



Issue Date: 29 March 2016

CASE NO.: 2015-LCA-00001

In the Matter of:

**VENKATA NAGA RAVI TETALI,¹
Complainant,**

v.

**FUSION GLOBAL SOLUTIONS, LLC,
Respondent.**

**DECISION AND ORDER GRANTING RESPONDENT'S RENEWED
MOTION FOR SUMMARY JUDGMENT AND DISMISSING COMPLAINT**

The instant case has been brought under the enforcement provisions of the H-1B visa program of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.* with implementing regulations found at 20 C.F.R. Part 655, Subparts H and I. An H-1B visa allows an alien to obtain temporary admission to the United States to perform services in a specialty occupation. *See* 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700(c). An employer seeking to hire an alien on an H-1B visa must first obtain certification by filing a Labor Condition Application (“LCA”) with the U.S. Department of Labor (“Department”). 20 C.F.R. § 655.730(a). The employer is, *inter alia*, required to pay an H-1B worker a wage rate which is at least the higher of its actual wage rate and the locally prevailing wage for the occupation and is precluded from placing an employee on nonproductive status due to a lack of work (known as “benching.”) *See* 8 U.S.C.A § 1182(n)(1)(A) and (2)(C)(vii)(I); 20 C.F.R. § 655.731(a), (c).

Complainant, Venkata Naga Ravi Tetali (“Complainant”), alleges that under the H-1B Visa Program he is entitled to back wages resulting from alleged H-1B program violations for the entire period of his H-1B employment, *i.e.*, from October 1, 2008 until October 31, 2012, and damages resulting from the Respondent’s breach of contract with him. In his determination,

¹ When this case was docketed, the Wage and Hour Division of the U.S. Department of Labor was listed as the complainant; however, by letter of April 8, 2015, counsel for the Wage and Hour Division indicated that the Administrator decided not to participate in this administrative adjudication and further indicated that the Respondent has fully complied with the Administrator’s determination of September 14, 2014 [apparently a reference to the September 16, 2014 determination.] Accordingly, Venkata Naga Ravi Tetali is now the Complainant in this matter, appearing *pro se*.

the Administrator found that Respondent had failed to pay the required wages, confined to the investigation period from October 30, 2012 to October 29, 2013, and Respondent complied with the Administrator's determination with respect to that period.

The matter before me is Respondent's Renewed Motion for Summary Decision filed on January 7, 2016 ("Resp. Renewed Motion"). For the reasons set forth below, Respondent's motion for summary judgment is granted. Accordingly, this action is dismissed with prejudice.

PROCEDURAL BACKGROUND

On October 29, 2013, Complainant filed a timely complaint with the United States Department of Labor Employment Standards Administration Wage and Hour Division ("Wage and Hour Division") in Kansas City, Kansas. ("Complaint," CX 1, 11).² He alleged that the Respondent Fusion Global Solutions, LLC ("Respondent" or "Fusion") supplied incorrect or false information on the Labor Condition Application ("LCA"); failed to pay him the higher of the prevailing or actual wage; failed to provide fringe benefits equivalent to those provided to U.S. workers; and required him to pay all of the scholarship and training fees. (Complaint at 2). The Wage and Hour investigator investigated the complaint, and on September 16, 2014, the Wage and Hour's Administrator ("Administrator") determined that during the investigation period of October 30, 2012 to October 29, 2013, the Respondent failed to pay wages and maintain documentation as required. Accordingly, the Administrator found that Respondent owed \$7,522.20 to three H-1B nonimmigrants (including the Complainant, who was found to be entitled to \$6,136.00).³

However, on September 29, 2014, Complainant, filed a timely objection and request for a hearing asserting that that the findings did not identify the back wages owed to Complainant per his individual claims or the timeframe for which the back wages were owed, and may be based upon incorrect analysis of the law pertaining to the allowable timeframe scope of an H-1B back wage claim.⁴ The case was assigned to the undersigned judge for disposition on January 16, 2015 and a Notice of Assignment and Order was issued the same day. On April 8, 2015, the Administrator exercised his discretion not to participate in the administrative adjudication as he determined that the Respondent had fully complied with the Administrator's September 16, 2014 determination.

