

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 04 February 2016**

**CASE NO.: 2015-LCA-00011**

**In the Matter of:**

**ADEWALE (aka Wally) TAWOSE**  
**Prosecuting Party<sup>1</sup>**

**v.**

**PAYCOM PAYROLL,**  
**Respondent**

**Appearances:**

**Adewale Tawose, Pro Se**  
**Edmond, Oklahoma**  
**For the Prosecuting Party**

**Emily Fagan, Esq.**  
**Oklahoma City, Oklahoma**  
**For the Respondent**

**Before: Stephen R. Henley**  
**Administrative Law Judge**

**DECISION AND ORDER AFFIRMING ADMINISTRATOR'S DETERMINATION AND DENYING REQUEST FOR ADDITIONAL BACK WAGES**

*Procedural History*

This matter arises under the Immigration and Nationality Act ("Act"), as amended, 8 U.S.C. § 1101 and § 1182, and the implementing regulations at 20 C.F.R. Part 655, Subparts H

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<sup>1</sup> On March 9, 2015, the Administrator, Wage and Hour Division, U.S. Department of Labor, normally the prosecuting party in Labor Condition Application cases, filed a Notice to the Court that it would not be participating in this matter and would not be filing a notice of appearance. Consequently, I designated Adewale Tawose, the putative party-in-interest, as the Prosecuting Party in this matter.

and I. The Administrator, Wage and Hour Division, U.S. Department of Labor (“Administrator”) issued an Administrator’s Determination on January 13, 2015, holding that Respondent failed to pay required wages to one (1) H-1B nonimmigrant worker (Mr. Adewale Tawose) in violation of 20 C.F.R. § 655.731 and ordered payment of back wages in the amount of \$15,006.84, which was previously paid in full.<sup>2</sup> The Administrator did not assess a civil money penalty against Respondent.<sup>3</sup> The Administrator’s Determination, mailed to Paycom Payroll (“Respondent”) and Adewale Tawose, the employee Party-in-Interest, included instructions on the procedure for filing a request for hearing.

On January 20, 2015, the Office of Administrative Law Judges received a request for hearing from the underpaid employee, Mr. Tawose, regarding the Administrator’s Determination that Respondent was only required to pay him back wages in the amount of \$15,006.84, instead of the \$21,531.84 he thought he was due. (See Reference # 171550). Respondent did not request a hearing.

A *de novo* formal hearing was held in Oklahoma City, Oklahoma on August 4, 2015. All parties were present and the following exhibits were received into evidence: Administrative Law Judge Exhibits (“ALJX”) 1-6 (Tr. 6-7); Respondent’s Exhibits (“RX”) 1-18 (Tr. 91); and Prosecuting Party’s Exhibits (“TX”) 1-4, 6-8 (Tr. 19, 90). Three witnesses, including Mr. Tawose, testified at the hearing. The parties made closing arguments at the hearing and waived written post-hearing submissions (TR. 99).

#### Statutory and Regulatory Framework

The H-1B visa program allows U.S. employers to temporarily hire non-immigrants to fill specialized jobs in the United States. Specialized occupations are those occupations that require “theoretical and practical application of a body of highly specialized knowledge, and ... attainment of a bachelor’s or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732. Employers who seek to hire an H-1B nonimmigrant in a specialty occupation must first submit to the Department of Labor (DOL), and obtain DOL certification of, a labor condition application (“LCA”).<sup>4</sup> 20 C.F.R. § 655.700(b)(1); *In the Matter of Eva*

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<sup>2</sup> The Administrator advised Respondent to pay Mr. Tawose \$21,531.64, less \$6,525.00 previously paid as part of a December 2012 severance package, for a total of \$15,006.84. After applicable federal and state income taxes, Medicare and social security withholdings, Mr. Tawose was due \$8,841.09. Paycom issued Mr. Tawose a check in this amount on November 18, 2014. However, Mr. Tawose did not cash it and it was void after 90 days. Upon information and belief, it now appears that Paycom Payroll issued Mr. Tawose a new check in the same amount. It is the \$6,525.00 that Mr. Tawose continues to seek at this hearing.

