.

Hari Nagumalla Testimony

Hari Nagumalla, the Respondent company's president, testified under oath at the hearing. He testified that the Respondent made the Prosecuting Party an employment offer on May 10, 2013. On May 29, the Prosecuting Party reached out to the Respondent and stated that he was interested in the offer. The company's offer was that the Prosecuting Party would become an employee from the day that his H-1B visa is approved.¹⁰ T. at 127-130. Mr. Nagumalla reported that "in the discussion what we told him is we don't want him to work, but he said he wanted to find something. We said if you find something yourself, we'll put it—we'll put you under the project until the H-1B gets approved, but we'll pull you out after that." T. at 191. Mr. Nagumalla was hesitant to allow the Prosecuting Party to work because he felt that the Prosecuting Party's H-1B situation was tricky; the Prosecuting Party was on a pending H-1B extension for which the previous employer, Artech, received an RFE. T. at 192. Thus, Mr. Nagumalla felt that the Prosecuting Party did not have valid H-1B status; he explained that the Prosecuting Party was not working from May 10 to June 1, and so may have been out of status.¹¹ T. at 193.

Mr. Nagumalla went on to state that the Respondent did not want the Prosecuting Party to work because if the company placed the Prosecuting Party into a project, it could not take him out without a valid reason. The client would be upset if it found out that its consultant is taken out and would be concerned as to why the Respondent gave it a consultant whose immigration status is uncertain. T. at 194. Thus, the Respondent did not allow the Prosecuting Party to start

¹⁰ Mr. Nagumalla pointed out an email that summarizes this discussion. In RX 12, page 58, the Prosecuting Party wrote to Mr. Nagumalla: "already we discussed last month so you mentioned, the paycheck is unnecessary until my H-1B approve or get a new project."

¹¹ Mr. Nagumalla confirmed that the Respondent's H-1B petition shows that the Prosecuting Party was in H-1B status at the time the Respondent filed his H-1B transfer application. T. at 137; RX 4.

on the in-house project because it did not want to lose a client, and Mr. Nagumalla could not “present a candidate who I don’t know whether I will be able to employ or not.” T. at 198.

Mr. Nagumalla said that the Respondent did not market the Prosecuting Party because the company already had an end client for the Prosecuting Party when it filed his H-1B petition. According to Mr. Nagumalla, the Prosecuting Party did not want to wait for his H-1B petition to be approved and to start working on their project. Mr. Nagumalla said: “it was our arrangement with him that he will not lose the time and monies during that time, so we let him market himself to find a temporary assignment until we put him on our project.” Mr. Nagumalla said that the Respondent selected the Prosecuting Party for a “Sand Storage Project,” which was supposed to be performed in-house, at the Respondent’s office. T. at 135, 155. The company agreed to market the Prosecuting Party after he exhausted his options.¹² T. at 155-156.

Mr. Nagumalla said that the Respondent ultimately agreed to put the Prosecuting Party into a project before his H-1B was approved in order to retain him. He explained that he was going to bill \$85 per hour for the in-house project. T. at 169. He confirmed that the ClearBridge contract was not favorable for the company because based on the hourly rate, the Respondent would not make a profit. T. at 189. The Respondent never received any money from ClearBridge for the work that the Prosecuting Party performed. Id. Mr. Nagumalla stated that August 9 was the last day that they heard from the Prosecuting Party. T. at 184.

Mr. Nagumalla explained the Prosecuting Party’s compensation arrangement. He stated that the technology industry works on a split basis. The offer letter had a compensation rate of \$93,600 based on the company’s estimate of the Prosecuting Party’s profit; this amount approximates 70 percent of the client billing. Mr. Nagumalla confirmed that \$93,600 per year comes out to approximately \$45 an hour. T. at 159-160. Mr. Nagumalla explained that at minimum, the Prosecuting Party would receive \$93,000 and then whatever excess amount of the 70% of client billing. T. at 162. He said that the Respondent listed \$65,000 as the compensation rate on the Prosecuting Party’s LCA “because the LCA was filed for somebody else and it was reused for him. It was never filed for him.” Later in his testimony, Mr. Nagumalla said that the \$65,000 is the minimum that the company would pay for the Prosecuting Party’s services. T. at 160-168.

Mr. Nagumalla stated that the Respondent company collected \$4,000 from the Prosecuting Party to protect itself in case the Prosecuting Party backed out of the employment agreement. Mr. Nagumalla said that after the company received the Prosecuting Party’s complaint letter, it “offered to pay back that amount.” He confirmed that the fee consisted of the \$4,000 payment plus the premium processing fee, for a total of \$5,225. T. at 150-151.

¹² Mr. Nagumalla testified that “Mr. Komakula did not want to wait until his H-1B gets approved, as agreed. He wanted something in-between because he claims he’s short of monies. So that’s the reason why we wanted to look for a short-term assignment. And it was our agreement with him that initially he can look for himself, and once he got exhausted by himself looking for a project, we started doing it for him.” T. at 156.

