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Issue Date: 24 February 2016

Case No. 2015-LCA-5

In the Matter of:
ADMINISTRATOR,
WAGE & HOUR DIVISION,
Prosecuting Party,

v.

GOVERNMENT TRAINING, LLC.,
Respondent.

DECISION AND ORDER GRANTING PROSECUTING PARTY'S MOTION FOR SUMMARY JUDGMENT

This proceeding arises under the H-1B provisions (20 C.F.R. Part 655) of the Immigration and Nationality Act of 1952, amended by the Immigration Act of 1990 and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (hereinafter referred to collectively as the "INA"), 8 U.S.C. § 1182(n), and its implementing regulations, which are located at 29 C.F.R. § 507.700 *et seq.*

The INA permits employers to hire non-immigrants in "specialty occupations" to work in the United States for prescribed periods of time. 20 C.F.R. §655.700. Employers seeking to hire such workers, commonly referred to as H-1B non-immigrants, must obtain certification from the Department of Labor by filing a Labor Condition Application ("LCA"). The LCA stipulates the wage levels and working conditions that the employer provides the H-1B non-immigrant. After securing certification, and upon approval of the Department of Homeland Security ("DHS"), the H-1B non-immigrant is issued a visa and may begin work. 20 C.F.R. §655.705(a) & (b).

In addition to the conditions set forth in the LCA, the INA required employers to pay H-1B non-immigrants as much as it pays other similarly experienced and qualified employees or to pay the prevailing local wage level for the H-1B non-immigrant's occupational classification, whichever is greater. 8 U.S.C. §1182(n)(1)(A)(i)(I)&(II).

Procedural History

In this case, the Administrator, Wage and Hour Division ("Administrator"), issued findings that Government Training, LLC ("Respondent") violated the INA with respect to one non-immigrant H-1B employee, Mr. Puneet Sharma ("Mr. Sharma"), as per the Administrator's determination letter dated October 28, 2014. The Respondent timely appealed the Administrator's findings on November 10, 2014. Subsequently, the case was referred to the

Department of Labor Office of Administrative Law Judges ("OALJ") and assigned to me on November 14, 2014. Pursuant to a Notice of Hearing dated April 22, 2015, I scheduled a hearing in this matter for June 15-16, 2015. On May 26, 2015, the parties' partook in a telephone conference with the undersigned and by agreement, the hearing scheduled for June 15-16, 2015, was vacated and the discovery deadline was extended. Pursuant to a Notice of Hearing dated September 16, 2015, I scheduled a hearing in this matter for November 17, 2015.

On October 1, 2015, the Administrator filed a Motion for Summary Decision, with supporting exhibits, pursuant to 29 C.F.R. §18.72, requesting a judgement be entered in its favor. By Order issued October 7, 2015, the scheduled hearing was continued pending my decision on Summary Judgement and the Respondent was given an extension to reply to the Administrator's Motion. On November 12, 2015, the Respondent filed a Reply to the Motion for Summary Judgement, with supporting exhibits. On November 16, 2015, pursuant to 29 C.F.R. §18.33(d), the Administrator requested permission to submit a Reply to Respondent's Response to the Administrator's Motion for Summary Decision. That request is granted and the Reply to Respondent's Response is admitted into the record. On November 17, 2015, the Respondent Replied to the Administrator's Reply and that correspondence is also admitted into the record.

Parties' Contentions

In its Motion for Summary Decision, the Administrator maintained that the undisputed facts establish, as a matter of law, that 1) the Respondent violated 20 C.F.R. §566.731 by failing to pay Mr. Sharma either the actual wage set forth or the prevailing wage set forth in two LCAs, and 2) that the Respondent owes Mr. Sharma back wages.

In its Response, the Respondent argued that there were triable issues of fact regarding 1) whether Mr. Sharma's complaint with the Administrator was timely filed, 2) whether the Respondent was relieved of its obligation to pay back wages due to lack of work and Mr. Sharma's failure to mitigate his damages, 3) whether Mr. Sharma took additional vacation time other than the days that were reported to the Administrator, 4) whether the Administrator exceeded its authority when assessing the scope of back wages the Respondent was required to pay, and 5) whether the Respondent provided Mr. Sharma with a car, a cell phone, and health insurance, which should be considered part of Mr. Sharma's wages.