On May 12, 2015, Complainant's attorney withdrew her representation and Complainant submitted an amended complaint as a pro se litigant ("Am. Compl.") In his amended complaint, Complainant alleges that from the start of his H-1B employment on October 1, 2008 until his

² The October 18, 2013 complaint was not transmitted with the hearing request; however, Complainant attached a copy of the form WH-4 and October 28, 2013 supporting letter as exhibits 1 and 11, respectively, to his amended complaint of May 12, 2015. According to the Administrator's Response filed on October 27, 2015, the complaint was filed on October 29, 2013. See footnote 6 below.

³ The September 16, 2014 determination letter did not specify the investigation period or other particulars; however, the Administrator provided the lacking information in the Response filed on October 27, 2015.

⁴ Complainant specifically asserts that the investigation period should include the entire 5-year period that he worked with the Respondent.

resignation on October 31, 2012, Fusion regularly underpaid and/or did not pay him in breach of their employment contract. (Am. Compl. at 1, 4). Specifically, Complainant alleges that according to his employment contract, he was entitled to 70% (and later 80%) of the hourly rate charged to each client, but was actually only paid a fraction of the promised wage. (Am. Compl. at 2). Complainant further alleged that he was benched in 2009 for 28 days and in 2010 for about 17 days and that he was required to pay \$2,500 in H-1B filing fees, for which he was never reimbursed. (Am. Compl. at 3) Based on these alleged violations, Complainant asserts that his total wages should have been in the amount of \$456,737.91, instead of the \$388,000.67 that he was ultimately paid. (Am. Compl. at 5). Accordingly, Complainant requests that DOL investigate beyond the one (1) year period prior to the date of his complaint (to include the entire five (5) years of his employment with Fusion) and order Fusion to pay \$71,601.24 in uncompensated wages, \$2,500 as reimbursement for filing fees, and \$2,147.60 in attorney's fees. (Am. Compl. at 6).

On May 19, 2015, counsel for Respondent submitted a motion for continuance of the hearing, which was granted on May 27, 2015 by an order canceling and rescheduling the hearing for September 24, 2015. Dispositive motions were to be filed by August 10, 2015, with responses due on August 24, 2015 and replies due on August 31, 2015.

On August 11, 2015, Respondent filed a Motion to Dismiss and Memorandum in Support of its Motion to Dismiss, arguing that the Complainant had effectuated a waiver of his H-1B claims by accepting the back wages paid to him by the Respondent and that the remainder of the Complainant's claims are based on Respondent's breach of contract and therefore not within this tribunal's subject matter jurisdiction. (Resp. Memo. at 2). In support of the waiver argument, Respondent relied upon a single decision by an administrative law judge.⁵ Subsequently, due to the lack of response from the Complainant and no ruling on the motion to dismiss, Respondent filed a motion for continuance of the hearing and for amendment of the scheduling order on August 26, 2015.

On September 10, 2015, I denied the motion to dismiss and granted the motion for continuance. Specifically, in regards to the motion to dismiss, I respectfully disagreed with the cited decision to the extent that it stood for the proposition that cashing a check for underpaid back wages extinguishes all rights of a party for additional amounts under the H-1B program; and found that due to the lack of explanation or basis for the calculation of \$6,136.00 in back wages, it was impossible to determine whether Respondent had complied with the requirement that Complainant be paid the required wages under the H-1B program. I further found that Respondent's suggestion that I cannot look behind the Administrator's findings is simply wrong, as proceedings before administrative law judges are de novo. Likewise, while I acknowledged that I lacked authority to adjudicate a contract damage claim, I noted that I was not precluded from reviewing the contractual arrangements between the parties when determining whether Respondent had complied with the requirements of the H-1B visa program. In granting the motion for continuance, I scheduled a prehearing conference for the previously scheduled hearing date, September 24, 2015.

⁵ *Siddhartha Maity v. E-Business International, Inc.*, ALJ No. 2015-LCA-00010 (ALJ March 24, 2015). Decisions of administrative law judges lack precedential value but may be cited for their reasoning and persuasiveness.

On September 24, 2015, a telephonic prehearing conference was held and transcribed. At the conference I advised the parties that my jurisdiction was limited to whether Respondent had complied with the requirements of the H-1B program and that I did not have jurisdiction over claims relating to contractual obligations apart from those pertaining to the H-1B program. Additionally, I determined that it was necessary to add the Administrator of the Wage and Hour Division as a party for the limited purpose of obtaining additional information necessary to make the appropriate ruling.