Raj Alexander Testimony

Raj Alexander testified under oath at the hearing. Mr. Alexander is responsible for business development and human resources at the Respondent company. Mr. Alexander testified that he offered the Prosecuting Party a job on May 9, 2013, the Prosecuting Party accepted on May 29 and, Mr. Alexander drafted the offer letter on May 31. Mr. Alexander testified that he had approximately three or four conversations with the Prosecuting Party regarding the offer between May 9 and May 31. He explained that the Prosecuting Party's compensation was as follows: "his portion of his salary, his package will be 70 percent of the client billing, okay, from which \$93,600 will be his base pay. Whatever comes on top of that will go towards his bonus." T. at 205-207. Mr. Alexander explained that "benching" is when an employee is not on a project. He said that the Respondent pays its employees that are on the bench. Mr. Alexander said that there is no document which shows the parties' agreement that the Prosecuting Party's employment would start work only after H-1B petition approval. T. at 233.

Mr. Alexander reiterated Mr. Nagumalla's testimony regarding the Prosecuting Party's desire to work. He explained that the company allowed the Prosecuting Party to work for an end-client after his persistence in asking for work. Accordingly, the Respondent changed its original position and allowed the Prosecuting Party to enter into a contract. T. at 215-220. Mr. Alexander testified that he helped with the paperwork for the ClearBridge project; he sent an email confirmation on August 5 when the Prosecuting Party started on the project. On August 9, the Prosecuting Party called Mr. Alexander and told him that "he's being rolled out of the project because of client budget. They don't have budget and they are rolling me out of the project." T. at 226-227.

Mr. Alexander said that the Prosecuting Party paid the Respondent a \$4,000 "security deposit." Mr. Alexander looked at an email in which he wrote that the \$4,000 is a non-refundable attorney fee and said that he does not remember why he called the security deposit an attorney fee. T. at 229.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

- a. Is the Respondent obligated to repay the USCIS premium filing fee and \$4,000 paid by the Prosecuting Party?

The H-1B regulations prohibit an employer from receiving, or the employee from paying, the filing fee for the visa. §655.731(c)(10)(ii). The parties do not dispute that the Prosecuting Party paid \$4,000 and later paid a \$1,225 premium processing fee. The parties dispute the characterization of the \$4,000 payment. As there is a dispute regarding the \$4,000, I will discuss each payment separately.

i. \$1,225 Premium Processing Fee

Both parties agree that the Prosecuting Party paid \$1,225 to the Respondent to convert his case to premium processing. Because the fee was for the Prosecuting Party's H-1B filing, I find that the Respondent's acceptance of this payment was in violation of §655.731(c)(10)(ii). Mr.

Nagumalla, in a personal interview statement for the WHD dated August 7, 2014, wrote that “we have been advised by our new attorney that asking the employee for premium processing fees is not allowed under the regulations. Therefore, we are ready to refund that money and will not engage in such practice again.” CX 5b. Additionally, in its October 22, 2013 letter, the Respondent’s former counsel wrote that it advised the Respondent to refund the \$1,225 fee and that the Respondent had agreed to do so. CX 5h. Accordingly, as both parties agree that the Prosecuting Party paid the \$1,225 premium processing fee to the Respondent, and the Respondent has acknowledged its obligation to repay this amount, the Respondent must remit this amount back to the Prosecuting Party.

ii. \$4,000 Payment

Both parties agree that the Prosecuting Party paid \$4,000 to the Respondent, but dispute the underlying purpose of that payment. The Prosecuting Party testified that during a phone conversation with Mr. Nagumalla, Mr. Nagumalla told the Prosecuting Party to pay \$4,000 for his H-1B petition. T. at 37-38. On May 29, 2013, Raj Alexander wrote an email to the Prosecuting Party stating “you will contribute \$4,000 as a non-refundable attorney cost.” CX 1j (emphasis added). However, in an October 22, 2013 letter, Respondent’s former counsel wrote:

All USCIS fees for the H-1B petition on behalf of Mr. Komakula were paid by AIS from company accounts with company checks. However, because Mr. Komakula had a pending H-1B extension petition from his previous employer and he was unwilling to join AIS before approval of the AIS petition on his behalf, AIS collected \$4,000 from Mr. Komakula as securing his performance of the obligations pursuant to the employment offer signed by him.

CX 5h (emphasis added). The October 22 letter is consistent with Mr. Nagumalla’s and Mr. Alexander’s testimonies. Mr. Nagumalla testified that the \$4,000 fee was to protect itself in case the Prosecuting Party backed out of the employment agreement. T. at 150. Similarly, Mr. Alexander characterized the \$4,000 fee as a “security deposit” but could not explain why he described it as an attorney’s fee in one of his emails. T. at 229. Mr. Nagumalla said the company agreed to repay the \$5,225 after it received the Prosecuting Party’s complaint. T. at 150-151.

I find that the Respondent’s characterization of the \$4,000 payment as a security deposit is not credible. The Respondent has not provided any written evidence that the Prosecuting Party was obligated to pay a \$4,000 security deposit. One would presume that the obligation to pay money as security for performance under an employment contract would be included in an employment agreement, or at the very least, would be reduced to writing. The Respondent also has not provided any plausible explanation for why Mr. Alexander characterized the \$4,000 as a “non-refundable attorney cost” in his initial email. A non-refundable fee is inapposite from a security deposit. I could discern no reasonable explanation for Mr. Alexander’s conflicting statements. I find that Mr. Alexander’s May 29, 2013 email is the most probative evidence on the purpose of the \$4,000 payment and do not credit his testimony on this issue. Finally, Mr. Nagumalla acknowledged that he should return the filing fee to the Prosecuting Party, which includes the \$4,000 payment.