Statutory and Regulatory Framework

The H-1B visa program permits employers to employ non-immigrants temporarily to fill specialized jobs in the United States. The INA requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage. Under the INA, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must receive permission from the DOL before the non-immigrant may obtain a visa.

The INA defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. §1184(i)(1). To receive permission from the DOL, the INA requires an employer seeking permission to employ an H-1B non-immigrant to submit a Labor Condition Application ("LCA")

to the DOL. *See* 8 U.S.C. §1182(n)(1). Only after the employer receives the DOL's certification of its LCA may the Immigration Naturalization Service approve a non-immigrant's H-1B visa petition. 8 U.S.C. §1101(a)(15)(H)(1)(B); 20 C.F.R. §655.700.

The INA provides that the LCA filed by the employer with the DOL must include a statement to the effect that the employer is offering to an alien status as an H-1B non-immigrant, that wages for H-1B visa holders are at least equal to the actual wage level paid by the employer to all other individuals with similar experiences and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is higher, based on the best information available at the time of the filing of the application. 8 U.S.C. §1182(n)(1)(A).

The INA directs that DOL to review the LCA only for completeness or obvious inaccuracies. Unless the DOL finds that the application is incomplete or obviously inaccurate, the DOL shall provide the certification described by the INA within seven (7) days of the date of the filing of the application. 8 U.S.C. §1182(n)(1); 20 C.F.R. §655.740.

The DOL has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation, of the required wages. *See* 20 C.F.R. Part 655 Subpart H. The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid, debarment of the employer from future employment of aliens, civil money penalties, and other relief that the DOL deems appropriate. 20 C.F.R. §655.810; §655.855.

Standards for Summary Decision

Summary decision is appropriate when the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. §18.72. The standard for granting summary decision is essentially the same as that found in Fed. R. Civ. Pro. 56. *See Saporito v. Central Locating Services, Ltd.*, ARB No. 05-004, 2006 WL 535427 (ARB Feb. 28, 2006), *citing Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 03-SIX-026, slip op. at 3 (ARB Dec. 30, 2005). In deciding a motion for summary judgment, the fact finder must view the facts in the light most favorable to the non-moving party. *Howlett v. Birkdale Shipping Co.*, 513 U.S. 92 (1994). The Moving party bears the burden of proof, though the opposing party "may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 447 U.S. 242 (1986).

Findings of Undisputed Facts

I find the following facts to be undisputed:

1. Mr. Sharma is an Indian citizen who holds a Master's degree in Information Technology. (Sharma dep. at 12).

2. The Respondent is a limited liability corporation with its principal place of business in Longboat Key, Florida. The

Respondent provides training in the areas of business management, acquisition, physical and cyber security, and grant writing. (Administrator's Motion for Summary Decision, Ex. C, p. 29 & 61).

3. In February 2010, the Respondent filed a LCA for the H-1B non-immigrant visa program (LCA case No. I-200-10034-476261) on behalf of Mr. Sharma for the position of software engineer. (Administrator's Motion for Summary Decision, Ex. D, p. 1-8).

4. Under LCA case No. I-200-10034-476261, the Respondent promised to pay Mr. Sharma for the position of software engineer at the offered wage rate of $65,000.00 per year. (Administrator's Motion for Summary Decision, Ex. D, p. 3).

5. Under LCA case No. I-200-10034-476261, the Respondent listed the prevailing annual wage rate as $55,808.00. (Administrator's Motion for Summary Decision, Ex. D, p. 3).

6. LCA case No. I-200-10034-476261 was approved by the DOL for a period of three (3) years starting February 3, 2010, to January 31, 2013. (Administrator's Motion for Summary Decision, Ex. D, p. 5).

7. In February 2010, the Respondent's filed a petition for an H-1B visa classification (form I-129) with the DHS on behalf of Mr. Sharma, noting that Mr. Sharma would be employed full time as a computer programmer and that he would be paid an annual salary of $65,000.00 for a period of three years from February 1, 2010, to January 31, 2013. (Administrator's Motion for Summary Decision, Ex. D, p. 76-79).

8. On March 25, 2010, the Respondent's petition for H-1B visa classification on behalf of Mr. Sharma was approved by the DHS. (Administrator's Motion for Summary Decision, Ex. C, p. 125).

