

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 02 April 2018

Case No.: 2017-LCA-00024

In the Matter of:

**ADMINISTRATOR, WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR
Prosecuting Party**

v.

**DOCTOR'S HELP, INC.,
Respondent**

Appearances:

**Elsbeth Doskey, Esq.
Arlington, Virginia
For the Prosecuting Party**

**Ebeyana Lois Simmons, Pro Se
National Harbor, Maryland
For the Respondent**

**DECISION AND ORDER AFFIRMING
ADMINISTRATOR'S DETERMINATION, IN PART**

Background and Procedural History

An employer who seeks to hire a non-immigrant worker in an H-1B specialty occupation¹ must first obtain approval of a Labor Condition Application ("LCA") from the United States

¹ The regulations define a "specialty occupation" as requiring theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor including but not limited to biotechnology, chemistry, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, law, accounting, business specialties, theology, and the arts, and requiring the attainment of a bachelor's degree or its equivalent as a minimum (with the exception of fashion models, who must be "of distinguished merit and ability"). Likewise, the foreign worker must possess at least a bachelor's degree or its equivalent and state licensure, if required to practice in that field. H-1B work-authorization is strictly limited to employment by the sponsoring employer. 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732.

Department of Labor (“DOL” or “Department”). The Secretary of Labor has established a system of enforcement proceedings and sanctions for employers who fail to meet a condition specified in the LCA or misrepresent a material fact when completing the LCA. The system provides for the filing of complaints, investigations by the Department’s Wage and Hour Division (“WHD” or “Administrator”), hearings before an administrative law judge (“ALJ”), and appellate review by the Administrative Review Board (“ARB”). 8 U.S.C. § 1182(n)(2)(A); 20 C.F.R. § 655.700, 655.800.

Kelly Silva, an H-1B nonimmigrant worker, filed a complaint with WHD in December 2009 against Doctor’s Help, Inc. (“Respondent”) seeking payment of back wages and reimbursement of ancillary application and legal fees paid by her or on her behalf. WHD belatedly investigated and eventually issued an Administrator’s Determination on August 15, 2017, holding that Respondent failed to pay required wages to Ms. Silva in violation of 20 C.F.R. § 655.731 and ordered payment of back wages for non-productive time in the amount of \$5,313.60. The Administrator also determined that Respondent, or its attorney, required or accepted payment of \$4,070.00 for processing and legal fees associated with preparing the H-1B petition in this case, in violation of 20 C.F.R. § 655.731. The Administrator also determined that Respondent failed to post notice of the LCA filing in two conspicuous locations for 10 days, in violation of 20 C.F.R. § 655.734. The Administrator did not assess a civil money penalty.² The Administrator’s Determination, mailed to Respondent, included instructions on the procedure for filing a request for hearing.

On September 1, 2017, the Office of Administrative Law Judges received a letter from Respondent requesting a hearing on all findings noted above.

A formal hearing was held in Arlington, Virginia on January 12, 2018. All parties were present and the following exhibits were received into evidence: Administrative Law Judge Exhibits (“ALJX”) 1-4 (Tr. 11); Prosecuting Party’s Exhibits (“EX”) 1-27 (Tr. 13); and Respondent’s Exhibits (“RX”) 1-16. (Tr. 14).³ Three witnesses testified. The parties made closing arguments at the hearing. (Tr. 99). The prosecuting party also submitted a written post-hearing brief on March 9, 2018.⁴

² 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).

³ I sustained the Administrator’s objection to Respondent’s Exhibit 17. (Tr. 14).

⁴ In her brief, counsel for the Prosecuting Party argues that “Respondent was obligated to pay Ms. Silva the required wage rate from the date of her availability, October 1, 2009, to the date of the bona fide termination, December 15, 2009.” *Administrator’s Brief* at 16. According to the Prosecuting Party, a bona fide termination did not occur in this case until December 15, 2009, when USCIS actually received notice that Respondent was withdrawing the

As discussed in greater detail below, I find Respondent owes Kelly Silva \$4,624.80 in back wages for the period October 1, 2009 to December 5, 2009 and must also reimburse her \$4,070.00 for attorney and processing fees.⁵

Statutory and Regulatory Framework

As noted above, the H-1B visa program allows U.S. employers to temporarily hire non-immigrants to fill specialized jobs in the United States. Employers who seek to hire an H-1B nonimmigrant in a specialty occupation must first submit to DOL, and obtain DOL certification of, a labor condition application.⁶ 20 C.F.R. § 655.700(b)(1); *In the Matter of Eva Kolbusz-Kline v. Technical Career Institute*, ALJ No. 93-LCA-00004, 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. § 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 H-1B visa for the workers. The non-immigrant workers are then admitted into the United States.