<sup>3</sup> Under the regulations, a civil money penalty of up to \$1,000.00 per violation may be assessed for a violation pertaining to displacement of U.S. workers (§ 655.738), a “substantial” violation pertaining to notification (§ 655.734), and for violations of the requirements pertaining to public access where the violation impedes the Administrator’s investigation (failure to cooperate) (§ 655.760). 20 C.F.R. § 655.810(b)(1). Penalties of up to \$5,000.00 per violation may be assessed for each “willful” violation pertaining to wages or working conditions. 20 C.F.R. § 655.810(b)(2). Willful failure is defined as “a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sections 212(n)(1)(A)(i) or (ii), or 212(t)(1)(A)(i), or (ii) of the INA, or §§ 655.731 or 655.732.” 20 C.F.R. § 655.805(c); *see also McLaughlin v. Richland Shoe Company*, 486 U.S. 128, 133-135 (1988).

<sup>4</sup> Within the DOL, the Employment and Training Administration (ETA) is responsible for receiving and certifying

*Kolbusz-Kline v. Technical Career Institute*, ALJ No. 93-LCA-4, 1994 WL 897284, at \*3 (Sec'y July 18, 1994). The application must specify the number of workers sought, the occupational classification in which they will be employed, and the wage rate and conditions under which they will be employed. 8 U.S.C.A. § 1182(n)(1)(D). In addition, the employer must attest that it is offering and will offer during the period of employment the greater of: (1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the prevailing wage level for the occupational classification in the area of employment. 8 U.S.C.A. § 1182(n)(1)(A)(i)-(ii); 20 C.F.R. § 655.730(d). The employer must retain the original signed and certified LCA in its files, and must make a copy of the application, as well as specified necessary supporting documentation, available for public examination. 20 C.F.R. § 655.705(c)(2). Once DOL certifies the LCA, the employer submits paperwork to the United States Citizenship and Immigration Services ("USCIS") and requests an H1-B visa for the workers. The non-immigrant workers are then admitted to the United States.

The Act directs the DOL to review the LCA only for completeness or obvious inaccuracies. Unless the Department finds that the application is incomplete or obviously inaccurate, the Department shall provide the certification described by the Act within seven days of the date of the filing of the application. 8 U.S.C. § 1182 (n)(1) and 20 C.F.R. § 655.740. Upon certification of the LCA by DOL, the employer is required to pay the wage and implement the working conditions set forth in the LCA. 8 U.S.C. § 1182(n)(2). These include hours, shifts, vacation periods, and fringe benefits. *Id.* The Department 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 Department deems appropriate. 20 C.F.R. §§ 655.810, 655.855. An employer also has a duty to notify INS "immediately" of any changes in the terms and conditions of an H-1B nonimmigrant's employment. 8 C.F.R. § 214.2(h)(11). The Employer's obligation to pay H-1B workers the required wages begins on the date on which the worker "enters into employment with the employer." 20 C.F.R. § 655.731(c)(6). The H-1B worker is considered to "enter into employment" when he first makes himself available to work or otherwise comes under the control of the employer. *Id.* at § 655.731(c)(6)(i). Alternatively, even if the worker has not yet "entered into employment," where the worker is present in the U.S. on the date of the approval of the H-1B petition, the employer shall pay to the worker the required wage beginning 60 days after the date the worker becomes eligible to work for the employer. *Id.* § 655.731(c)(6)(ii). The H-1B worker becomes eligible to work for employer on the date set forth in the approved H-1B petition filed by the employer. *Id.* Under the INA's "no benching provision," the employer is obligated to pay the required wage even if the H-1B nonimmigrant is in "nonproductive status due to a decision by the employer (e.g., because of lack of assigned work)." 20 C.F.R. § 655.731(c)(7)(i); *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-010 through 01-LCA-025, slip op. at 7 (ARB May 31, 2005); *Rajan v. International Bus Solutions, Ltd.*, ARB No.03-104, ALJ No. 03-LCA-12, slip op. at 7 (ARB Aug. 31,2004). However, the employer

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labor condition applications in accordance with applicable regulations. ETA is also responsible for compiling a list of labor condition applications and making such lists available for public examination.

does not need to pay compensation if the “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).” 20 C.F.R. § 655.731(c)(7)(ii). The employer’s obligation to pay the required wage ends when there is a “bona fide termination” of the employment relationship. *Id.* at §655.731(c)(7)(ii). In order to effectuate the termination, the employer under the H-1B program, must notify the Department of Homeland Security (DHS) that the employment relationship has been terminated so that the petition is canceled. 8 C.F.R. § 214.2(h)(11). Where appropriate, the employer must provide the nonimmigrant employee with payment for transportation back home.