9. In 2012, the Respondent filed a LCA for the H-1B non-immigrant visa program (LCA case No. I-200-12206-665441) on behalf of Mr. Sharma for the position of computer programmer. (Administrator's Motion for Summary Decision, Ex. C, p. 96-101).

10. Under LCA case No. I-200-12206-665441, the Respondent promised to pay Mr. Sharma for the position of computer programmer at the offered wage rate of $24.24 per hour. (Administrator's Motion for Summary Decision, Ex. C, p. 99).

11. Under LCA case No. I-200-12206-665441, the Respondent listed the prevailing hourly wage rate as $24.24 per hour. (Administrator's Motion for Summary Decision, Ex. C, p. 99).

12. LCA case No. I-200-12206-665441 was approved by the DOL on August 16, 2012, for a period of three (3) years starting February 1, 2013, to January 18, 2016. (Administrator's Motion for Summary Decision, Ex. C, p. 101).

13. In October 2012, the Respondent's filed a petition for an H-1B visa classification (form I-129) with the DHS on behalf of Mr. Sharma, noting that Mr. Sharma would be employed part-time as a computer programmer and that he would work 20-40 hours per week at an hourly wage of $24.24 with a minimum annual remuneration of $38,500.00. (Administrator's Motion for Summary Decision, Ex. C, p. 49-50).

14. The Respondent's October 2012 petition for H-1B visa classification on behalf of Mr. Sharma was approved.

15. Records from the DHS, Customs and Boarder Protection, show that Mr. Sharma arrived in the United States on January 18, 2010. (Administrator's Motion for Summary Decision, Ex. D, p. 75).

16. Mr. Sharma stated that he became available to work for the Respondent on February 18, 2010. (Administrator's Motion for Summary Decision, Ex. C, p. 140).

17. In 2010, Mr. Sharma's wages, tips, and other compensation totaled $34,271.78, as stated in his W-2 for 2010. (Administrator's Motion for Summary Decision, Ex. C, p. 138).

18. In 2011, Mr. Sharma's wages, tips, and other compensation totaled $35,242.95, as stated in his W-2 for 2011. (Administrator's Motion for Summary Decision, Ex. C, p. 137).

19. In 2012, Mr. Sharma's wages, tips, and other compensation totaled $36,128.25, as stated in his W-2 for 2012. (Administrator's Motion for Summary Decision, Ex. C, p. 136).

20. In 2013, Mr. Sharma's wages, tips, and other compensation totaled $15,718.47, as stated in his W-2 for 2013. (Administrator's Motion for Summary Decision, Ex. C, p. 135).

21. The Respondent did not list any other benefits and/or compensation in Mr. Sharma's payroll records dating from 2010 to 2013. (Administrator's Motion for Summary Decision, Ex. C, p. 14-15; 127-129; 139, Ex. E, p. 1-2).

22. Starting in February 2013, when Mr. Sharma became an hourly employee, the Respondent did not keep records of the hours worked by Mr. Sharma. (Administrator's Motion for Summary Decision, Ex. C, p. 14-15; 139, Ex. E, p. 1-2).

23. The Respondent did not keep any record that Mr. Sharma took time off work for any reason including travel or to pursue and obtain additional technical certifications. (Administrator's Motion for Summary Decision, Ex. C, p. 14-15; 127-129; 139, Ex. E).

24. Starting in February 2013, when he became on hourly employee, Mr. Sharma reported working between 30-32 hours per week. (Administrator's Motion for Summary Decision, Ex. B, p. 50).

25. Mr. Sharma voluntarily resigned from his employment on September 15, 2013, and records from the DHS, Customs and Boarder Protection show that Mr. Sharma left the United States on September 21, 2013. (Administrator's Motion for Summary Decision, Ex. C, p. 144; 148, Ex. D, p. 75).

26. Records from the DHS, Customs and Boarder Protection show that there was no activity on Mr. Sharma's passport from January 1, 2010, until September 21, 2013. (Administrator's Motion for Summary Decision, Ex. D, p. 75).

27. Mr. Sharma filed a complaint (form WH-4) with the Wage and Hour Division ("WHD") of the United Stated Department of Labor ("DOL") on January 8, 2014. Mr. Sharma alleged that his employer, Government Training, LLC, supplied incorrect or false information on LCAs, failed to pay the required wages listed on his LCAs and I-129 visa applications, and failed to provide fringe benefits equal to those provided to US workers. (Administrator's Motion for Summary Decision, Ex. C, p. 145-148).