The Immigration and Nationality Act (“Act”) directs 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.

H-1B petition. *Id.* The Prosecuting Party also reiterated its request that my decision and order reflect that Respondent conceded at the hearing that it violated 20 C.F.R. §§ 655.731 and 734. *Id.* at 20-21.

⁵ I 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.

⁶ Within the DOL, the Employment and Training Administration (“ETA”) is responsible for receiving and certifying 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.

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 USCIS “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 (based on factors such as assigned work).” 8 U.S.C. 1182(n)(2)(C)(viii)(I); 20 C.F.R. § 655.731(c)(7)(i); *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-00010 through 01-LCA-00025, slip op. at 7 (ARB May 31, 2005); *Rajan v. International Bus Solutions, Ltd.*, ARB No.03-104, ALJ No. 03-LCA-00012, slip op. at 7 (ARB Aug. 31,2004). However, the employer 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. 20 C.F.R. § 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. *Id.* at § 655.815(c)(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. *Id.* at § 655.815(c)(1).

An interested party requests a hearing under procedures set out in § 655.820. The regulation indicates that a hearing relates to “review of a[n Administrator’s] determination issued under §§ 655.805 and 655.815.” § 655.820(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

Respondent.⁷ Kelly Silva never actually worked for Doctor’s Help. While Doctor’s Help did process an H-1B application for her, I called her before it was to begin and told her that the contract was cancelled. Kelly was told Doctor’s Help no longer had a job for her and that she should not come to the United States. She came anyway. Doctor’s Help does not owe her any back wages.

Prosecuting Party. Even if Kelly Silva did no actual work for Doctor’s Help, it must pay her the required wage rate for all non-productive time under the H-1B program because Doctor’s Help did not perfect a bona fide termination of Ms. Silva’s employment. In addition, Doctor’s Help must reimburse Kelly Silva for all processing and attorney’s fees associated with the H-1B application paid by her, or on her behalf.

Stipulations

The LCA was not posted in two conspicuous locations for a period of 10 days, as required by 20 C.F.R. § 655.734. (Tr. 11). Respondent owes Ms. Silva \$4070.00 in processing and legal fees associated with filing the LCA petition, pursuant to 20 C.F.R. § 655.731. (Tr. 100).

Remaining Issue⁸

As Respondent stipulated to repayment of the \$4,070.00 in processing and legal fees, and stipulated to failing to post notice of the LCA filing in two conspicuous locations for 10 days, the sole remaining issue is whether Respondent owes Ms. Silva back wages for non-productive time and, if so, in what amount?

⁷ As a pro se respondent lacking specific legal expertise, this Court has afforded Ms. Simmons “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-00020, slip. op. at 8 (ARB March 28, 2010) (citing *Ubinger v. CAE Int’l*, ARB No. 07-083, ALJ No. 2007-SOX-00036, slip op. at 6 (ARB Aug. 27, 2008)).

⁸ Respondent concedes that it did not post the LCA notice in 2 locations for 10 days and also withdrew its request for a hearing on the Administrator’s determination that it owes Kelly Silva \$4,070.00 in processing and attorney’s fees.

Testimonial Evidence⁹

Kelly Silva (Tr. 19-48, 52-54).

I am a Brazilian citizen, a pharmacist and clinical chemist, and live in Brazil. (Tr. 21). In 2008, I was living in the U.S. as an H-1B Visa student and I saw a posting on Craigslist for a position with Doctor's Help. I met the director, Ms. Simmons, and she offered me a position and said that she would sponsor me for a job. (Tr. 22). She told me I needed to take a phlebotomy workshop in the U.S. because all my training was in Brazil. I was offered the position in December 2008. We discussed how long the visa process would take. Ms. Simmons found Ms. Yurika Cooper, an immigration attorney, to help me through the process. I remember Ms. Simmons telling me that she could not pay the fees and if I wanted to work at Doctor's Help, then I would have to pay them. (Tr. 23). I paid \$2,500.00 to Attorney Cooper for processing the H-1B visa. (Tr. 25). My then friend, now husband, Chris Kneiding, also paid \$1,570.00 to Ms. Simmons for attorney fees that were billed by Attorney Cooper to Doctor's Help. (Tr. 28). I was eventually approved for an H-1B visa, which was valid from October 1, 2009 to September 23, 2012. (Tr. 30). By this time I was back in Brazil

Before coming to the U.S., I had exchanged emails with Ms. Simons and had some phone calls. She told me that she had lost the contract for my job and that she would try and put me in a different position than the one we had initially discussed. I arrived in the U.S. in the end of September 2009, intending to start on October 1, 2009. I tried to contact Ms. Simmons to let her know I was in the U.S., but she was not available, so I went to her office two or three times to meet her. At some point we talked over the phone. But it wasn't until October 9, 2009 that we physically met.