After investigation, the WHD Administrator issues a determination letter, which is served on the interested parties, including the H-1B nonimmigrant who’s LCA was the subject of the investigation. § 655.815(a). The determination letter sets out the Administrator’s conclusions; in the event the Administrator finds that an employer committed violation(s), the Administrator’s letter will prescribe remedies. § 655.815(b)(1). For back wage obligations, 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 Administrator also may assess civil-money penalties and other remedies, as listed in § 655.810. § 655.815(c)(1).

An interested party requests a hearing under procedures set out in § 655.840. The regulation indicates that a hearing relates to “review of a[n Administrator’s] determination issued under §§ 655 and 655.815.” § 655.840(a). Under § 655.840(b), an administrative law judge has the authority to affirm, deny, reverse, or modify, in whole or in part, the determinations of the Administrator. The administrative law judge is not authorized to render findings on the “legality of a regulatory provision or the constitutionality of a statutory provision.” § 655.840(d).

#### Positions of the Parties

Prosecuting Party.<sup>5</sup> At the time of my termination from Paycom Payroll in December 2012, I received a severance payment of \$6,525.00 in exchange for signing a release, non-disparagement, non-solicit and confidentiality agreement. Paycom Payroll should not have received a credit for this amount against Wage and Hour Division’s calculation of the back wages owed to me. These are two separate agreements. I am seeking payment of the \$6,525.00 credit.

Respondent. Mr. Tawose was an H-1B employee of Paycom Payroll who was terminated in December 2012. As part of the termination, Mr. Tawose knowingly and voluntarily entered into a severance agreement, which provided for 20 days of severance, or approximately \$6,525.00.

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<sup>5</sup> As a pro se respondent lacking legal expertise, this Court has afforded Mr. Tawose “a degree of adjudicative latitude” as it relates to this case. *Hyman v. KD Resources, Inc, et al.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip. op. at 8 (ARB March 28, 2010) (citing *Ubinger v. CAE Int’l*, ARB No. 07-083, ALJ No. 2007-SOX-036, slip op. at 6 (ARB Aug. 27, 2008)).

WHD determined Paycom Payroll owed Mr. Tawose \$21,531.64 in back wages covering the period after his termination from Paycom until a new employer assumed his H-1B visa. WHD credited Paycom \$6,525.00, the amount it previously paid Mr. Tawose as part of the severance package, leaving a total amount due Mr. Tawose of \$15,006.84. After deducting applicable taxes and withholding, Mr. Tawose was due \$8,841.09. WHD did not assess a civil money penalty against Respondent.

Paycom fully complied with the Wage and Hour Division's investigation, paying Mr. Tawose the full amount WHD said he was due, less applicable taxes and social security withholding. Regardless, as part of the settlement agreement entered into in December 2012, Mr. Tawose released all claims for compensation against Paycom Payroll, to include this hearing.

### Issues

Whether the settlement agreement entered into by Adewale Tawose and Paycom Payroll in December 2012 extinguished any claim for back wages under the H-1B Program?

If not, could the Administrator credit Paycom Payroll \$6,525.00 towards satisfaction of the amount of back wages owed?

### Testimonial Evidence<sup>6</sup>

**Adewale Tawose (Tr. 14-57).** I am originally from Nigeria and graduated from the University of Oklahoma in May 2007. I started working full-time for Paycom Payroll<sup>7</sup> as an H-1B software developer in November 2007 until I was terminated on December 2, 2012. (Tr. 15). I found out that I could get back wages, so I pursued that in December 2013. I was eventually successful in November 2014. But I found out that there was a \$6,525.00 deduction so I called the investigator who advised me to call Paycom. I talked to Jenny Stepp and told her I did not agree with the amount that was deducted. (Tr. 16). I did not cash the check. I did not return the check to Paycom Payroll. Instead, I filed a complaint in state court which was dismissed when the judge learned that Paycom had a piece of paper from the Department of Labor saying that Paycom was in compliance with the DOL investigation. (Tr. 17).