Subsequently, an Order was issued on September 25, 2015 adding the Administrator as a party for the limited purpose of providing: (1) a detailed explanation of the basis of the calculation of the underpaid wages in the amount of \$7,522.20, including the names of the underpaid employees and the amount underpaid for each; (2) the basis for the action by the Administrator of including or excluding inappropriate deductions; (3) the basis for the exclusion of periods that the employees were benched (if they were indeed excluded); and (4) the Administrator's statement as to the period of investigation, the reason the investigation was so limited, and the Administrator's position as to whether and to what extent the undersigned administrative law judge would have jurisdiction over any additional periods.

The Administrator filed his response on October 27, 2015 ("Admin. Resp."). On November 13, 2015, the Respondent filed a motion for extension of time to file dispositive motions until January 7, 2016. On January 7, 2016, Respondent filed a renewed motion for summary judgment. The Complainant did not provide a response.

FACTUAL BACKGROUND

Mr. Tetali ("Complainant"), a citizen of India, entered into an employment agreement with Fusion Global Solutions ("Fusion" or "Respondent") on November 16, 2007, effective September 10, 2007. (CX 5).⁶ According to the agreement, the Complainant was to be paid 70% of the billing rate on billable hours from the client, which would increase to 80% after six months. (CX 5 at 1; December 13, 2008 Email (CX 8)). On April 21, 2008, Fusion submitted a "Petition for a Nonimmigrant Worker" (Class H-1B) on behalf of Complainant that was approved on May 28, 2008 for the period of October 1, 2008 to August 20, 2011. (CX 4) Subsequently, Fusion submitted a second petition on behalf of the Complainant seeking to extend his H-1B visa period from August 20, 2011 to May 31, 2014 and also approved. *Id.*

Fusion also submitted three Labor Condition Applications ("LCA") pursuant to which Complainant was hired, all of which were certified. The first,⁷ for the period of February 23, 2009 to February 22, 2012, related to employment of a software engineer at a wage of \$64,000 in Orangeburg, NY; the prevailing wage was listed as \$63,814.00.⁸ (CX 3). The second LCA,⁹

⁶ As used in this decision, unless otherwise indicated, "CX" refers to Complainant's Exhibits 1 through 11 submitted on May 15, 2015; "RX" refers to Respondent's Exhibits A through C submitted on January 7, 2016; and "AX" refers to the Administrator's Exhibits A-1 through A-3 and B submitted on October 28, 2015.

⁷ Specifically, LCA #I-09054-4691641.

⁸ The application also listed a prevailing wage of \$45,198.00 for Laramie, WY, Employer's city.

valid from July 19, 2010 to July 18, 2013, sought a software engineer in Boston, MA at a wage of \$62,000 per year; the application listed the prevailing wage as \$61,176.00.¹⁰ *Id.* The third LCA,¹¹ valid from June 23, 2011 to May 31, 2014, sought a Programmer Analyst at a salary of \$55,000 per year in Albany, NY; the prevailing wage was listed as \$49,795 per year. *Id.*¹²

On October 29, 2013, Complainant filed a complaint with the Kansas City Wage and Hour Division, which investigated the complaint and the Administrator's determination was issued by the district director's September 16, 2014 letter. The Administrator found that throughout the periods of October 30, 2012 to October 29, 2013, the Respondent had violated the LCA by failing to pay required wages and maintaining required documents and awarded three H-1B nonimmigrants, including the Complainant, \$7,522.20 in back wages.¹³ Thereafter, Complainant filed an objection and request for hearing on September 29, 2014.

LEGAL BACKGROUND

Summary Judgment Standard

A party is entitled to summary decision or judgment if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there are no genuine issues as to any material fact and the party is entitled to judgment as a matter of law. 29 C.F.R. § 18.72(a); Fed. R. Civ. P. Rule 56. The moving party has the initial burden of demonstrating that the non-movant cannot make a showing sufficient to establish an essential element of his case. *Celotex Corp. Catrett*, 477 U.S. 317, 322, 325 (1986). The burden then shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At this stage, the non-movant may not rest upon mere allegations, speculation, or denials in his pleadings but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. *See* 29 C.F.R. §18.72(c). If the non-movant fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact; a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23. All evidence and reasonable inferences are considered in the light most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

⁹ Specifically, LCA #I-200-10197-639855.