I was never paid anything by Doctor's Help. I was not reimbursed for the visa fees I paid to Attorney Cooper. (Tr. 36). Before returning to the U.S. at the end of September 2009, Ms. Simons did tell me the position we had initially discussed was no longer available due to termination of the contract. I told Ms. Simons I was coming anyway because I had the visa, I booked the flight and we had kept up communications that she might have work for me in 2010. (Tr. 41). Ms. Simons never directly told me not to come to the U.S. (Tr. 44). She did suggest that I could come and work on a training schedule because she was expecting more work in the beginning of 2010. The last day I was at Doctor's help was December 1, 2009. I returned home to Brazil on December 5, 2009. (Tr. 47).

Christoph E. Kneiding (Tr 48-54).

I am now married to Kelly Silva. In 2009 we were dating when I was working at the World Bank in Washington, D.C. and asked Kelly to join me. (Tr. 49). She told me she had found a job on the internet and was interviewing for a position with Doctor's Help. The only time I met Ms. Simmons was when I gave her \$1,570.00 for Kelly's visa fees. I think it was March 30, 2009

⁹ The summary of the hearing testimony is not intended to be a verbatim transcript but merely to highlight certain relevant portions.

when I rented a car and drove to Oxon Hill, Maryland. While the money came from my bank account, I paid Ms. Simmons on Kelly's behalf.

David Mitchell (Tr. 55-88).

I am an investigator for the Wage and Hour Division. While I was assigned this case in March 2017, it was initiated in December 2009 upon a complaint filed by Kelly Silva. Another investigator had the case before me. I don't know why the previous investigator never finished her investigation.

Ms. Silva alleged that she was not paid for employment with Doctor's Help. I investigated and concluded that she was owed back wages and reimbursement for application and visa fees. Under the labor condition application, Ms. Simons was required to pay Ms. Silva the higher of the actual wage or the prevailing wage. In this case, that was the prevailing wage, \$12.30/hour. (CX 3). The employer is also required to pay fees associated with processing visa applications. The employee is never required to pay.

I calculated wages for the period October 1, 2009 to December 15, 2009, when I believed a bona fide termination had occurred. Under the H-1B regulations, in order for a bona fide termination to occur, the employer must notify USCIS of the termination. I picked December 15 because that is the date that USCIS said they were notified by Doctor's Help of the revocation of Ms. Silva's petition. (CX 20; Tr. 65). I was not aware that Ms. Silva resigned and had left the U.S. on December 5. In order for an employer to incur a wage obligation under the H-1B program, the employee must actually make themselves available for work and notify the employer as such. (Tr. 67). In this case, Ms. Silva made herself available for work on October 1, 2009. Under the regulations, even if the employee doesn't actually work, unless the employer has terminated the visa by notifying USCIS, then the employer is still responsible for wages for what we call nonproductive work, otherwise known as benching. I determined that Ms. Silva was owed a total of \$5,313.60 for nonproductive time, in addition to the \$4,070.00 for fees, for a total of \$9,383.60. (Tr. 68).

I spoke to Ms. Simons in July 2017 about my findings. Ms. Simons told me that Ms. Silva never actually worked for Doctor's Help and that she had lost the contract that she was supposed to work under. Ms. Simons did agree to future compliance. (Tr. 68). She also said she would pay the full amount of back wages due. (Tr. 68).

I sent a follow up email to Ms. Simmons, with a summary of back wages owed and instructions on payment. Ms. Simmons contacted me and said she thought about it and it wasn't fair to pay Ms. Silva since she did not actually do any work. I then provided Ms. Simmons information on her appeal rights and issued my determination letter. (CX 1).

One of the other regulatory requirements is that the LCA must be posted in two conspicuous areas at the employer's business.