Consequently, the Prosecuting Party has established by a preponderance of the evidence, that the Respondent received \$5,225 in H1-B filing fees from the Prosecuting Party, in violation of the regulations. Therefore, the Prosecuting Party is entitled to reimbursement for such funds.

b. Did the Respondent violate the regulations by failing to provide a copy of the Prosecuting Party's certified LCA?

To hire an H-1B worker, an employer must file a LCA with the Employment and Training Administration of the Department of Labor. Pursuant to §655.734(a)(3)(b)(3) “the employer shall, no later than the date the H-1B nonimmigrant reports to work at the place of employment, provide the H-1B nonimmigrant with a copy of the LCA certified by ETA and signed by the employer.” An Administrator can impose penalties and disqualify an H-1B employer for failing to comply with §655.734, but only if the violation was found to be “substantial or willful.” §655.805(a)-(b). Section 655.805 states that “willful failure” means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to H1-B visa statutes or regulations.

The evidence suggests that the Prosecuting Party did not receive his certified LCA copy until October 22, 2013. On August 2, 2013, the Prosecuting Party sent an email to V-Soft stating that he does not have a copy of his old employer's LCA. RX 29. In an October 4, 2013 letter, Prosecuting Party's counsel wrote that according to the Prosecuting Party, he never received a copy of his LCA for the in-house project or Hitachi project. RX 24. On October 22, 2013, the Respondent's former counsel, Ishar law Firm, P.C., wrote a letter to the Prosecuting Party stating the following:

AIS would have provided a copy of the LCA to Mr. Komakula along with the approval notice and a copy of the entire petition. Because Mr. Komakula abandoned the client project and failed to respond to phone messages and emails from AIS, AIS has withdrawn the H-1B petition filed on his behalf. However, AIS is still willing to provide a copy of the LCA to Mr. Komakula and the same is attached herewith.

CX 5h. Thus, ample evidence suggests that the Respondent did not provide the Prosecuting Party with a copy of his certified LCA in violation of §655.734. However, I find that the Respondent's action was neither substantial nor willful. The violation is not substantial because there is no evidence that the Respondent engaged in this conduct in the past and there is no evidence that this violation affected other employees. Furthermore, the Respondent eventually provided the LCA to the Prosecuting Party upon the Prosecuting Party's request. Based on the October 22, 2013 letter by Respondent's counsel, the Respondent did intend on giving the certified LCA to the Prosecuting Party as soon as USCIS approved his H-1B petition. I find this letter to be credible and find that the Respondent did not willfully withhold the LCA from the Prosecuting Party. Consequently, as the Respondent's violation was neither substantial nor willful, I find that penalties are not appropriate in this case.

- c. Did the Respondent unlawfully attempt to require the Prosecuting Party to pay a penalty for ceasing employment prior to an agreed upon date?

The regulations state that the employer is not permitted to require, either directly or indirectly, that the employee pay a penalty for terminating employment prior to an agreed date. § 655.731(c)(10)(i)(A). However, the regulation permits the employer to receive bona fide liquidated damages from an employee who ceases employment prior to an agreed-upon date. § 655.731(c)(10)(i)(B).¹³ The distinction between a liquidated damages payment, which is permitted, and a penalty, which is not permitted, is based on state law. § 655.731(c)(10)(i)(C). The section provides that in general,

Liquidated damages are amounts which are fixed or stipulated by the parties at the inception of the contract, and which are reasonable approximations or estimates of the anticipated or actual damage caused to one party by the other party's breach of the contract.

Id. Penalties are “amounts which (although fixed or stipulated in the contract by the parties) are not reasonable approximations or estimates of such damage.” Id. If the employer is found to have imposed an early termination penalty in violation of the Act and regulations, the Administrator may impose a civil monetary penalty of \$1,000 for each such violation and issue an administrative order requiring the return to the [H-1B employee] of any amount paid in violation. 8 U.S.C. § 1182(n)(2)(C)(III).

The Respondent’s Letter of Offer contains the following provision:

During the initial phase where the employee accepts the offer, AQUAINSYS might invest its efforts, time and money on the employee for various professional activities... If the employee withdraws his/her offer during this phase of process AQUAINSYS will undergo an irrecoverable loss. To overcome this loss the employee agree(s) to pay \$10,000 in addition to the actual value of the investment done by AQUAINSYS on the employee.

CX 3h. Another provision of the offer letter states: “[f]ailing to submit a resignation letter prior to 10 working days of termination will result in a processing fee of \$3,000.” Id. In its October 22, 2013 letter, Respondent’s former counsel wrote that the Prosecuting Party “failed to provide the 10 day notice to AIS before leaving, as required by the offer letter signed by him. He did not submit any time sheets, and he is violation of the offer letter signed by him that required him to pay \$10,000 damages to AIS if he withdrew from the employment offer he had accepted.” CX 5h.