Exhibit T-1 is a copy of the October 23, 2013 dismissal in *Paycom Payroll v. Adewale Tawose*, filed in the District Court of Oklahoma County. (Tr. 19). Oklahoma law requires that a case be refiled within one year of the dismissal or it is barred. (Tr. 20). I have a bachelor's degree in computer engineering from the University of Oklahoma and am currently pursuing my master's degree in data science and analytics. It is a pretty technical, advanced degree. (Tr. 20-21). I started working at NIC in February or March 2013. I have been employed by Chesapeake Energy since January 2015. I started as a software developer and was promoted to senior software developer. T-2 is the Employee Confidentiality and Non-Disclosure Agreement that I

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<sup>6</sup> The summary of the hearing testimony is not intended to be a verbatim transcript but merely to highlight certain relevant portions.

<sup>7</sup> Paycom Payroll is a software company that provides software primarily for payrolls or other human resource function, such as benefits administration and 401(k) deductions. (Tr. 84).

signed in June 27, 2008. It required me to preserve the confidentiality of Paycom Payroll information, (Tr. 23), and continues for two years after I left the company. (Tr. 24). RX 3 is a copy of Paycom's employer handbook, with my signature on the first page. It is dated November 26, 2007. (Tr. 25). I was required to keep client information and Paycom information confidential. (Tr. 26). On page 18 of the document is a section titled "Termination of Employment." I was an "at will" employee. (Tr. 27). Exhibit 8 is an "Employee Release Non Disparagement, Non-Solicit, Confidentiality, Termination and Severance Agreement" between myself and Paycom Payroll, dated December 3, 2012. It was mailed to me and I signed it sometime between December 3 and December 21, 2012. (Tr. 30). I agree it is binding between me and Paycom. Paragraph 4 of the document provides that Paycom has no obligation to provide severance benefits but that we have agreed upon severance benefits and post-employment obligations. (Tr. 31). The agreement states that "in consideration of the promise and obligations of this release and agreement, employee and employer will agree that, in addition to his/her salary and benefits for the time he has worked, employee had or will receive severance benefits subsequent to the final day of employment as follows: a monetary amount equal to four weeks of employee's most recent base salary, the equivalent to 20 day base salary consisting of 160 hours, less federal, state and social security withholding and other applicable withholding taxes. (Tr. 32). I understood that by accepting this I was foregoing any additional claims or cause of action against Paycom. (Tr. 34). I received the severance benefits as set forth in the agreement in January 2013. (Tr. 32-33). I did sign a form giving the Department of Labor permission to file a case on my behalf. (Tr. 34).

I do not believe I am in breach of the agreement because the two cases are independent of each other. (Tr. 35). I do agree that the severance agreement and release of claims included a provision that I was releasing Paycom Payroll from any and all claims for damages and compensation and that my claim against Paycom for the \$6,525.00 is a claim for compensation (Tr. 41-2). After my employment ended, I received a check for \$19,515.75 for redeeming company units. I also received a check for my unused vacation and sick days in the amount of \$6,525.00, or 160 hours. (Tr. 44). I was not aware that Oklahoma law does not require a company to pay unused vacation or sick days upon termination.

After leaving Paycom, I contacted the Department of Labor to see if I had a case for back wages. The investigator eventually determined that I was owed \$21,531.84, less the \$6,525.00 I was already paid as part of the severance agreement. Exhibit 11 is the computation worksheet. It reflects that "Employee was paid a severance in the amount of \$6525.00, which is credited to the employer." (Tr. 45). It is my position that the investigator was wrong in doing so. Less applicable taxes, the net amount I received was \$8,841.09, but I never cashed the check nor did I return it to Paycom Payroll.

I agree that Paycom Payroll paid me the full amount that the investigator determined it owed to me. (Tr. 51). My employment with Paycom Payroll terminated in December 2012. I received 4 weeks of severance payments. I began employment with Oklahoma Interactive LLC (NIC) on February 19, 2013. The new company filed for a transfer of the H-1B visa. (Tr. 56). Right now I am a permanent resident of the United States.

**Jenny Stepp (Tr. 58-69).** I started with Paycom on January 7, 2013 and am the Director of Human Resources. Mr. Tawose was already gone when I started. The Department of Labor came and interviewed me in relation to this case. The Department of labor eventually found that Paycom was liable for back wages to Mr. Tawose, which were paid in full.

