

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

Issue Date: 26 October 2016

CASE NO.: 2016-LCA-00018

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*In the Matter of:*

**ADMINISTRATOR, WAGE AND HOUR DIVISION,  
UNITED STATES DEPARTMENT OF LABOR,**  
*Prosecuting Party,*

v.

**WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,**  
*Respondent.*

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Before: Jonathan C. Calianos, Administrative Law Judge

Appearances:

Faraz Nayyar, United States Department of Labor's Office of the Solicitor, Kansas City, Kansas,  
for the Prosecuting Party

Scott Moore, Baird Holm LLP, Omaha, Nebraska, for the Respondent

**DECISION AND ORDER**

This case arises from a request for hearing filed by Woodmen of the World Life Insurance Society ("Woodmen Life" or "Respondent") under § 212(n) of the Immigration and Nationality Act ("the Act") and the regulations promulgated thereunder. *See* 8 U.S.C. § 1182(n); 20 C.F.R. § 655.825(a). At issue is the enforcement of an H-1B Labor Condition Application by the Administrator of the United States Department of Labor's Wage and Hour Division ("Administrator" or "Prosecuting Party"). Specifically, on March 17, 2016, the Administrator found that Woodmen Life failed to pay required wages to an H-1B employee, Oscar Paul Garcia Capetillo ("Garcia") in accordance with 20 C.F.R. § 655.731. As a result, the Administrator determined that Woodmen Life owed Garcia back wages totaling \$4,575.00, and ordered repayment of the back wages.

**I. PROCEDURAL BACKGROUND**

On March 30, 2016, Woodmen Life filed a request for hearing to review the Administrator's determinations. *See* 20 C.F.R. § 655.820. An initial evidentiary hearing was established and later cancelled at the parties' request as they attempted to resolve their dispute

through mediation and informal discussions. Over the ensuing months, I conducted several telephonic status conferences, and when it became apparent that settlement was not a viable option, the parties agreed to submit the matter on a paper record. On July 26, 2016, the parties filed a Joint Statement of Undisputed Facts (“Joint Statement”) which included 20 joint exhibits which I shall refer to as JX-1 through 20. On August 11, 2016, the Administrator filed a Motion to Amend Determination Letter, a Motion for Summary Decision, and the Declaration of Oscar Paul Garcia Capetillo. On August 19, 2016, the Respondent filed a combined objection to the motion for summary decision, objection to the motion to amend and cross motion for summary decision.<sup>1</sup> Additionally it filed the Declaration of Stacy Gutierrez. On August 23, 2016, I convened a telephonic hearing on the record wherein I allowed for additional argument and I granted the motion to amend the determination letter. The amendment sets forth three statutory grounds for the Administrator’s decision: 20 C.F.R. §§ 655.731(c)(1), (c)(3), and (c)(9). TR 13.<sup>2</sup> The parties indicated that no further evidence is required, and with regard to any conflicting evidence, I am permitted to make findings and draw inferences from the evidence submitted, including the two declarations filed. TR 25-26 & 32. This matter is now ripe for determination, and for the reasons set forth below, I find that no back wages are owed to Garcia and the Director’s determination is REVERSED and this matter is DISMISSED.

## **II. FACTUAL BACKGROUND**

This background is taken almost verbatim from the parties’ Joint Statement. On December 10, 2012, Woodmen Life hired Garcia, a citizen of Mexico, to work as a Senior Test Engineer (also referred to as Senior Systems Test Engineer) under a TN nonimmigrant visa status. JX-1. Garcia's TN nonimmigrant visa status was subsequently extended and valid until November 30, 2016. JX-2.

On March 31, 2014, Woodmen Life submitted a petition for H-1B nonimmigrant visa status on behalf of Garcia to the U.S. Citizenship and Immigration Services (“USCIS”) to work as a Senior Systems Test Engineer. USCIS approved Woodmen Life's petition with validity dates of October 1, 2014 to September 12, 2017. JX-3.

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<sup>1</sup> Woodmen Life attached Exhibit 22 to its filing which is entitled “Confidential- For Settlement Purposes Only Mediation Statement.” This was submitted in the parties’ confidential mediation before the Office of Administrative Law Judges and should not have been filed as part of the public record in this proceeding. As such, I did not review this Exhibit in connection with this decision and it is stricken from the record.