28. Ms. Carmen Rodriguez was the WHD Investigator who investigated Mr. Sharma's complaint to assess and determine the Respondent's compliance with the H-1B program. (Administrator's Motion for Summary Decision, Ex. G, Rodriguez Aff. ¶ 2).

29. On February 4, 2014, Investigator Rodriguez informed the Respondent, via letter, of the investigation and requested documentation which provided the wage rates paid to all H-1B employees. (Administrator's Motion for Summary Decision, Ex. C, p. 24-25).

30. Mr. Sharma stated that he was voluntarily on vacation from November 9, 2011, through November 16, 2011; December 10, 11, and 13, 2011; and October 26, 2012.[1] (Administrator's Motion for Summary Decision, Ex. C, p. 143).

31. As a result of its investigation, the Administrator found that the Respondent failed to pay Mr. Sharma wages as required under 20 C.F.R. §655.731, and failed to maintain documents as required under 20 C.F.R. §655.731(b), §655.738(e), §655.739(i), and/or §655.760(c). (Administrator's Motion for Summary Decision, Ex. C, p. 2-8).

32. On October 28, 2014, the Administrator issued a Determination Letter to the Respondent, citing the violations found as a result of the investigation and notifying the Respondent it owed $47,855.82 in back wages to Mr. Sharma. (Administrator's Motion for Summary Decision, Ex. C, p. 2-8).

33. The Respondent admitted that it did not pay Mr. Sharma $65,000.00 for the period from January 1, 2011, to December 31, 2011. (Administrator's Motion for Summary Decision, Ex. A).

34. The Respondent admitted that it did not pay Mr. Sharma $65,000.00 for the period from January 1, 2012, to December 31, 2012. (Administrator's Motion for Summary Decision, Ex. A).

[1] November 9, 2011, was a Wednesday, December 10, 2011, was a Saturday, and October 26, 2012, was a Friday. *See* http://www.dayoftheweek.org (last visited Nov. 24, 2015).

ANALYSIS AND CONCLUSIONS OF LAW

The WH-4 complaint was timely filed

A complaint must be filed not later than 12 months after the latest date on which the alleged violations were committed, which is defined as the date on which the employer allegedly failed to perform an act or fulfill a condition specified in the LCA, or the date in which the employer allegedly demonstrated a misrepresentation of material fact on the LCA. 20. C.F.R. 655 §806(a)(5).

Here, Mr. Sharma filed his complaint on January 8, 2014. This date fell within 12 months from the latest violation complained of as Mr. Sharma alleged that he was not paid either the actual or prevailing wage from January 2010 through September 2013. Thus, the undisputed facts of record establish that Mr. Sharma's complaint was timely filed.

The Respondent failed to pay Mr. Sharma his actual wage from September 18, 2011, through September 15, 2013.

In the regulations, 20 C.F.R. §655.731 sets forth the wage requirement for non-immigrant H-1B employees. The employer must attest that they will pay the required wage rate to their non-immigrant H-1B employees for the entire period listed in the LCA. 20 C.F.R. §655.731(a). The employer must pay the greater of the actual wage or the prevailing wage. (*Id*.). The required wage must be paid to employees "cash in hand, free and clear, when due." 20 C.F.R. §655.731(c)(2). The regulation further defines "when due:" "[f]or salaried employees, wages will be due in pro-rated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where the employer pays bi-weekly) paid no less often than monthly . . ." 20 C.F.R. §655.731(c)(4). For hourly-wage employees, "the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (e.g., weekly) but in no event less frequently than monthly." 20 C.F.R. §655.731(c)(5).

The applicable regulations state that employers must pay their H-1B workers beginning on the date on which the worker "enters into employment" with the employer. 20 C.F.R. §655.731(c)(6). Workers are considered to "enter into employment" when they first make themselves available for work or otherwise come under the control of the employer, such as by waiting for an assignment or reporting for orientation. 20 C.F.R. §655.731(c)(6)(i).