**Lauren Toppins. (Tr. 69-89).** I am corporate attorney for Paycom Payroll. T-8 is a copy of the lawsuit Paycom filed against Mr. Tawose in May 2013. The lawsuit was based on agreements that Mr. Tawose had signed that we believed he violated by soliciting current Paycom employees to other employment. (Tr. 76-80). Paycom eventually moved to dismiss the lawsuit. The statute of limitations would prevent us from refile. (Tr. 83). Because the company has access to a lot of personal information, to include employee social security numbers, bank accounts, rates of pay, as part of its business, it is important that we have confidentiality agreements in place. It is standard in the industry. (Tr. 84-85). I believe that Mr. Tawose released Paycom and all of its affiliates, directors, officers, employees from any claims, past or present, federal or state, relating to damages, compensation, reinstatement and reemployment when he signed the severance agreement in December 2012. (Tr. 86). I believe the reason WHD assessed back wages in the amount of \$21,531.84 was because they said we had additional obligations past Mr. Tawose's term until he found a new employer. (Tr. 87). Not all Paycom Payroll employees receive a severance package upon termination. Mr. Tawose started with a new employer on February 19, 2013.

#### Documentary Evidence

At the hearing, I admitted the following documents: Administrative Law Judge Exhibits (ALJX) 1-6; Prosecuting Party's Exhibits (TX) 1-8; and Respondent's Exhibits (RX) 1-18.

The Administrative Law Judge Exhibits are summarized as follows:

ALJX-1: Notice of Hearing and Prehearing Order, issued February 18, 2015.

ALJX-2: Supplemental Order Designating Trial Location, issued June 9, 2015.

ALJX-3: Supplemental Order Granting, in Part, Respondent's Motion to Quash, issued on June 29, 2015.

ALJX-4: Administrator' Determination letter dated January 13, 2015 which includes an LCA relating to Mr. Tawose, submitted by Paycom Payroll, covering the time period from September 27, 2012 to September 27, 2015, and listing a prevailing wage of \$49,483.00 for a "software developer," and documents reflecting that Respondent was assessed back wages in the amount of \$15,006.84 and not assessed a civil money penalty and that Respondent paid the full amount of back wages the Administrator determined to be due.

ALJX-5: The Prosecuting Party's request for hearing, dated January 26, 2015, including a copy of Form WH-58 calculating the amount of back wages due for the period December 16, 2012 to March 17, 2013.

ALJX-6: The Administrator's February 27, 2015 Notice to the Court that it would not be participating in this matter.

The Prosecuting Party's Exhibits are summarized as follows:

TX-1: Copy of order from Paycom Payroll dismissing its pending claims filed in state court against Adewale Tawose without prejudice, filed on October 23, 2013.

TX-2: December 19, 2013 E-mail from Mr. Tawose to Gwendolyn Bates (U.S. Department of Labor) providing several case cites for her to review.

TX-3: Extract from WHD website regarding workers owed wages.

TX-4: Extract from ELAWS regarding information an employer is to provide a terminated H-1B employee.

TX-5: Transcript of a phone call between Steven Clark, U.S. Department of Labor and Mr. Tawose.

TX-6: February 8, 2013 email from Mr. Tawose to the Office of Foreign Labor Certification portal seeking guidance on payment of back wages.

TX-7: January 3, 2014 email from Mr. Tawose to Gwendolyn Bates, U.S. Department of Labor

TX-8 Copy of May 2, 2013 civil action filed by Paycom Payroll against Mr. Tawose in District Court of Oklahoma County, withdrawn on October 23,2013.

The Respondent's Exhibits are summarized as follows:

RX-1: Timeline Summary of Events and Documents.

RX-2: Employee Confidentiality and Non-Disclosure Agreement between Paycom Payroll and Mr. Tawose, effective June 27, 2008.

RX-3: Copy of Paycom Payroll Employee Handbook.

RX-4: Copy of Employee Proprietary Information Agreement between Paycom Payroll and Mr. Tawose, effective July 9, 2008.

RX-5: Non-Solicitation Agreement, dated August 12, 2009.