¹⁰ According to Complainant's amended complaint, he only worked on-site in Boston, Massachusetts from July 19, 2010 to August 17, 2010. (Am. Compl. at 2).

¹¹ Specifically, LCA #I-200-11174-387243.

¹² According to Complainant's complaint, he resigned from his position as Program Analyst at Fusion on October 31, 2012, due to alleged repeated failures of Fusion to pay the Complainant his promised wages. (Am. Compl. at 3).

¹³ See footnote 3 above.

Enforcement under the H-1B Program

The Department of Labor administers the LCA process and its enforcement provisions. 20 C.F.R. § 655.705(a). In connection with that responsibility, the Wage and Hour Division is responsible “for investigating and determining an employer’s misrepresentation in or failure to comply with LCAs in the employment of H-1B nonimmigrants.” 20 C.F.R. § 655.700(a)(4). The Administrator will issue a determination in which he or she may order civil money penalties, disqualification from future petitions, and other administrative relief including payment of back wages. 20 C.F.R. § 655.810, 655.815. Any interested party may appeal the Administrator’s determination by requesting a hearing before an administrative law judge. 20 C.F.R. §655.820. Following a hearing, the administrative law judge will issue a decision that makes findings and conclusions on material issues presented and affirms, denies, reverses, or modifies the determination of the Administrator. 20 C.F.R. §655.840. The administrative law judge’s decision may be appealed to the Administrative Review Board. 20 C.F.R. §655.845.

DISCUSSION

Jurisdiction

Both the Administrator and the Respondent have asserted that the Administrator’s jurisdiction to investigate H-1B visa violations is limited to the one-year period prior to the filing of a complaint. (Admin. Resp. at 4-5; Resp. Renewed Motion at 7). I agree. For the same reason, I lack jurisdiction over the Complainant’s allegations relating to the remainder of his employment and, even if I had such jurisdiction, I would have no basis for going beyond the Administrator’s investigation.

Eight U.S.C. § 1182(n)(2)(A) provides that “[n]o investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation *unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation*, respectively [*emphasis added*].” Twenty C.F.R. § 655.806(a)(5), in addition, provides that:

A complaint must be filed not later than 12 months after the latest date on which the alleged violation(s) were committed, which would be the date on which the employer allegedly failed to perform an action or fulfill a condition specified in the LCA, or the date on which the employer, through its action or inaction allegedly demonstrated a misrepresentation of a material fact in the LCA. This jurisdictional bar does not affect the scope of the remedies which may be assessed by the Administrator. Where, for example, a complaint is timely filed, back wages may be assessed for a period prior to one year before the filing of a complaint. [*Emphasis added*].

The Administrator asserts that the Administrative Review Board (ARB) has interpreted the INA provision (8 U.C.S § 1182(n)(2)(A)) and implementing regulation (20 C.F.R. § 655.806(a)(5)) as limiting the investigation period regarding H-1B violations to the one year period prior to the filing of a complaint. (Admin. Resp. at 4-5). In support, the Administrator relies upon a recent ARB decision that has now been reversed on other grounds by the Eighth Circuit, *Administrator Wage & Hour Division v. Greater Missouri Medical Pro-Care Providers*,

Inc., ARB Case No. 12-015, ALJ No. 2008-LCA-00026 (ARB Jan. 29, 2014), *aff'd. sub nom. Greater Mo. Med. Pro-Care Providers, Inc. v. Perez*, 2014 U.S. Dist. LEXIS 151352, *22-25 (USDC, W.D. MO), *rev'd on other grounds*, 812 F.3d 1132 (8th Cir. Dec. 14, 2015).¹⁴

In *Greater Missouri*, the ARB held that the plain meanings of the above statute and regulatory provision “dictate a finding that any LCA violations which occurred more than a year before [the complainant] filed her complaint are not actionable.” *Greater Missouri*, ARB No. 12-015 slip op. at 15. In support of its holding, the ARB cited to the statute’s legislative history. *Id.* Specifically, in a House of Representatives Report on September 19, 1990, the House stated that “[t]he bill limits the period during which such a complaint may be filed to the 12 months following the date of the employer’s action or inaction. . . .” *Id.* at 15, n. 38.