<sup>2</sup> “TR” refers to the hearing transcript of August 23, 2016.

Garcia requested that an H-1B petition be filed on his behalf and that it be submitted via Premium Processing, which incurred an additional fee of \$1,225 for expedited processing for his convenience. Before submitting an H-1B petition on behalf of Garcia, Woodmen Life filed, and the United States Department of Labor (“DOL”) certified Labor Condition Application I-200-14073-370153, approving the wage rate of \$90,615.39, which indicated a Prevailing Wage of \$65,936.00 for Garcia's position as a full-time Senior Systems Test Engineer. Subsequently, Woodmen Life filed a second LCA (I-200-14085-531195) for Garcia's position, correcting Woodmen Life's name, and that application was also certified by the DOL. JX- 4 & 5.

On June 5, 2014, Garcia entered into a Repayment Agreement with Woodmen Life for expenses related to the filing of his H-1B visa petition. JX-6. From December 10, 2012 to January 28, 2016, Woodmen Life employed Garcia as a full-time Senior Systems Test Engineer, and for the period starting October 1, 2014 through January 28, 2016, Garcia held H-1B nonimmigrant visa status and was employed by Woodmen Life as an H-1B employee. From June 5, 2014 to February 28, 2015, Woodmen Life paid Garcia an annual salary at the rate of \$90,615.39. JX-7. From March 1, 2015 until the end of Garcia's employment on January 28, 2016, Woodmen Life paid Garcia an annual salary at the rate of \$92,880.77. JX-7.

From December 10, 2012 to January 28, 2016, Garcia was a "regular full-time associate" within the meaning of the Woodmen Life Vacation Policy. As of the last day of his employment, January 28, 2016, Garcia had earned vacation pay totaling \$9,644.33. JX-8. On January 28, 2016, Garcia voluntarily resigned his employment from Woodmen Life. JX-9. Garcia received a final paycheck which included regular wages for nine work days totaling \$3,214.78, and the additional sum of \$9,644.33 for his unused vacation pay. JX-10. The final paycheck also included a \$5,800 deduction for attorney's fees related to the H1-B application process. The Administrator only seeks to recover \$4,575.00 because the Administrator determined that Woodmen Life was due a credit for the \$1,225 premium processing fee paid on Garcia's behalf. The final net pay to Garcia was \$2,230.42. JX-11 & 12.

### **III. POSITION OF THE PARTIES**

#### **(a) The Administrator's Position**

The Administrator argues that the required wage for Garcia is his actual wage in March 2015- \$92,880.77. This is so because Woodmen Life employed no other individuals with similar experience and qualifications as Garcia, thereby making the actual wage the required wage Woodmen life was mandated to pay under 20 C.F.R.§655.731(a). Because Woodmen life made

deductions from Garcia's final paycheck, thereby reducing his required wage, and none of the deductions were authorized by paragraph (c)(9) of the regulation, Woodmen Life violated section 655.731(c)(1) by not paying Garcia the required wage free and clear when due.

Additionally, section 655.731(c)(3) requires that all benefits, such as payment of unused vacation time, be offered to H-1B nonimmigrant employees on the same basis and in accordance with the same criteria as Woodmen Life offer its U.S. workers. The Administrator argues that Woodmen violated this section by deducting the H-1B legal expenses under its repayment agreement with Garcia from his unused vacation pay because no other U.S. worker is subjected to a similar deduction from their vacation pay. Simply put, Woodmen is required to offer paid vacation time to all employees on the same basis and by docking Garcia's vacation pay, Woodmen has treated Garcia in an inferior manner.

Finally, the Administrator argues under section (c)(9), employer expenses such as attorney fees and other costs connected with the performance of the H-1B program are specifically prohibited from recoupment by the Employer, and allowing such a deduction from unused vacation pay would circumvent the mandate of the regulation.

**(b) Woodmen Life's Position**

Woodmen Life principally argues that the deduction of attorneys' fees pursuant to the parties' repayment agreement from Garcia's final paycheck did not cause Garcia's compensation to dip below the required wage.<sup>3</sup> It highlights that in determining the required wage, 20 C.F.R. § 655.731(a)(1) requires us to examine what Woodmen Life paid other employees with similar experience and qualifications as Garcia for performing the specific job in question. Woodmen points to five other "System Test Engineers" who had similar qualifications and experience as Garcia and were paid between \$60,000 to \$90,000 per year. Woodmen then averages these salaries to come up with a required wage of \$79,094, citing to 65 Fed. Reg. 80193 (2000) for the proposition that averaging the wages of non H-1B workers is acceptable in determining the actual wage.