The initial complaint did come into our office in December 2009. Eva Gross was the initial investigator and assigned the case on September 17, 2012. I can't speculate why it took so long

to assign the case to her or what she did before I took over the case over in March 2017. I did not contact Doctor's Help until July 14, 2017. (Tr. 75). By then, I had already made a determination that, based on the evidence, Doctor's Help owed back wages and reimbursement of fees. (EX 15).

In the LCA, the employer attests that they have a position in which they need a non-immigrant worker to fill. They also attest to location and wages and how many hours the employee will work. It is essentially a contract. Ms. Simmons could have terminated Doctor's Help wage obligation to Ms. Silva by effecting a bona fide termination before Ms. Simmons made herself available for work on October 1, 2009 by notifying Ms. Silva that she was fired and also notifying USCIS that the petition was revoked. But in order for Ms. Silva to be eligible for wages, she had to make herself available for work. That is why she came to the U.S. In this case, there was no bona fide termination until Ms. Simmons notified USCIS to revoke the visa.

Normally these investigations do not take 7 ½ years to complete. While December 15, 2019 is the date that USCIS actually received the termination notification, Doctor's Help actually submitted it on December 5, 2009. Ms. Silva's position was to be full-time. (Tr. 84, CX20).

Ana Rodriquez (Tr. 93-97).

I was a registration clerk at Doctor's Help from March 2008 to the end of November 2009. I worked two days a week. I never saw Kelly Silva working there.

Ebeyana L. Simmons (Tr. 101-115).

Ms. Silva was aware that the LCA position had been terminated and no longer available before she flew to the United States. (Tr. 102). I told her I did not have a full time position as outlined in the application. Ms Silva told me she was coming anyway and she did contact me when she arrived in the U.S. hoping for another job possibility that might open up. The maximum time that Ms. Silva was working at Doctor's Help was no more than 6 hours. (Tr. 106). On December 7, 2009, I sent an email to Ms. Silva that I was going to contact the attorney that day and cancel the petition. (Tr. 106).

I assumed that Ms. Cooper was handling the legal work but eventually I wrote a letter to immigration telling them to cancel the petition. (Tr. 108). Doctor's Help never paid Ms. Silva any wages.

Doctor's Help provides services to the health care industry, such as training and workshops. We assist doctors, nurses, EMTs, paramedics and also provide referral services if they have staffing needs. (Tr. 112). Doctor's Help has been in business since 2001. I am the owner. In October 2009, we had no full time employees, only part time. As part of a contract I entered into with a healthcare provider, I solicited one H-1B nonimmigrant worker. Ms. Silva applied and was selected. This was a full time position. At the time I submitted the I-129 and the LCA, it was a full time position and in anticipation of a contract Doctor's Help had with a third party. That third party contract was cancelled and I no longer had a need for a full time employee. Prior to Ms. Silva, I had filed one previous I-129.

ESSENTIAL FINDINGS OF FACT

1. Kelly Silva was authorized to work for Doctor's Help, under an approved H-1B visa, from October 1, 2009 through September 23, 2012 at a wage rate of \$12.30 per hour.
2. While not performing any actual work for Doctor's Help, Ms. Silva was in a non-productive work status, and available to work for Doctor's Help, beginning on October 1, 2009.
3. Ms. Silva voluntarily returned to Brazil on Saturday, December 5, 2009, making her unavailable to work for Doctor's Help.
4. There were 44 work days and 3 paid holidays between October 1, 2009 and December 5, 2009.
5. Doctor's Help advised Ms. Silva by email on Monday, December 7, 2009 that her H-1B visa was going to be cancelled.
6. On December 7, 2009 Doctor's Help submitted documentation to USCIS requesting termination of Ms. Silva's H-1B visa.
7. USCIS did not receive the termination notification until Tuesday, December 15, 2009.

DISCUSSION

Doctor's Help and owner Ebeyana Simmons have provided staffing and referral services to the health care industry since 2001. As part of a contract entered into with a third party healthcare provider, Ms. Simmons solicited the services of one H-1B nonimmigrant worker. Ms. Kelly Silva applied, was selected by Ms. Simmons, and obtained an H-1B visa from USCIS for the period October 1, 2009 through September 23, 2012. At the time Ms. Simmons submitted the I-129, *Petition for Nonimmigrant Worker*, and the LCA, it was a full time position. However, when the third party contract was subsequently cancelled, Doctor's Help no longer had a need for Ms. Silva's services. While Ms. Simmons informed Ms. Silva before October 1, 2009 that the position was no longer available, Ms. Simmons did not immediately notify USCIS and request they revoke the visa before Ms. Silva traveled from Brazil to the United States.