The ARB further supported its holding by citing to its prior decisions in *Jain v. Empower IT, Inc.*, ARB No. 08-077, slip op. at 12, ALJ No. 2008-LCA-008 (ARB Oct. 30, 2009); *Adm’r, Wage & Hour Div. v. Avenue Dental Care*, ARB No. 07-101, slip op. at 11, ALJ No. 2006-LCA-029, (ARB, Jan. 7, 2010); and *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-00039, slip op. at 5 (ARB Mar. 30, 2007)(Order of Remand)..

In *Jain*, the ARB rejected the determination by the administrative law judge that the complainant’s claims were actionable because “the applicable regulation permits an aggrieved party...to raise H-1B pay violations that occurred at any time during the periods of this employment as long as the complaint is filed within 12 months of when the employee was last employed under an H-1B visa.” *Jain*, ARB No. 08-077 slip op. at 12. Rather, the ARB held that the INA requires that the complaint be filed “not later than 12 months after the latest date on which the alleged violation(s) were committed,” and thus “the limitation period begins to run when the violation occurred, not when the ‘employee was last employed under an H-1B visa.’” *Id.*

In *Avenue Dental Care*, however, the ARB explained that a claim for back pay can be extended beyond the one year if it is a *continuing violation*. *Avenue Dental Care*, ARB No. 07-101 slip op. at 11. Therefore, in *Avenue Dental Care*, the ARB found that the complainant’s complaint about back pay was timely, and thus actionable, because the respondent continued to not pay him up until and after he had filed his complaint alleging non-payment. *Id.* By contrast, the ARB found that the complainant’s filing fee claim, which occurred in May 2002, was time-barred because the payment of the filing fee occurred more than one year before he filed his claim in September or October of 2005. *Id.*

The ARB had previously addressed the continuing violation issue in *Gupta*, wherein it found a period of unemployment or benching that extended until the termination of the complainant’s employment to be a continuing violation that remained actionable. Noting that the

¹⁴ In a decision of December 14, 2015, the Eighth Circuit rejected the Secretary’s claim to expansive authority, including investigation of matters beyond the complaint, noting: “Rather than authorize an open-ended investigation of the employer and its general compliance . . . , § 1182(n)(2)(a) expressly ties the Secretary’s initial investigatory authority to the complaint and those specific allegations ‘respecting [an employer’s alleged] failure to meet a condition specified in an [LCA] or an employer’s misrepresentation of material facts in such an [LCA].’” *Greater Mo. Med. Pro-Care Providers, Inc. v. Perez*, 812 F.3d 1132, 2015 U.S. App. LEXIS 21544, *14-16 (8th Cir. 2015).

regulation required an H-1B employer to pay the nonimmigrant employee the required wages even when the employee was in nonproductive status due to lack of work, the ARB reasoned that the express terms of the regulation therefore made a benching violation a “continuing violation” that remains actionable for the duration of the employment.

Applying these precedents, the ARB reasoned that, as the complaint was filed on June 22, 2006, only violations that occurred on or after June 22, 2005, or that began before that date but continued to or after June 22, 2005 were timely. *See Greater Missouri*, slip op. at 16. When the benching periods began and ended prior to June 22, 2005, the ARB found them not to be actionable. Likewise, the ARB found illegally deducted fees to be actionable only if imposed after June 22, 2005.

On appeal, the U.S. Court of Appeals for the Eighth Circuit did not disturb the limitation on the Administrator’s jurisdiction. To the contrary, the Eighth Circuit found that the Secretary of Labor’s expansive understanding of his investigatory authority was inconsistent with the plain language of the INA. With respect to the application of the twelve-month limitation period, the Eighth Circuit found the ARB’s application of it to be “sensible”:

Taking the twelve-month time limitation first, we note that in urging the ARB to affirm the damage award for discrete violations that occurred before the twelve-month period specified in § 1182(n)(2)(A), the Secretary argued the statutory and regulatory requirements were met as long as just one claim fell within the twelve-month period. The ARB rejected the Secretary’s expansive interpretation, deciding “[t]he plain meaning of the[] statutory and regulatory provisions dictate [sic] a finding that any LCA violations which occurred more than a year before Arat filed. . . her complaint are not actionable” under § 1182(n)(2)(A). *The Secretary does not challenge that sensible conclusion* on appeal. [Emphasis added.]

Greater Mo. Med. Pro-Care Providers, Inc. v. Perez, 812 F.3d 1132, 2015 U.S. App. LEXIS 21544 *14-16 (8th Cir. 2015).