Once the employment period beings, the employer is required to pay an H-1B employee the required wage for the duration of the period on the LCA. If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g. lack of available work), lack of a permit or license, or any other reason except as specified below, the employer is still required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week at the required wage for the occupation listed on the LCA. 20 C.F.R. §655.731(c)(7)(i)

There are only two situations where an employer does not need to pay wages to an H-1B worker. The first is when the worker is in non-productive status due to conditions unrelated to employment which take them away from work at their own convenience or request or which renders them unable to work, for example travel or maternity leave. 20 C.F.R. §655.731(c)(7)(ii). The second is when there has been a *bona fide* termination of the employment relationship. (*Id*.). In order for there to be a *bona fide* termination of the employment relationship, the employer must notify the DHS that the employment relationship has been terminated to the petition may be canceled. (*Id*.).

Once a complaint has been filed, the regulation provides the Administrator the authority, to "conduct investigations as may be appropriate and . . . as deemed necessary by the Administrator to determine compliance with the regulation." 20 C.F.R. § 655.800(b). Upon determining that an employer has failed to pay wages or provide fringe benefits as required by §655.731 and §655.732, the Administrator shall assess and oversee the payment of back wages or fringe benefits to any H-1B non-immigrant who has not been paid or provided fringe benefits as required. The back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to the non-immigrant. 20. C.F.R. 655 §810(a).

Here, the Administrator is seeking back wages equal to the difference between the amount that should have been paid to Mr. Sharma and the amount that actually was paid for the period of time from September 18, 2011, through September 15, 2013. Mr. Sharma entered the county in January of 2010. The undisputed evidence shows that Mr. Sharma presented himself as available for work in February of 2010. Thus, it is clear that Mr. Sharma had entered into employment and was available for work on September 18, 2011. It is also clear from the undisputed evidence that Mr. Sharma voluntarily resigned from his position on September 15, 2013, and left the county soon after. By voluntarily resigning from his position and leaving the country, Mr. Sharma demonstrated that he was unwilling and unavailable to work, essentially placing himself in a non-productive status due to conditions unrelated to employment. Therefore, the Respondent was not obligated to pay wages past September 15, 2013.

The undisputed facts further show that from February 3, 2010, to January 31, 2013, the Respondent offered Mr. Sharma an annual salary of $65,000.00 as compensation for the position of software engineer. It is also clear that Mr. Sharma's total compensation for 2011, 2012, and January of 2013 fell below the annual salary (or prorated annual salary) noted in his LCA and I-129 visa petition. Further, from February 2013 onward, the Respondent offered Mr. Sharma an hourly wage of $24.24 with a minimum annual remuneration of $38,500.00 for the position of computer programmer. It is also clear that Mr. Sharma's total compensation for the time he was employed in 2013 falls short fell below the prorated minimum annual remuneration noted in his LCA and I-129 visa petition.

Here, the Respondent does not argue that the Administrator's finding regarding the failure to pay wages was improper. Further, the Respondent admits that it did not pay Mr. Sharma the required wages under the LCAs. However, the Respondent does argue that it should be excused from paying the required wage for a number of reasons.

The Respondent first argued that it should not have to pay Mr. Sharma back wages because during the years Mr. Sharma was employed it experienced a downturn in business due to circumstances outside of its control and thus was unable to pay the amounts indicated in the LCAs. The Respondent also argued that it should not have to pay Mr. Sharma back wages as Mr. Sharma was responsible for limiting his damages by, for example, seeking alternative work, retuning to India earlier, or seeking the aid of the Department of Labor at an earlier date in time. However, a downturn in business or an H-1B employee's failure to mitigate damages does not relieve the Respondent of its responsibilities under the LCAs; rather, the regulations clearly require wages be paid, even if an employee is not productively working. The only times a company is relieved of its obligation to pay the required wages are: 1) when the H-1B worker places him- or herself in non-productive status due to conditions unrelated to employment, or 2) where there is a *bona fide* termination of the employment relationship. 20 C.F.R § 655.731(c)(7)(ii).

Here, there is nothing in the record to indicate that the DHS was ever notified that the employment relationship had been terminated. Therefore, the Respondent has failed to demonstrate that that there are triable factual issues on whether there was a *bona fide* termination of the employment relationship. As noted above, the only evidence of a termination of the employment relationship is when Mr. Sharma made himself unavailable to work by leaving the country on September 21, 2013.