Woodmen Life also argues that it did not violate section 655.731(c)(3) because Garcia accrued and was paid for his unused vacation time just like any other non H-1B employee. Similar to other non H-1B employees who separate from Woodmen Life owing a debt to the

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<sup>3</sup> Just to keep the terminology straight, section 655.731(c) mandates that the employer pay the employee the "required wage." Under section 655.731(a), the required wage is the greater of either the "prevailing wage" or the "actual wage". Here the prevailing wage was determined to be \$65,936, and both parties agree that the "actual wage" is higher and should apply. The question becomes: what is the actual wage—the amount actually paid to Garcia (\$92,880.77) or something less?

company, Garcia's pay was reduced by the debt he owed Woodmen under the Employee Repayment Agreement. Woodmen states that Garcia was treated no differently than employees who owe the company tuition under a tuition repayment plan. While neither the vacation pay policy nor the tuition repayment plan policy specifically authorize the deduction of the debt from a departing employee's vacation pay, the debt is routinely deducted from the employee's last paycheck which invariably includes unused vacation pay. As such, Garcia was treated no differently than any other departing Woodmen Life employee. *See* Declaration of Stacy Gutierrez, pp 3-4.

Finally Woodmen Life states that it did not violate section 655.731(c)(9) because any deductions taken from Garcia's final check did not cause Garcia to fall below the required wage. Section 655.731(c)(9) prohibits deductions for H-1B attorney fees and other expenses associated with filing a Labor Condition Application only to the extent such deductions reduce the H-1B worker's pay below the required wage. Because the deductions did not reduce Garcia's pay below his required wage, this section does not come into play.

#### **IV. DISCUSSION**

The H-1B visa program allows employers to hire non-immigrant professionals to work temporarily in the United States in specialty occupations. *See* 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) & 1182(n) *et seq.*; 20 C.F.R. § 655.700 *et seq.* The Act defines a specialty occupation as one "requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher." 8 U.S.C.A. § 1184(i)(1). A Senior Systems Test Engineer fits within the definition of a specialty occupation. To get the process started, the Employer must complete and file with the United States Citizenship and Immigration Services branch of the Department of Homeland Security ("USCIS") an H-1B petition which consists of the Form I-129, various supplements, and a labor condition application ("LCA"). *See* 8 U.S.C. § 1182(n); 8 C.F.R. § 214.2(h)(2). The petition is then either approved or denied in a written decision by the USCIS. *See* 8 C.F.R. §§ 214.2(h)(9) & (10). If approved, the petition is used to obtain a visa from the Department of State for a period of up to three years. *See* 8 C.F.R. § 214.2(h)(9)(iii)(A)(1). Before the expiration of the three year term, an employer may seek an extension of the alien professional's term, however, no extension may extend the total period of admission beyond six years. *See* 8 C.F.R. §§ 214.2 (15)(ii)(B) & (h)(13)(iii)(A). An alien professional can become eligible for a new six year term under the H-1B program by remaining outside of the United States for at least one year. *See* 8 C.F.R. § 214.2(h)(13)(iii)(A). Garcia's completed H-1B

petition is found at JX-3 and 4, and USCIS approved it for a term commencing on October 1, 2014 to September 12, 2017. *See* JX 3 & 4.

In completing the petition, the employer makes several attestations including that it will pay the alien professional the required wage, which is the greater of the job's actual wage or the prevailing wage, throughout the entire period of authorized employment.<sup>4</sup> *See* 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(a). The regulation states that:

The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.

20 C.F.R. § 655.731(c)(1). The parties agree that the required wage is the actual wage as it is higher than the prevailing wage determination. The rub is whether the actual wage is what Woodmen Life paid Garcia (\$92,880.77) or whether it should be based on what it paid five other non H-1B "System Test Engineers" who had similar qualification and experience as Garcia (\$79,094, on average).