After analyzing the Administrator’s position, the Respondent’s arguments, Complainant’s statements, and the relevant law, I find that the Administrator properly confined his investigation to the one year limitation, as Respondent’s isolated incidents of failure to pay the required wages, separate periods of benching, and initial illegal deduction of filing fees were individual discrete acts that occurred more than one year prior to the filing of the complaint rather than continuing violations that would warrant an extended investigation period.

Even if the Administrator had the authority to investigate beyond the one-year period, I would nevertheless be constrained to limit my consideration to the period of investigation. Regardless of the extent of the Administrator’s investigative authority, my authority is limited to making findings and conclusions on material issues presented and then affirming, denying, reversing, or modifying the determination of the Administrator. 20 C.F.R. §655.840(b). I am not authorized to conduct my own investigation.

Back Wage Calculation

Failure to Pay Prevailing or Actual Wage Rate

The Administrator determined that the required semi-monthly prevailing wage under the 2011 LCA¹⁵ was \$2,074.79 and the actual wage was \$5,568.00^{16, 17} (Admin. Resp. at 2; CX 2). Following an investigation, the Administrator found that the Respondent failed to pay the required wage to the Complainant during the investigation period of October 30, 2012 to October 29, 2013, by paying less than the actual wage and by benching Complainant without pay. (Admin. Resp. at 2). Specifically, the Administrator found that when the Respondent paid Complainant for the October 1, 2012 to October 15, 2012 pay period, the amount paid was only \$5,000, \$568.00 less than the required actual wage. (Admin. Resp. at 3). Accordingly, the Administrator assessed \$568 in underpaid back wages. I agree with this finding.

In this case, the Complainant alleges that throughout his entire employment with Fusion, i.e. for October 2008 to October 2012, Fusion violated the LCA by failing to pay the higher of the actual or prevailing wage. However, the evidence submitted in this case by the Administrator and even the Complainant himself contradicts these allegations. In addition to his response, the Administrator submitted, as exhibit A-3, the Wage Transcription and Computation Worksheet for the Complainant (“Worksheet”), detailing the Complainant’s wage history from October 1, 2008 to October 31, 2012 compared to the relevant actual and prevailing wages under the prevailing LCA.¹⁸ The Complainant also submitted his pay stubs records from October 1, 2008 to October 31, 2012, which corresponded with the Administrator’s worksheet. (CX 10). As neither party disputes the Department’s calculations or the pay stubs records, I accept the Department’s calculations and the Complainant’s pay stubs as an accurate reflection of prevailing and actual wages under the relevant LCA and an accurate reflection of the wages actually paid to the Complainant.

Based on the Worksheet, between October 1, 2008 and October 31, 2012, the Respondent failed to pay the required actual wages during the pay periods designated within the months and dates of January 16, 2009 through August 15, 2010¹⁹ and October 1, 2012 through October 31, 2012. (AX A-3). Throughout each of these time periods the Respondent was required to pay the required actual wage of \$5,568 semi-monthly. Accordingly, each time the Respondent failed to

¹⁵ At the time the Complainant filed his complaint, Respondent was subject to LCA #I-200-11174-387243 which was active from August 20, 2011 to May 31, 2014. (CX 2; Admin. Resp. at 2).

¹⁶ The actual wage was determined based on the semi-monthly actual wage as of the pay period ending September 30, 2012, which was \$5,568.00.

¹⁷ Neither party has contested this finding.

¹⁸ Throughout Complainant’s employment with the Respondent, the Respondent has filed three separate LCAs pursuant to which Complainant was hired under the H-1B program, as more fully discussed above.

¹⁹ From December 16, 2008 to August 15, 2009 the prevailing wage was \$2,658.92 semi-monthly and that actual wage was \$53.60 per hour. However, from January 16, 2009 to August 15, 2009, Complainant’s actual hourly rate fell below the required actual wage by at least \$1.60 and Respondent failed to pay him for 20 hours of work. *Id.*

pay the required semi-monthly wages on the date that they were due, the Respondent committed a separate discrete violation. As discrete violations, the one year limitation is applicable and therefore a complaint must be filed within 12 months after the violation occurred, which in this case would be when the payment for a pay period was due and not the last day of the pay period. *See Jain*, ARB No. 08-077 slip op. at 12 (holding that the limitations period begins to run when the violation occurred). Accordingly, any complaint(s) regarding violations occurring from January 16, 2009 through August 15, 2009 must have been filed by the corresponding months in 2010. In this case the Complainant did not file his complaint until October 29, 2013, more than a year after the Respondent failed to pay the required actual wage. Therefore, Complainant is not entitled to back wages for any violations occurring between January 16, 2009 to August 15, 2009, as any complaint regarding such violations are time-barred. Complainant is, however, entitled to back wages for violations occurring between October 1, 2012 and October 31, 2012, as payment for these violations falls within the investigation period.