With regard to Mr. Sharma placing himself in nonproductive status prior to September 21, 2013; the undisputed facts show that Mr. Sharma took eight (8) days of vacation during his employment. Mr. Sharma is not entitled to compensation for those eight days as he placed himself in non-productive status. The Respondent alluded that Mr. Sharma took additional days off, either for vacation or to pursue additional education or certifications, and even left the county for months at a time during his employment. However, it is clear from the DHS Customs and Border Protection records that Mr. Sharma did not leave the country from the date he entered on January 18, 2010, until he finally left on September 21, 2013. Further, the Respondent did not produce any documentation showing the dates that Mr. Sharma did or did not work and cannot support the vague allegations that Mr. Sharma took more vacation days than he is claiming, for any reason. The mere allegation that Mr. Sharma took additional days off is not enough to oppose a motion for summary judgement.

Regarding the Respondent's argument that Mr. Sharma was required to mitigate his damages, the regulations do not permit an H-1B non-immigrant worker to be employed by any entity aside from the one contained on the LCA and I-129 visa petition. Thus, Mr. Sharma was not free to seek alternative work "at will" as a citizen of the United Stated would be able to. The regulations also do not require an H-1B employee to return to their home county if, at any time during the contracted period of employment, the provisions in the LCA are not met. Finally, as discussed above, the regulations allow for a one-year statute of limitations for the H-1B worker to file a complaint and provide no relief to an employer simply because a worker does not file a complaint immediately after a violation occurs. It is clear from the record that Mr. Sharma had an expectation that he was to be paid the annual salary or wages listed in the LCAs and there is nothing in the regulations that require him to mitigate his damages when he was underpaid.

In sum, the Respondent has failed to provide evidence to create an issue of triable fact concerning the two situations specifically outlined in the regulations that would relieve it of the obligation to pay Mr. Sharma the required wages. Further, the Respondent's other reasons for why it should not have to pay back wages do not constitute a defense under the regulations that would relieve it of its obligation.

The Respondent also speculated that the Administrator improperly conducted the investigation or otherwise exceeded its authority by assessing back wages for a two-year period of time. Again, these speculations are insufficient to defeat a motion for summary decision. The Administrator can determine the boundaries of the investigation to the extent necessary to determine compliance with the regulations. *See e.g. Administrator v. Greater Missouri Med. Pro-Care Providers, Inc.*, ARB 12-015, 2014 WL 469269 (ARB Jan. 29, 2014). Any further argument is without merit as the regulation does not contain any language that outlines a prescribed period for back pay recovery. The pertinent regulation expressly *permits* the H-1B nonimmigrant to recover back wages for periods "prior to one year before the filing of a complaint." *See* 20. C.F.R. 655 §806(a)(5). However, the Administrator is provided great discretion in both the scope of the investigation and the assessment of the remedies owed. While back wages could have been assessed for an even greater period of time, back to February of 2010, the Administrator chose to limit the back wages sought to a two-year window. The Respondent cannot point to any specific actions or colorable evidence that the Administrator violated the authority provided to it by the regulations.

In sum, for the reasons noted above, aside from the eight (8) vacation days Mr. Sharma acknowledged taking, the Respondent has not demonstrate any issue of triable fact or articulated any defense in law which would alleviate it of the requirement to fully compensate Mr. Sharma for the period he was employed. Mr. Sharma is thereby entitled to the two years of underpaid wages sought by the Administrator.

Amount of Back Wages Due

As noted above, upon determining that an employer has failed to pay wages or provide fringe benefits as required by §655.731 and §655.732, the Administrator shall assess and oversee the payment of back wages or fringe benefits to any H-1B non-immigrant who has not been paid or provided fringe benefits as required. The back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to the non-immigrant. 20. C.F.R. 655 §810(a).

In the Notice of Determination issued on October 28, 2014, the Administrator advised the Respondent that $47,855.82 in back wages was due to Mr. Sharma. (Administrator's Motion for Summary Decision, Ex. C, p. 2-8). Further, Wage and Hour Investigator Ms. Carmen Rodriguez, who investigated Mr. Sharma's complaint, submitted an affidavit with the Administrator's Motion for Summary Decision in which the process used to arrive at the amount of back wages owed was explained. (Administrator's Motion for Summary Decision, Ex. G).

In determining the back wages due, Investigator Rodriguez assessed back wages based on the difference between the amount Mr. Sharma received and the amount he should have received. She made a distinction between the time period when Mr. Sharma was a salaried employee (September 18, 2011 to January 31, 2013) and when he was paid an hourly rate (February 1, 2013 to September 15, 2013).