Complicating the analysis is the fact that some (or perhaps even all) of the \$4,575 deducted pursuant to the Employee Repayment Agreement came from Garcia's unused vacation time. The parties do not agree on where the \$4,575 deduction came from; however, given that his gross pay for the nine days he worked totaled \$3,214.78, that sum is insufficient to cover the \$4,575 deduction. JX-10. His unused gross vacation pay was \$9,644.33, which clearly could have covered the entire deduction. JX-10 & 12. For purposes of my analysis, I find that the entire deduction was taken from Garcia's unused vacation pay and address the Administrator's arguments under section 655.731(c)(3) and (c)(9).<sup>5</sup> Because that is dispositive, I need not enter the thicket of whether Garcia was paid the required wage because there was no deduction from his actual wage of \$92,880.77.

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<sup>4</sup> The prevailing wage is typically the average wage paid to professionals engaged in similar employment within the same location as where the alien professional will be working, and it is customarily obtained by the employer contacting the state employment security agency that has jurisdiction over the area where the H-1B employee will be stationed.

<sup>5</sup> The parties did not provide any information to discern what Garcia's net pay would have been for his final wages or unused vacation time after accounting for allowed deductions such as taxes, health insurance, parking and the like. The pay stub provides a gross deduction with no way to apportion it to either wages or vacation pay. Certainly with allowable deductions, both gross numbers are reduced, making the wage number less likely to be the source for \$4,575 deduction. JX-10 & 12.

**(a) 20 C.F.R. § 655.731(c)(3)**

The regulation requires that H-1B employees receive benefits on par with those offered to U.S. workers. It states as follows:

(3) Benefits and eligibility for benefits provided as compensation for services (e.g., cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.

(i) For purposes of this section, the offer of benefits “on the same basis, and in accordance with the same criteria” means that the employer shall offer H-1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more strict eligibility or participation requirements for the H-1B nonimmigrant(s) than for similarly employed U.S. workers(s) . . . Offers of benefits by employers shall be made in good faith and shall result in the H-1B nonimmigrant(s)'s actual receipt of the benefits that are offered by the employer and elected by the H-1B nonimmigrant(s).

20 C.F.R. §655.731(c)(3).

Woodmen Life has a defined Vacation Policy, and there is no dispute that Garcia accrued vacation time on par with other U.S. employees. JX-8. The Administrator argues, however, that deducting H-1B attorney fees under Garcia’s Employee Repayment Plan effectively nullifies his accrued vacation benefit, thereby placing him worse off than other similarly situated U.S. workers. The evidence does not support the Administrator’s conclusions.

The Vacation Leave Policy provides, in part, that if an employee resigns or is terminated, “accrued but unused Vacation Leave will be paid out in the Associate’s final paycheck” which is calculated “using the Associates normally scheduled workday pay.” JX-8 at 6. The Policy does not define what deductions, if any, may be taken from an employee’s unused vacation pay. Woodmen Life states that there are many instances where a U.S. employee’s final paycheck, including payment for unused vacation pay, is reduced by debts a departing employee may owe the company. Stacy Gutierrez, a Human Resources Consultant for Woodmen Life explained the following:

WoodmenLife has repayment agreements with other employees for similar situations where WoodmenLife pays the costs up front and if the employee leaves before an agreed upon amount of time, the employee must repay the cost. These Agreements include tuition repayment agreements and they authorize Woodmen Life to deduct the amount owed, if any from the employee’s final paycheck.

Gutierrez Declaration at 3-4.

In support, Woodmen Life provided a copy of its Tuition Reimbursement Policy. JX-15. Pursuant to that Policy, an employee is required to sign a repayment agreement and authorizes Woodmen Life to deduct any sums owed Woodmen under the Policy from his or her final paycheck. JX-15 at 4-5. If the amount owed to Woodmen exceeds the amount of the final paycheck, the departing employee is required to pay Woodmen the difference within ten business days. JX-15 at 4-5. There is nothing in the Tuition Repayment Policy that specifically authorizes deductions from payment of unused vacation time.

By way of example, Woodmen Life submitted evidence of three employees who departed prematurely from their employment with the company and consequently had tuition fees deducted from their final paycheck under the Tuition Reimbursement Policy. The tuition repayment agreements of the three employees all contained the following clause: “in the event that any reimbursement is due from Employee to WoodmenLife, Employee authorizes WoodmenLife to deduct the full amount due from Employee’s last paycheck(s) . . . .” JX-15. Upon their departure, the final paychecks were reduced by the tuition they owed Woodmen under the repayment agreements, and two of the employees had payment of unused vacation time substantially reduced as part of their tuition repayment. JX-15.<sup>6</sup> The third employee (Sears) was not paid for any unused vacation time in his final paycheck, and therefore, only had his wages reduced by the tuition repayment.<sup>7</sup> JX-15.