According to the Worksheet, after failing to pay the required actual wage for the pay period ending on August 15, 2009, Respondent complied with such requirements until the pay period of October 1, 2012 to October 15, 2012. When the payment for aforementioned pay period was due, approximately sometime in November based on Respondent's typical payroll practice of issuing paycheck three and a half to five weeks after the last day of the pay period²⁰, Complainant was only paid \$5,000, \$568 less than the actual wage. Therefore, because Respondent's violation approximately occurred in November 2012, it is within the one-year investigation period and thus actionable. Complainant is therefore entitled to \$568 in underpaid back wages, for the Respondent's failure to pay the required actual wage for pay period October 1, 2012 to October 15, 2012.

Benching or Failure to Pay Violations

Complainant is also entitled to payment for periods during which Respondent failed to pay him when he was in nonproductive status through no fault of his own, or "benching" periods.

In addition to the benching period found by the Administrator, the Complainant alleges that he was illegally benched without pay on three separate occasions: (1) September 4, 2009 to September 27, 2009; (2) December 26, 2009 to January 3, 2010; and (3) July 4, 2010 to July 18, 2010. During the investigation, the Administrator determined that there were no benching violations on the dates alleged. This determination was based on the Administrator's prior investigation of Respondent, covering March 9, 2009 to March 8, 2010, in which the

²⁰ Based on the Complainant's pay stubs, the Respondent's typical payroll practice seems to indicate payment between three (3) and a half to five (5) weeks of the last day of the pay period. *See CX 10*. For example, during the early part of 2012 Complainant was paid within three and a half weeks of the last day of the pay period, i.e. for pay period ending on January 15, 2012, Complainant was paid by February 8, 2012, three and a half weeks after January 15, 2012. *Id.* However, for pay period ending on September 15, 2012, the last pay stub of record, Complainant was not paid until October 23, 2012, representing a five week payroll practice. *Id.* Thus, based on the most recent payment practice, it would seem that Complainant would not have been paid for the pay period ending October 15, 2012 until five weeks later. Accordingly, this would indicate an approximate pay date of November 12, 2012. Therefore, Respondent's failure to pay the required rate for the pay period ending on October 15, 2012 on November 12, 2012 falls within the one year investigation period.

Administrator determined that no benching violations had occurred and the finding during the current investigation, that the Complainant was paid the required wage rate for nonproductive time from July 5, 2010 to July 18, 2012.²¹ In regards to whether a violation occurred I will defer to the Administrator's findings, as neither party has provided a basis for disputing those findings.

However, even if such violations were to have been found, because each benching period was for a limited period of time and not continuous, the benching violations constitute discrete acts. As such, the Complainant must have filed his complaint within a year of the last day of each alleged benching period. Specifically, this would have required the Complainant to have filed complaints by September 27, 2010, January 3, 2011, and July 18, 2011, respectively. In this case the Complainant did not file this complaint until October 2013, more than two years later. Any prior complaints filed by Complainant or his coworkers are not currently before me. Therefore Complainant's aforementioned benching claims are time-barred and thus are not actionable.

The Administrator did, however, find that the Complainant was benched without pay from October 19, 2012 until the Complainant's termination on October 31, 2012. Accordingly, the Administrator assessed back wages of \$5,568.00, the actual wage due Complainant for the pay period of October 16, 2012 to October 31, 2012, against the Respondent. As there is no dispute that Respondent failed to pay the Complainant for the pay period of October 16, 2012 to October 31, 2012; that finding is supported by the Worksheet; and there is no evidence to the contrary,²² I accept the Administrator's findings.