RX-6-7: December 4, 2012 email from Mr. Tawose to Chad Richison thanking Mr. Richison for all that he has done for him during the course of his employment at Paycom Payroll and a December 5, 2012 response.

RX 8: Employee Release, Non Disparagement, Non-Solicit, Confidentiality, Termination and Severance Agreement, dated December 3, 2012, and signed by Mr. Tawose on December 21, 2012 and Paycom Payroll on December 26, 2012, which includes severance benefits equal to 20 days' base salary consisting of 160 hours less Federal, State, and Social Security withholding and any other applicable withholdings.

RX-9: Severance Agreement and Release of Claims, signed by Mr. Tawose on December 21, 2012, which provides, in pertinent part, that Mr. Tawose freely and voluntarily released Paycom Payroll, from any and all claims, in law and equity, arising out of his employment with Paycom Payroll, including claims for damages and compensation of any kind arising under state or federal law, for the severance consideration reflected in RX-8.

RX-10: Limited Liability Company Unit Redemption Agreement, signed by Mr. Tawose on January 24, 2013 reflecting 75 vested incentive units owned by Mr. Tawose to be sold to Paycom Payroll for \$19,515.75.

RX-11: Copy of Form WH-56 and worksheet reflecting back wages due Mr. Tawose in the amount of \$15,008.84, after a credit to Employer of \$6,525.00.

RX-12: Copy of Form WH-58 Receipt for Payment of Back Wages, Liquidated Damages, Employment Benefits and Other Compensation reflecting gross amount of back wages of \$21,531.84, less legal deductions in the amount of \$6,165.75 and other deductions in the amount of \$6,525.00 for a net amount due to Mr. Tawose of \$8,841.09; and a copy of the check. Mr. Tawose did not sign the form.

RX-13: Administrator's Determination dated January 13, 2015, reflecting that no penalty was assessed against Paycom Payroll for failing to pay the required wage rate and that Paycom Payroll has paid back wages in the amount of \$15,006.84 to one H-1B employee.

RX-14-15: Copy of Affidavit filed by Mr., Tawose in District Court for the County of Oklahoma on December 11, 2014 seeking \$7500.00 from Paycom Payroll for money owed, emotional distress, breach of contract and court costs, dismissed by the court on January 23, 2015.

RX-16: Mr. Tawose's 2014 W-2 (from Paycom Payroll), reflecting \$15,006.84 in wages, tips and other compensation.

RX-17: Screenshot from Mr. Tawose's LinkedIn page.

RX-18: Copy of Form G-28 dated February 4, 2013, Form I-129, ETA Form 9035 and USCIS Form I-797A, pertaining the transfer of Mr. Tawose's H-1B visa to Oklahoma Interactive with a period of intended employment of February 11, 2013 to February 11, 2016.

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 arguments of the parties.

### Findings of Fact and Conclusions of Law

On December 2, 2012, Paycom Payroll terminated Mr. Adewale Tawose's employment. Pursuant to a Severance Agreement and Release of Claims (RX 8, 9), signed by Mr. Tawose on or about December 21, 2012, Mr. Tawose released Paycom Payroll, from any and all claims, in law and equity, arising out of his employment with Paycom Payroll, including claims for damages and compensation of any kind arising under state or federal law, in consideration for receiving \$6,525.00. I find Mr. Tawose knowingly, freely and voluntarily entered into RX 8 and RX 9 and that he waived any claims, demands, or causes of action alleging violations of federal or state law for monetary or equitable relief against Paycom Payroll, including wages, back pay, and severance pay arising out of his employment at Paycom Payroll.<sup>8</sup>

Mr. Tawose subsequently filed a written complaint with DOL arising out of his H-1B employment with Paycom Payroll, alleging he was due back wages. WHD issued a letter in January 2015 indicating that it had determined Paycom Payroll violated the H-1B provisions of the INA by failing to pay Mr. Tawose required wages. WHD advised Respondent to pay Mr. Tawose \$21,531.64, less the \$6,525.00 previously paid as part of the December 2012 severance package, for a total of \$15,006.84. After applicable federal and state income taxes, Medicare and social security withholdings, Mr. Tawose was due \$8,841.09. Paycom issued Mr. Tawose a check in this amount on November 18, 2014. However, Mr. Tawose did not cash it and it was void after 90 days. Subsequent to the August 4, 2015 hearing, Paycom Payroll issued Mr. Tawose a new check in the same amount.