Looking at Garcia’s repayment agreement, the language is nearly identical to the language contained in the tuition repayment agreements illustrated above. Specifically, Garcia’s agreement states as follows: “in the event that any reimbursement is due from Employee to Woodmen, Employee authorizes Woodmen to deduct the full amount due from Employee’s last paycheck(s).” Garcia accrued vacation time on par with other U.S. employees, and he was paid for his unused vacation time upon his departure. But, in accordance with the repayment agreement he signed, Garcia’s payment for unused vacation time was reduced by a debt he owed

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<sup>6</sup> I note that JX-15 contains the last paycheck information for three employees. There was also a copy of a personal check of one of the employees. That information includes un-redacted financial account information for these employees. Similarly, Garcia’s final paycheck, JX-10 contains similar information. Filing the Joint Exhibits with this information violates 29 C.F.R. § 18.31. I initially tried redacting this information with a black magic marker, but was unsuccessful with the documents containing the last paycheck information. To remove this personally identifiable information from the record, I physically cut the financial account information of these employees (including Garcia) from the offending documents. Accordingly, the holes in these documents are intentional to protect the employee’s PPI.

<sup>7</sup> Because Sears owed substantially more tuition to Woodmen than the final wages he earned, if he had any unused vacation time requiring payment upon departure, any such payment would have been reduced by his outstanding tuition debt.

Woodmen at the time of his departure. In other words, Garcia was treated no differently than any other departing Woodmen employee with a repayment agreement and unused vacation time owing a debt.

Accordingly, I find that Woodmen Life did not violate § 655.731(a)(3) because Garcia's benefits were offered on the same basis and in accordance with the same criteria as offered U.S. workers. To give Garcia full payment for his unused vacation time and not allow a deduction pursuant to the terms of his repayment agreement places Garcia in a better position than Woodmen's other U.S. employees with repayment agreements and unused vacation time. That is not the purpose behind the regulation.

**(b) 20 C.F.R. § 655.731(c)(9)**

Section 655.731(c)(9) speaks to authorized deductions from an employee's required wage and specifically prohibits an employer from seeking recoupment of H-1B attorney fees and expenses from the required wage, even if the employee consents. The section states:

(9) "Authorized deductions," for purposes of the employer's satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (i.e., paragraph (c)(9)(i), (ii), or (iii))—

...

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing); [and]

(B) Is for a matter principally for the benefit of the employee . . . ; [and]

(C) Is not a recoupment of the employer's business expense (e.g., tools and equipment; . . . attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition)) . . . .

20 C.F.R. §655.731(c)(9). Because \$4,575 deduction for H-1B attorney fees came from the benefits side of the equation and not Garcia's required wage, this section is inapplicable to the case at bench. The Administrator's reading of the regulation as prohibiting any deduction of H-1B attorney fees and costs from an employees pay or benefits is far too broad and not supported

by the plain language of the regulation. The DOL explained the application of the regulation as follows:

At the outset, the Department wants to clarify an apparent misconception by some commenters regarding the restrictions placed upon employers in assessing the employer's own business expenses to H-1B workers. An H-1B employer is prohibited from imposing its business expenses on the H-1B worker—including attorney fees and other expenses associated with the filing of an LCA and H-1B petition—only to the extent that the assessment would reduce the H-1B worker's pay below the required wage, i.e., the higher of the prevailing wage and the actual wage.

65 Fed. Reg. 80199 (2000). Garcia's required wage was not affected by this deduction. While the deduction did reduce Garcia's payment for unused vacation time, this action is consistent with Woodmen Life's treatment of other U.S. employees.

#### **V. CONCLUSION**

For the foregoing reasons, Woodmen Life's Cross Motion for Summary Decision is GRANTED and the Administrator's Motion for Summary Decision is DENIED. Woodmen Life paid Garcia his required wage and no back wage assessment is required.

**SO ORDERED.**

**JONATHAN C. CALIANOS**  
Administrative Law Judge

Boston, Massachusetts

**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](mailto: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.