¹³ If such damages are to be paid via deduction from the employee or a reduction in the payment of the required wage, the requirements of § 655.731(c)(9)(iii) must be fully satisfied. These requirements state, in general, that the employee must authorize the deduction in writing; that the deduction must be for matters principally for the benefit of the employee; is not a recoupment of the employer’s business expense; is not excessive; and does not exceed 25% of the employee’s weekly disposable earnings. § 655.731(c)(9)(iii). I find this provision is not applicable to the instant matter.

The Respondent did not provide any information as to how it arrived at the \$10,000 figure or the \$3,000 figure. Due to the lack of information in the record, there is no way of knowing what expenses, if any, the \$10,000 fee or \$3,000 fee included and it is therefore unclear whether these fees were intended as a measure of damages or as penalties. The record does not contain any evidence that the Respondent actually collected the monetary penalties from the Prosecuting Party. Nor is there evidence that the Respondent willfully and knowingly violated the Act by attempting to impose a termination fee. The Administrator did not impose a civil monetary penalty for this alleged violation, but did not provide any explanation for this determination. I find that a civil monetary penalty is not merited in this case because the Respondent never attempted to enforce any penalty provision. As there is no evidence of an enforcement action against the Prosecuting Party and the Prosecuting Party never paid the \$10,000 fee or \$3,000 fee, the Respondent is not liable to pay any damages or penalties under this section.

d. Is the Prosecuting Party entitled to recover back wages? If so, what is the applicable period of employment and the applicable prevailing wage?

i. *Is the Prosecuting Party entitled to benefit from the portability provision of the American Competitiveness in the Twenty First Century Act?*

Section 655.705(c)(4) provides that an H-1B employer cannot allow a non-immigrant worker to work until the non-immigrant's H-1B petition is approved for that employer. However, in the case of a non-immigrant employee who was previously granted H-1B status, the employee can begin work once a new employer files a non-frivolous petition. *Id.* USCIS never approved the Respondent's H-1B petition on behalf of the Prosecuting Party.¹⁴ The Prosecuting Party asserts that the Act's "portability provision" entitles the Prosecuting Party to work for, and receive payments from, the Respondent before the H-1B petition approval.

In 2000, Congress passed the American Competitiveness in the Twenty First Century Act (AC21) and included provisions known as the H-1B "portability" provisions. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-31, § 105(a), 114 Stat 1251, 1253 (2000). The portability provisions allow a nonimmigrant previously granted H-1B status to begin working for a prospective employer once the prospective employer files a non-frivolous H-1B petition. 8 U.S.C.A. § 1184(n)(1)-(2). To qualify for the portability provisions, the H-1B nonimmigrant must have been lawfully admitted into the U.S. and not have engaged in unauthorized employment. *Id.* The nonimmigrant's employment authorization continues until USCIS acts on the H-1B petition. If USCIS denies the H-1B petition from the prospective employer, the temporary authorization to work for the prospective employer ceases.¹⁵ *Id.*

¹⁴ The record includes a January 15, 2015 email from USCIS to WHD which states that USCIS denied the Respondent's H-1B petition by reason of abandonment on October 2, 2013.

¹⁵ The portability provision is codified as follows:

(1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(b) of this title is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under

The portability provisions permit the H-1B employer and the H-1B employee to decide whether to work together while the H-1B petition is pending approval by USCIS. Consequently, in the absence of mandatory employment provisions, it is the H-1B employee's burden to prove that he qualifies under 8 U.S.C.A. § 1184(n)(2) to work for a new employer during a portability phase and that he engaged in compensable activities for such employer. On December 27, 2005, USCIS issued an Interoffice Memorandum providing guidance on the portability provision of AC21. See CX 2.¹⁶ The memorandum explained what constitutes a "period of stay authorized by the Attorney General." According to this memo, an H-1B alien continues to be in a period of authorized stay if, while the first employer has a H-1B petition pending, the second employer files a non-frivolous H-1B petition. Id.

As summarized above, the Prosecuting Party was in valid H-1B status from May 2012 to April 2013. CX 1e; CX 5i. On April 9, 2013, Artech filed an H-1B extension petition and USCIS issued an RFE on the pending H-1B extension. CX 1k; CX 1e. By email dated May 6, 2013, Artech notified the Prosecuting Party that his employment with Artech had been terminated as of May 3, 2013 and Artech will revoke his H-1B petition effective May 17, 2013. RX 2. The Prosecuting Party testified that he called Artech the day he received the email and that Artech agreed to extend the H-1B revocation deadline until May 31, 2013. T. at 23-35. The Prosecuting Party confirmed that he does not have any written evidence of this agreement. T. at 67-68. The Respondent filed an H-1B petition on behalf of the Prosecuting Party on June 5, 2013, for a period of employment beginning on June 1, 2013. RX 28.

Presuming that the Prosecuting Party's testimony is credible, his period of authorized stay would have ended on May 31, 2013. There is no evidence in the record documenting when, or whether Artech in fact revoked its H-1B extension petition. The record does show that on August 27, 2013, USCIS denied Artech's extension petition. A printout from the USCIS website includes the receipt number and date of denial but does not include the decision notice that explains why USCIS denied the petition. CX 5i (AIS0178). Based on this evidence, I find that Artech never revoked its H-1B petition for the Prosecuting Party. Thus, the Prosecuting Party was in a period of authorized stay when the Respondent filed its non-frivolous H-1B petition. Accordingly, the Prosecuting Party is entitled to benefit from the Act's portability provision.

ii. *Did the Prosecuting Party enter into an employment relationship with the Respondent?*

subsection (a) of this section. Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

(2) A nonimmigrant alien described in this paragraph is a nonimmigrant alien—

- (A) who has been lawfully admitted into the United States;
- (B) on whose behalf an employer has filed a nonfrivolous petition for new employment before the date of expiration of the period of stay authorized by the Attorney General; and
- (C) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition.