An employer's obligation to pay an H-1B employee begins when the employee "enters into employment." 20 C.F.R. § 655.731(c)(6). The term "enters into employment" means the date on or after the date of need on the H-1B petition when the worker makes herself available for work or otherwise comes under the control of the employer and includes all activities hereafter, such as waiting for an assignment. 20 C.F.R. § 655.731(c)(6)(i). In other words the term "enters into employment" is not triggered when the employee actually starts working but rather when the worker first makes herself available for employment or is waiting for an assignment. In this case, Ms. Silva made herself available for employment on October 1, 2009 when she reported to Doctor's Help for work. Thus, Doctor's Help obligation to pay Ms. Silva the required wage began on October 1, 2009. Under the INA's "no benching provision," Doctor's Help was obligated to pay the required wage to Ms. Silva even if she was in a nonproductive status due to a decision by the employer, here because of a lack of assigned work.

8 U.S.C. § 1182(n)(2)(C)(viii)(I); 20 C.F.R. § 655.731(c)(7)(i). In other words, that Doctor's Help did not have any work to assign to Ms. Silva did not negate the requirement to pay her while waiting for work.

An employer's obligation to pay the H-1B worker ends when there has been a "bona fide" termination of the employment relationship or the H-1B worker voluntarily makes herself unavailable for work. One of the requirements for a "bona fide" termination to occur is that the employer must cancel the H-1B petition and notify the USCIS of the termination.¹⁰

With respect to this requirement, it is clear that Ms. Simmons waited until December 7, 2009 to notify USCIS that the employment relationship with Ms. Silva was terminated. However, Ms. Silva had already departed the United States, having returned to Brazil on December 5, 2009, thus terminating her non-productive status.

Therefore, I find Doctor's Help is obligated to pay Ms. Silva the required wage for the period beginning October 1, 2009 and ending on December 5, 2009, when Ms. Silva voluntarily departed the United States and returned to Brazil, effectively making herself unavailable for work assignments. Accordingly,

ORDER

The Administrator's January 13, 2015 determination, that Respondent owes back wages to Kelly Silva, less legally required deductions, is MODIFIED, as follows: Respondent owes Kelly Silva \$4,624.80¹¹ in back wages, less legally required deductions, for the period October 1, 2009 to December 5, 2009.¹² See 20 C.F.R. § 655.840(b).

The Administrator's determination that Respondent owes Kelly Silva \$4,070.00 in attorney and processing fees is AFFIRMED.

¹⁰ As the Administrative Review Board ("ARB") held in *Vinayagam v. Cronous Solutions, Inc.*, ARB Case No. 15-045; ALJ No. 2013-LCA-00029, (February 14, 2017), citing *Amtel Group of Fla., Inc. v. Yongmahapakorn* ARB No. 04-087, ALJ No. 2004-LCA-00006, slip op. at 11 (Sept. 29, 2006), there are three requirements necessary to effectuate a bona fide termination under the regulations, and thus end the obligation to pay wages. First, the "employer must expressly terminate the employment relationship with the H-1B nonimmigrant worker." Second, the employer must notify USCIS of the termination so that the approval of the employer's H-1B petition can be revoked. Third, the employer must, "under certain circumstances," provide the worker with payment for transportation home. *Cronous*, at p. 7.

¹¹ This figure is calculated by multiplying \$12.30/hour x 8 hours a day x 47 days = \$4,624.80.

¹² To effectuate a bona-fide termination, the regulations require only that an employer "notify" USCIS of the termination so that approval of the employer's H-1B petition can be revoked. The regulations do not state that USCIS must actually receive the notice before there is a bona-fide termination. I find notice was provided on December 7, 2009, when Doctor's Help submitted the request, and not December 15, 2009 when USCIS received it. Additionally, even if the period of back wages was extended to December 7, 2009, Doctor's Help would not owe any additional wages as Saturday, December 5, 2009, and Sunday, December 6, 2009, were not workdays.

The Administrator's Determination that Respondent failed to post its LCA application in two conspicuous locations for 10 days is AFFIRMED.¹³

SO ORDERED:

STEPHEN R. HENLEY
Administrative Law Judge

¹³ The Administrator is not seeking, and I do not order, reimbursement of transportation costs in this case. Further, given Respondent is not responsible for Wage and Hour Division's unreasonable delay in investigating the complaint, no interest is awarded.

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.