WHD did not assess any civil money penalties. Mr. Tawose sought review of the Administrator's determination before an ALJ to recover the \$6,525.00 deduction.

There is no statutory or regulatory bar to Mr. Tawose entering into a severance agreement with Paycom Payroll releasing it from all claims relating to his employment with them. By accepting the \$6,525.00 in December 2012, Mr. Tawose waived his right to obtain additional amounts for wages, back pay or benefits. In other words, in consideration for, in part, \$6,525.00, Tawose waived all employment related claims against Paycom arising up to the date of the agreement, thereby extinguishing his claim for the \$6,525.00 he says he is owed under the H-1B program.

The issue here is not whether Mr. Tawose was entitled to the \$21,531.84 in back wages as found by the DOL investigation. Respondent agreed he was. (Tr. 62). The issue before me, as framed by the parties, is whether the December 2012 severance agreement and release entered into by Adewale Tawose and Paycom Payroll extinguished any claim for additional back wages Mr. Tawose may have once had under the H-1B Program. I conclude that it does.

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<sup>8</sup> Mr. Tawose is a software developer with a bachelor's degree in computer engineering from the University of Oklahoma. (Tr. 20-21). He is currently pursuing a master's degree in data science and analytics, which, by his own admission, is an advanced and technical degree. (Tr. 21). Although originally from Nigeria, English is his first language. He is educated, intelligent and well-spoken. (Tr. 4). Although advised to do so, Mr. Tawose did not try and find an attorney. (Tr. 39). Oklahoma law does not require Paycom Payroll to provide severance benefits. (Tr. 31). When he signed the severance agreement and release, Mr. Tawose understood he was forgoing additional claims or causes of action against Paycom in exchange for the money he received. He had sufficient time to read the severance agreement, the terms of which appear clear and unambiguous. (Tr. 38-42).

Although an employee may not waive his right to file an H-1B complaint with WHD, he can waive his right to recover damages ordered or obtained by the Administrator on his behalf, which Tawose did as part of his December 2012 severance. Public policy considerations support allowing an H-1B employee to file a complaint even if he or she has entered into a severance agreement regarding employment with his or her H-1B employer.<sup>9</sup> For example, as a result of an investigation initiated as a consequence of such a circumstance, WHD could impose penalties on an employer for repeated violations or determine that back wages and benefits may be owed to other employees who have not entered into similar severance agreements, which may or may not include a waiver provision. So, I find an H-1B employee can waive his right to recover damages arising out of his H-1B employment, even if he cannot waive his right to file an H-1B complaint with WHD. Such is the case here. Mr. Tawose could certainly file a complaint against Paycom Payroll, even if he cannot recover damages arising out of his employment with them.

Therefore, because Mr. Tawose knowingly and voluntarily signed a severance agreement and release in December 2012, and accepted the sum of \$6,525.00 in consideration of the same,