¹⁶ https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/ac21intrm122705.pdf.

An employer's back wage liability commences on the date that an H-1B employee "enter[s] into employment" with the employer. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I). Regulatory section 655.731(c)(6)(i) specifies that the date the H-1B nonimmigrant is considered to "enter into employment" means the date that the nonimmigrant "makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter." Once the employment period begins, the employer is required to pay an H-1B employee the required wage at the full time rate for any time that is non-productive, due to a decision by the employer. §655.731(c)(7)(i).

Employers violate the INA if they place full-time H-1B workers on "nonproductive status due to a decision by the employer (based on factors such as lack of work) or . . . to fail to pay the non-immigrant full-time wages . . . for all such nonproductive time." 8 U.S.C. § 1182(n)(2)(C)(vii)(I); §655.731(c)(7)(i). This sort of non-productive time often is called "benching." It can occur when a company brings H-1B workers into the United States intending to contract their labor out to other entities, rather than to use the workers' labor directly in its own business. Acting more as an employment broker than as a traditional employer, the employer pays the alien workers nothing until it places them; it then begins to pay them out of money collected from the entities that actually use the workers' professional skills. See 65 Fed. Reg. 80,171-80,172 (Dec. 20, 2000).

The Respondent asserts that the Prosecuting Party never entered into an employment relationship with the Respondent. Mr. Nagumalla testified that the parties had an agreement in which the Prosecuting Party's employment would start only after USCIS approved the Prosecuting Party's H-1B petition. T. at 127. He said that the Respondent did not want to employ the Prosecuting Party before the H-1B approval for fear that the Prosecuting Party was not in valid H-1B status. T. at 192. I find that the Respondent's allegation that the employment relationship would start only after USCIS approves the H-1B petition is not supported by the evidence and does not disprove an employee-employer relationship. During his hearing testimony, Mr. Nagumalla pointed out an email in which the Prosecuting Party wrote "already we discussed last month so you mentioned, the paycheck is unnecessary until my H-1B approve or get a new project." T. at 128-130; RX 12. This email contradicts Mr. Nagumalla's statement that the Prosecuting Party would become an employee only upon USCIS approval. Notably, Mr. Nagumalla and Mr. Alexander both testified that the Respondent changed its position with regard to the Prosecuting Party's employment after the Prosecuting Party asked for work. Thus, not only is there no documentation of this agreement, the Respondent changed its position and allowed the Prosecuting Party to work.

Consequently, the issue turns on whether the Prosecuting Party made himself available to work or came "under the control of the employer." The Respondent asserts that the Prosecuting Party never considered himself to be the Respondent's employee. See the Respondent's Post Hearing Brief at 1. In support of its position, the Respondent submitted numerous emails documenting the Prosecuting Party's extensive communications with V-Soft, his current employer. See RX 29-32. The Prosecuting Party started communicating with V-Soft before he signed the Respondent's offer letter. The record contains emails between the Prosecuting Party

and V-Soft, from May 6, 2013 through May 28, 2013, in which the Prosecuting Party tried to find an end-client through V-Soft. RX 32. For example, in a May 28, 2013 email, the Prosecuting Party wrote to a prospective end-client, stating “[p]lease find my employer details,” listing V-Soft’s contact information. RX 32.

On July 2, 2013, Suresh Nanna, a V-Soft employee, sent an email to the Prosecuting Party informing him of his need to remain in H-1B compliance. RX 30. The V-Soft employee wrote that it is “important that H-1B employees working at offsite locations diligently document the following information evidencing H-1B compliance of the employer-employee relationship for the duration of your employment with V-Soft.” Id. The July 2 email is phrased in a way that suggests that the Prosecuting Party was V-Soft’s employee. However, this email is ambiguous.¹⁷ The record does not include the Prosecuting Party’s response to this email or any email from the Prosecuting Party soliciting this information.

After the July 2 email, the record shows that from July 8, 2013 through August 2, 2013, V-Soft marketed the Prosecuting Party for end-clients. Id. These emails are mostly consistent with the Prosecuting Party’s testimony. The Prosecuting Party testified that he reached out to V-Soft soon after Artech terminated his employment and reached out to V-Soft again after the Respondent did not pay the Prosecuting Party. The main discrepancy between the Prosecuting Party’s testimony and the V-Soft emails relates to the date that the Prosecuting Party first contacted V-Soft. The Prosecuting Party stated that he reached out to V-Soft in mid-July, after the Respondent refused to pay him, whereas the record shows that he was in full communication with V-Soft as early as July 8, and possibly July 2.