As no documentation noting Mr. Sharma's pay periods is of record, at times Investigator Rodriguez would pro-rate the weekly wage amount Mr. Sharma should have received based on the annual salary or minimum remuneration contained in the LCA. She would then compare it to the pro-rated weekly wage amount Mr. Sharma did receive based on the annual compensation contained in his W-2s. She also made appropriate reductions for the eight (8) days Mr. Sharma was unavailable to work, using a daily wage rate of $250.00. (Administrator's Motion for Summary Decision, Ex. G, Rodriquez Aff. ¶ 11a). Investigator Rodriguez averred that the Respondent underpaid Mr. Sharma by $6,261.22 from September 18, 2011 through December 31, 2011. (*Id*.). She averred that the Respondent underpaid Mr. Sharma by $28,621.75 in 2012. (*Id*. ¶ 11b). She averred that the Respondent underpaid Mr. Sharma by $3,886.64 in January 2013. (*Id*. ¶ 11c).

For the periods when Mr. Sharma was an hourly employee, Mr. Sharma stated that he worked 30-32 hours per week. As no documentation noting the hours Mr. Sharma worked is of record, Investigator Rodriguez determined that with an hourly wage of $24.24, Mr. Sharma would need to work 30.5 hours per week to achieve an annual remuneration of $38,500.00. (*Id*. ¶ 10). She also noted that 30.5 hours was within the hours range included on the I-129 form. (*Id*.). Using 30.5 hours she determined the weekly wage Mr. Sharma was owed and then compared it to the pro-rated weekly wage amount Mr. Sharma did receive based on the annual compensation contained in his W-2. Thus, she averred that Mr. Sharma was underpaid $14,605.31 from February 1, 2013 to September 15, 2013.

The Respondent argued that he provided additional compensation to Mr. Sharma in the form of health insurance, a car, and a cell phone; and that the cost of providing such items should be included in calculating Mr. Sharma's wages. The regulations require, however, that wages be paid to the H-1B employee as cash in hand, free and clear, when due. 20 C.F.R. §655.731(c)(1). The regulations also contain provisions for benefits provided as compensation and make clear that such benefits may be credited toward the satisfaction of the employer's required wage obligation only if the benefits are recorded and reported as "earnings" on the employee's payroll and to the IRS with appropriate taxes and FICA contributions withheld and paid. 20 C.F.R. §655.731(c)(3)(iv).

While the health insurance, car, and phone could be considered as benefits provided as compensation to Mr. Sharma, the Respondent has submitted no documentation to show how much these items cost, either in a lump sum or on a monthly basis. The Respondent also provided no documentation to show that such items were ever recorded or reported, either on Mr. Sharma's payroll or to the IRS, as required by the regulations. As there is nothing of record documenting the cost and value of these benefits, the Respondent has failed to provide any evidence that would allow them to be included in the calculation of Mr. Sharma's wages. Thus, I find that the Respondent's has again failed to respond to the motion for summary judgment by

providing colorable evidence that would create a triable issue of fact regarding any non-cash benefits supposedly provided to Mr. Sharma to be included in the wage determination.

In sum, having reviewed the Administrator's findings and the evidence of record, I find that the Respondent has not presented any evidence that a triable issue exists regarding the reasonableness of Investigator Rodriguez's calculation that the Respondent owes $47,855.82 in back wages to Mr. Sharma.

Conclusion

Summary decision in favor of the prosecuting party in appropriate in this matter. The Respondent's response to the Administrator's Motion consists of mere allegations and fails to identify where in the record there exist genuine issues for trial. Even construing all material in a light more favorable to the Respondent, there exists no factual issues which would affect the outcome of this case and preclude summary decision in favor of the Administrator. It is clear from the record that the Respondent failed to pay Mr. Sharma the required wage documented in LCA No. I-200-10034-476261 and No. I-200-12206-665441 from September 18, 2011, through September 15, 2013, in violation of 20 C.F.R. §655.731. Accordingly,

ORDER

The following is **ORDERED:**

1. The Administrator's Motion for Summary Decision is hereby **GRANTED**;

2. The Respondent will pay Mr. Sharma $47,855.82 in back wages.

Digitally signed by John P. Sellers III
DN: CN=John P. Sellers III,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

JOHN P. SELLERS, III
Administrative Law Judge

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

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.