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<sup>9</sup> Cf. *EEOC v. Cosmair, Inc. v. L'Oreal Hair Care Div.*, 821 F.2d 1085, 1091 (5th Cir. 1987) (“[A]lthough an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee’s behalf”); *Hoffman v. United Telecomms., Inc.*, 687 F. Supp. 1512, 1514 (D. Kan. 1988) (citing *Cosmair* with approval, and finding a settlement agreement in a private employment discrimination lawsuit enforceable but noting that a provision discouraging a victim of discrimination from giving the EEOC information in the form of filing a charge would not be enforceable); see generally *Khandelwal v. S. Cal. Edison*, ARB No. 97-050 (March 31, 1998) (distinguishing waiver of the right to file a charge from waiver of the right to personally recover from a cause of action under the employee protection provisions of the Energy Reorganization Act); *Enforcement Guidance on Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes*, EEOC Notice 915.002 (Apr. 10, 1997) (differentiating an employee’s non-waivable right to file a charge with the EEOC from the waivable right to recover in a lawsuit). The preceding authorities, which deal with employee protection provisions of the Energy Reorganization Act (ERA) and EEOC-enforced statutes (e.g., Title VII, ADA, ADEA, and the Equal Pay Act) are similar in pertinent respects to the H-1B provisions; They are designed to satisfy the dual goal of protecting both the public and the individual. Accordingly, those provisions aimed at protecting the public are not waivable, while the provisions that solely benefit the individual are. I note, however, that individual rights under the Fair Labor Standards Act (FLSA) are not waivable, and settlement of claims may only occur in certain limited circumstances. See *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) (FLSA rights to minimum wage and overtime pay cannot be waived by contract or abridged, otherwise the legislative policies behind these rights would be thwarted); *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 703, 713 (a release of FLSA individual rights not in settlement of a bona fide dispute is unenforceable); *Mitchell v. Greinetz*, 235 F.2d 621, 625 (10th Cir. 1956) (commenting that “[w]aiver of statutory wages by agreement is not permissible”). The FLSA was enacted in order to ensure “a minimum subsistence wage” was paid, and for that reason individual claims under the FLSA are not prospectively waivable. *Brooklyn Savings Bank*, 324 U.S. 707 n. 18. Claims that have accrued may be settled with either judicial or DOL approval. See *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982). A minority of circuits find that a bona fide dispute over hours worked or wages earned may be settled without DOL or judicial approval in certain limited circumstances. See *Martinez v. Bohls Bearing Equipment Co.*, 361 F. Supp. 2d 608 (W.D. Tex. 2005) (“parties may reach private compromises as to FLSA claims where there is a bona fide dispute as to the amount of hours worked or compensation due. A release of a party’s rights under the FLSA is enforceable under such circumstances”); *Martin v. Spring Break ’83 Productions, LLC*, 688 F.3d 247, 255 (5th Cir. 2012) (“FLSA claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves” may be validly settled by private agreement not approved by the court or the DOL). The FLSA appears to be enforced differently than the EEOC-enforced statutes because its purpose of ensuring certain minimum rights for everyone would be undermined by allowing waiver of those rights in individual cases. The H-1B regulations, like those of the ERA, ADA, and ADEA, do not operate in a way that curtails the minimum rights afforded under the FLSA. Accordingly, it is appropriate and not contrary to public policy to allow binding settlements of individual H-1B causes of action.

Respondent Paycom Payroll does not now owe him any additional back wages or payment of benefits. Nor does Paycom Payroll owe him any ancillary damages. In other words, I find the December 2012 severance agreement bars recovery of the damages Mr. Tawose now seeks for violations of the H-1B provisions of the Immigration and Nationality Act. Accordingly, I find Mr. Tawose is not entitled to recover the \$6,525.00 the Administrator credited Paycom towards payment of back wages it determined Mr. Tawose was owed.<sup>10</sup>

### ORDER

Accordingly, the Administrator's January 13, 2015 determination, that Respondent has paid in full the back wage assessment owed the Prosecuting Party, less legally required deductions, and does not owe any additional back wages or any other amount of money, is AFFIRMED. *See* 20 C.F.R. § 655.840(b).

**SO ORDERED:**

STEPHEN R. HENLEY  
Administrative Law Judge

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<sup>10</sup> Even if Mr. Tawose's release of his claims under the H-1B provisions of the Act is unenforceable, I find that the Administrator could properly credit Paycom \$6,525.00 towards satisfaction of the amount of back wages owed. The current record contains enough evidence that the reporting and recording requirements of 20 C.F.R. § 655.731(a) and (c)(3)(iv) were met. That is, there is sufficient evidence to demonstrate that the \$6,525.00 payment was treated as earnings, with appropriate taxes and FICA withheld and paid. *See* RX-12 (deductions were not taken from the \$6,525.00 credited at the time Mr. Tawose was paid back wages, presumably because these amounts had been withheld when Mr. Tawose was paid that \$6,525.00). Mr. Tawose does not contest that the payment was treated as earnings with taxes and FICA withheld. He states in his request for hearing that "a payment of \$6,525.46 (\$3,889.95 after taxes *See* Exhibit C) was paid to me after my termination." ALJX-5 at 3. That amount is withheld at approximately the same rate as the \$15,006.84 amount found to be owed. *See* RX 12 (\$15,006.84 owed satisfied by an \$8,841.09 check properly withheld on).

**NOTICE OF APPEAL RIGHTS:** Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845. To be effective, such petition shall be received by the Board within 30 calendar days of the date of the decision and order. Copies of the petition shall be served on all parties and on the administrative law judge.

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.