Despite the Prosecuting Party’s extensive contact with V-Soft, there is substantial evidence demonstrating an employee-employer relationship between the Prosecuting Party and the Respondent. The Respondent’s Letter of Offer tends to suggest that the parties entered into an employee-employer relationship. CX 3h. The offer letter is dated May 31, 2013 and signed by the Prosecuting Party on June 3, 2013. Id. The letter does not include a start date, nor does it condition the Prosecuting Party’s employment on the occurrence of any event, including the approval of an H-1B petition. Id. Moreover, the letter sets out all the pertinent information for an employee-employer relationship, including the salary, bonus pay, and benefits. Id. The offer letter states “we are pleased that you will be continuing to work with us and look forward to a long and successful career with [the Respondent].” Id.

In addition to the offer letter, the record reveals numerous communications between the Respondent and the Prosecuting Party in which the Prosecuting Party was marketing himself for an end client. Beginning on June 3, 2013, the Prosecuting Party sent emails to prospective end-clients listing the Respondent as his employer. CX 4i. The Prosecuting Party sent another email on June 5th inquiring about an opportunity for the Respondent. CX 4j. Between July 2 and July 30, the Prosecuting Party continued to send emails to prospective end clients listing the Respondent as his employer. RX 12. On July 2, 2013, Mr. Alexander sent an email to the Prosecuting Party asking him whether he wants the company to market him. CX 4u; RX 11. Mr. Alexander informed the Prosecuting Party if he wants the company to start marketing, the

¹⁷ This email could also be interpreted as evidence that V-Soft was concerned about the Prosecuting Party’s H-1B status and cautioned the Prosecuting Party that it would not employ him unless his status is established.

Prosecuting Party would need to stop all submissions. Id. I find that the June and July emails between the Prosecuting Party and prospective clients listing the Respondent as the Prosecuting Party's employer supports a finding that the Prosecuting Party was available to work for the Respondent. The Respondent's willingness to market the Prosecuting Party and directive that the Prosecuting Party should stop marketing himself also support a finding that the Prosecuting Party came under the control of the Respondent.

The record also reflects that, as the Prosecuting Party was marketing himself for a project with the Respondent, he continued to inquire about his H-1B status and compensation. On June 17, the Prosecuting Party sent an email to Mr. Nagumalla, asking when the company will start payroll. RX 12. Mr. Nagumalla responded "for June month, payroll date will be July 15th. We will initiate the payroll during the first week of July." Id. On July 30, the Prosecuting Party sent an email to Mr. Nagumalla asking him to start his paycheck, expressing concern that not running payroll would violate USCIS rules. RX 12.

The record also establishes that not only did the Prosecuting Party market himself on behalf of the Respondent, but the Respondent found a temporary project for the Prosecuting Party. On July 11, ClearBridge sent an email to Mr. Alexander confirming that the Prosecuting Party's compensation rate would be \$53 per hour for an upcoming project. CX 4g. The Respondent signed an Independent Contractor Agreement with ClearBridge on July 17, 2013 to perform work on the Hitachi project from August 5, 2013 through August 8, 2014.¹⁸ RX 7. Between July 17 and July 30, the Prosecuting Party discussed the Hitachi project with ClearBridge. RX 17. The emails between the Prosecuting Party and ClearBridge show that the Prosecuting Party was organizing his start date and onboarding process with the Respondent as his employer. Id. On July 31, ClearBridge sent an email to the Prosecuting Party confirming that his start date will be on Monday, August 5, 2013. CX 4g.

The Respondent's agreement with ClearBridge for the Prosecuting Party to work on the Hitachi project is the most probative evidence of an employee-employer relationship. The parties do not dispute the fact that ClearBridge offered the Prosecuting Party a project through the Respondent. See e.g., CX 4g; T. at 226. The Respondent signed an agreement with ClearBridge and the Prosecuting Party reported to work on August 5, 2013. T. at 41-46. The Prosecuting Party testified that he worked on the Hitachi Project under the Respondent for five days. Id. The Respondent's involvement in obtaining the ClearBridge agreement and organizing the Prosecuting Party's services for this project confirms that the Prosecuting Party worked under the Respondent for this project. Consequently, I find that the Respondent entered into an employment relationship with the Prosecuting Party.

iii. What is the applicable H-1B employment period?

The H-1B implementing regulations provide that once the H-1B employer's obligation to pay H-1B wages begins, the employer must continue to pay wages unless the employer can prove, by a preponderance of the evidence the presence of any of the circumstances specified at 20 C.F.R. § 655.731(c)(7)(ii) where the wages guaranteed in the H-1B petition need not be paid. Pursuant to this section, an employer is not obligated to pay the required wage rate:

¹⁸ This agreement does not include the Prosecuting Party's name.

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 (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant).

Id. The employer is also not obligated to pay wages if there has been a bona fide termination of employment.

The evidence shows that the Prosecuting Party's employment relationship with the Respondent began on June 3, 2013. The Prosecuting Party testified that he considered himself to be the Respondent's employee as of June 3, 2013. T. at 87. The Prosecuting Party signed the Respondent's offer letter on June 3rd and began to market himself for the Respondent on that date. CX 3h; CX 4i. Furthermore, the Respondent filed an H-1B petition on behalf of the Prosecuting Party on June 5, 2013. RX 28. There is no evidence in the record that the Prosecuting Party marketed himself for the Respondent prior to June 3rd or that the Prosecuting Party considered himself to be an employee before June 3rd.