During the pay period of October 16, 2012 to October 31, 2012, the required actual wage was \$5,568.00. Based on the Respondent's payroll practices previously discussed, this payment would have come due within the one year investigation period, approximately December 2012 based on a five and a half week payroll practice. Accordingly, as there is no dispute that Respondent benched the Complainant on October 19, 2012 and did not pay the Complainant the required wages when they became due, the Complainant is also entitled to \$5,568.00 in back wages in addition to the \$568.00 already awarded, or \$6,136. That is the amount awarded by the Administrator.

Illegal Deductions

Lastly, Complainant's claim for reimbursement of filing fees in the amount of \$2,500 is also time-barred. During its investigation, the Wage and Hour investigator found that attorney's fees and filing costs were deducted from Complainant's wages in \$500 increments between July and November of 2008 in the amount of \$2,500. (Admin. Resp. at 3). Nonetheless, the Administrator determined that the illegal deductions were not actionable because the deductions were not continuing violations, as to be considered timely, the complaint needed to be filed no later than November 2009. *Id.* I agree. As the violation began in July 2008 and continued until November of 2008, the Complainant was required to file his complaint, at the latest, by

²¹ Records relating to the Administrator's prior determination were not offered by any party.

²² The pay records do not include any payments made by the Respondent after the pay period ending September 15, 2012. (CX 10)

November 2009. Therefore, claims regarding the illegal deduction of \$2,500 are time-barred, as they fall outside of the October 29, 2012 to October 31, 2013 investigation period.

Conclusion

The total amount of back wage due to Complainant amount to \$6,136.00. Respondent has promptly paid this amount, pursuant to the Administrator's September 16, 2014 determination. (RX C)²³. Accordingly, Respondent has fully satisfied its obligations and does not owe any other back wages to the Complainant.

Side Agreement Violations

Respondent asserts that any alleged violations that are not H-1B violations, such as contract damage violations based on side agreements with the Respondent are not actionable before this tribunal in accordance with the holding in *Labor v. Prism Enterprises of Central Florida, Inc. dba Future Automation*, ARB No. 01-080, ALJ No. 2001-LCA-0008 (ARB Nov. 25, 2003). I agree.

In *Prism Enterprises*, the ARB upheld the undersigned's ruling that a \$30,000 payment made by the complainant, pursuant to a June 3 agreement, was "under a separate agreement and was not related to wages required to be paid under the LCA." *Prism Enterprises*, slip op. at 5; see also *Administrator, Wage and Hour Division v. Prism Enterprises of Central Florida, Inc. dba Future Automation*, ALJ No. 2001-LCA-00008, 14 (ALJ, June 22, 2001).²⁴ Similarly, in this case I find that the Complainant's allegations that he was not paid the agreed upon 70% or 80% of the hourly rate charged to clients was pursuant to a separate agreement, specifically the 2007 Fusion Employment Agreement, not related the H-1B wage requirements, and therefore not within my jurisdiction. See CX 11.

Complainant's allegations that Respondent failed to pay him the agreed upon 70%, and later 80%, of the hourly rate charged to clients are based on a November 16, 2007 employment agreement between Fusion and the Complainant, followed by a subsequent oral agreement, supported by a December 13, 2008 email communication between Suresh Muragalla and "venkat ramana" [Complainant], stating that after six months Complainant's hourly percentage would increase to 80%. (CX 11; CX 8). Given the fact that the employment agreement was entered into prior to the Respondent submitting its first labor condition application (LCA) and there has been no showing that the agreement was incorporated into the LCA, the employment agreement constitutes a separate agreement not related to the wages required to be paid under the LCA. Accordingly, any claims that Complainant has regarding the Respondent's failure to pay the agreed upon 70% or 80% of the hourly rate is based on contract obligations apart from those pertaining to the H-1B program and therefore, not within my jurisdiction.

²³ Bank records display a \$6,136.00 check made out to the Complainant on September 29, 2014. (RX C).

²⁴ Contrary to my finding, the ARB found that the employer should not be credited for payments it made to the complainant under the separate agreement, as the payments were separate and apart from the H-1B wage requirements. *Labor v. Prism Enterprises of Central Florida, Inc. dba Future Automation*, ARB No. 01-080, ALJ No. 2001-LCA-0008 (ARB Nov. 25, 2003).

ORDER

IT IS HEREBY ORDERED that Respondent's Renewed Motion for Summary Judgment be, and hereby is, **GRANTED** and Complainant's complaint be, and hereby is, **DISMISSED WITH PREJUDICE**.

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. 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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

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. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).