I had previously determined in my Order dated October 19, 2015 that the Respondent's liability for back wages ends effective August 21, 2013. I informed the parties that I will consider evidence on whether the Respondent's liability terminated prior to August 21, 2013. Based on my current review of the entire record, I find that the Respondent's liability for back wages ended on August 9, 2013.

The Prosecuting Party testified that on August 5, 2013, he began working on the ClearBridge project for the Respondent and worked there for five days. T. at 41-46. Based on this testimony, the Prosecuting Party worked from August 5 to August 9. Mr. Nagumalla testified that August 9th was the last day that the Respondent heard from the Prosecuting Party. T. at 184. Mr. Alexander testified that on August 9, the Prosecuting Party called Mr. Alexander and told him that "he's being rolled out of the project because of client budget. They don't have budget and they are rolling me out of the project." T. at 226-227. The Prosecuting Party has not rebutted this testimony. On cross-examination, the Prosecuting Party testified that he never told the Respondent that he was leaving the company. On August 8, 2013, the Prosecuting Party sent an email to ClearBridge notifying the company that his new employer is V-Soft. RX 20; RX 30.

On August 31, 2013, V-Soft sent ClearBridge an invoice for the Prosecuting Party's services from August 12 to August 18, 2013.¹⁹ RX 31. Thus, the record clearly shows that the Prosecuting Party's last day with the Respondent was Friday, August 9, 2013 and the Prosecuting Party started working on the same project as a V-Soft employee the following Monday, August 12, 2013. On August 19, 2013 V-Soft filed an H-1B petition on behalf of the Prosecuting Party. RX 5. USCIS approved the petition on December 20, 2013. Id. On August 22, 2013, the Prosecuting Party signed an employment agreement with V-Soft. RX 9. Although the Prosecuting Party did not sign V-Soft's employment agreement until August 22 and USCIS did not approve V-Soft's H-1B petition until December 20, 2013, the Prosecuting Party started performing work for V-Soft as of August 12.

¹⁹ According to this exhibit, ClearBridge paid this invoice. RX 31.

The Administrative Review Board (“ARB” or the “Board”) has held that “back wage claims against a former employer must stop accruing if it is clear that the H-1B employee changes from one H-1B employer to another and USCIS approves the subsequent H-1B petition allowing for the change.” Batyrbekov v. Barclays Capital, ARB No. 13-013, ALJ No. 2011-LCA-25 (ARB Jul. 16, 2014), slip op. at 10. In this case, it is clear that the Prosecuting Party changed employers on August 12, 2013. Even though V-Soft’s H-1B petition was not approved until December 20, 2013, the Prosecuting Party was authorized to work for V-Soft under the Act’s portability provision and did in fact work for V-Soft. 8 U.S.C.A. § 1184(n)(1)-(2); see RX 31. The Prosecuting Party removed himself from the Respondent’s employ at his own convenience. The Respondent did not “bench” the Prosecuting Party after he started working for ClearBridge. Instead, the Prosecuting Party entered into non-productive status through his own volition by informing the Respondent that ClearBridge was rolling him out of the project. T. at 226-227. Consequently, I find that the Respondent’s liability for back wages began on June 3, 2013 and ended effective August 9, 2013.

iv. Did the Respondent “bench” the Prosecuting Party?

Based on the record before me, I find that the Respondent impermissibly benched the Prosecuting Party. The Respondent placed the Prosecuting Party in non-productive status due to a decision by the Respondent; the Respondent decided not to pay the Prosecuting Party until the Prosecuting Party found a project. The Prosecuting Party’s email to Mr. Nagumalla stating “the paycheck is unnecessary until my H-1B approve or get a new project,” confirms that the Respondent would not pay the Prosecuting Party until there was work available. RX 12. At the same time, the Prosecuting Party was willing, and eager, to find a project through the Respondent. On August 21, 2013, Mr. Nagumalla sent an email to the Prosecuting Party stating: “even though you are on bench, you should be as good as working from 9AM-5PM.” CX 5ci. Thus, the Respondent believed that the Prosecuting Party was the Respondent’s employee at least since mid-August.

The Prosecuting Party’s communications with V-Soft, while suggestive of the fact that the Prosecuting Party distrusted the Respondent, do not eliminate the employee-employer relationship between the Prosecuting Party and the Respondent. First, the Prosecuting Party’s communications with V-Soft prior to June 1 are not relevant because evidence indicates that the Prosecuting Party’s relationship with the Respondent began in June. Second, I find that the Prosecuting Party’s communications with V-Soft in July did not remove the Prosecuting Party from the Respondent’s employ. While the Prosecuting Party was looking for an end-client for V-Soft, he continued to market himself for the Respondent. In his email communications with V-Soft in July, he did not hold himself out as V-Soft’s employee, but he did hold himself out as the Respondent’s employee in his marketing attempts for the Respondent. See e.g., RX 11 (on July 9, 2013, the Prosecuting Party sent an email to an end client listing the Respondent as his employer). The Prosecuting Party acknowledged in his testimony that he reached out to V-Soft in July because the Respondent did not pay him. T. at 62-23. The Prosecuting Party’s continued communication with V-Soft is akin to an employee who looks for other employment while he is still employed. An employee’s interest in other employment opportunities does not end his current employment relationship.

Consequently, I find that the Respondent impermissibly benched the Prosecuting Party by not paying the Prosecuting Party while he was in non-productive status by the decision of the Respondent.

- v. *What is the applicable wage rate? Is the Prosecuting Party entitled to interest on those back wages?*

The remedies for violations of the statute or regulations include payment of monies due. §655.810(a). Under the regulation, the amount owed is defined as the difference between the amount the employee should have been paid and the amount actually paid. § 655.810(a). The regulation requires that an employer pay H-1B nonimmigrants at the “required wage rate.” §655.731. This rate is defined as the greater of: (1) the “actual wage rate,” defined as the rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the “prevailing wage,” defined as the wage rate for the occupational classification in the area of employment, at the time the LCA is filed. § 655.731(a). If there are other employees with the same qualifications and experience as the H-1B workers, the actual wage is the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage is the wage paid to the H-1B nonimmigrant worker by the employer. § 655.731(a)(1). For a full time worker paid on an hourly basis, the employer must pay the rate for a 40-hour workweek. § 655.731(c)(7).

The Respondent’s Letter of Offer listed the Prosecuting Party’s base compensation as \$93,600. CX 5a. The Prosecuting Party’s bonus/bench pay was listed as 70% of the client billing. *Id.* Both Mr. Nagumalla and Mr. Alexander testified that at a minimum, the Prosecuting Party would receive \$93,600 and the excess amount would be the Prosecuting Party’s bonus. T. at 160-168, 205-207. Based on the Respondent’s Letter of Offer and the testimonies of Mr. Nagumalla and Mr. Alexander, I find that the Prosecuting Party’s actual wage was \$93,600 per year.

For the Prosecuting Party’s position under the applicable approved LCA in June of 2013, the prevailing wage listed in the LCA was \$65,000 per year. This is lower than the Prosecuting Party’s actual wage of \$93,600 per year. I find, therefore, that the back wages should be calculated based on the Prosecuting Party’s actual wages of \$93,600 per year, or \$45 per hour.²⁰ *Vojtisek-Lom v. Clean Air Technologies Int’l, Inc.*, ARB No. 07-097, ALJ No. 2006-LCA-9 (ARB July 30, 2009), slip op at 14 (computation of back wages may be based on wage rate paid to the employee). In sum, the Respondent is liable to the Prosecuting Party for ten weeks of back wages (June 3-August 9, 2013) at a rate of \$45 per hour, at 40 hours a week, for a total of \$18,000.²¹

The Board has held that, notwithstanding that the INA does not specifically authorize an award of interest on back pay, interest shall be paid on awards of back pay, with compound interest to be paid prejudgment. *Innawalli v. Am. Info. Tech. Corp.*, Case No. 05-165 (ARB: Sept. 29, 2006), slip op. at 8-9; *Amtel Group of Florida, Inc., v. Yongmahapakorn*, Case No. 04-

²⁰ Based on an average of 52 work weeks per year and 40 hours per week, a full time employee works 2,080 hours per year. Accordingly, a salary of \$93,600 per year equals \$45 per hour (\$93,600/2,080 hours=\$45 per hour).

²¹ \$45 per hour x 40 hours per week x 10 weeks= \$18,000.

087 (Sept. 29, 2006), slip op. at 12-13. Pre- and post-judgment compound interest is commonly ordered to make a complainant whole. See Doyle v. Hydro Nuclear Servs., ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000). The Board also has set the rate of interest at the rate charged on underpayment of federal income taxes prescribed under 26 U.S.C. § 6621(a)(2). Mao v. Nasser, Case No. 06-121 (ARB: Nov. 26, 2008), slip op. at 11-12.

Based on the foregoing, I find that prejudgment compound interest is due on the back pay determination. I also find that post-judgment interest is due on the back pay award, until paid or otherwise satisfied. Pre- and post-judgment interest is not due on the \$5,225 payment.

vi. Attorneys' Fees

The INA does not have an explicit provision for recovery of attorney's fees. 8 U.S.C. § 1182(n). The ARB has held that absent explicit statutory authority, the Prosecuting Party is not entitled to recover attorneys' fees. Talukdar v. U.S. Dept. of Veterans Affairs, Medical and Regional Office Center, Fargo, North Dakota, ARB No. 04-100, ALJ No. 2002-LCA-25 (ARB Jan. 31, 2007).

VI. CONCLUSION

1. The Prosecuting Party paid \$5,225 to the Respondent as fees for his H-1B petition in violation of the Act. Accordingly, I find that the Respondent must remit the \$5,225 payment to the Prosecuting Party. No interest is due on this payment.
2. The Respondent is not liable for any damages for failing to timely provide the Prosecuting Party with his certified LCA.
3. The Respondent is not liable to pay any damages or civil monetary penalties for contract provisions requiring the Prosecuting Party to pay an early termination fee.
4. The Respondent is liable to the Prosecuting Party for \$18,000 in back wages for June 3, 2013 to August 9, 2013.
5. The Respondent is liable for interest on the back wages award. The Respondent is liable to pay interest only on the back wages award.

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

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.