



**Issue Date: 06 February 2019**

CASE NO.: 2018-LCA-00024

*In the Matter of:*

**NIKHIL JAIN,**  
*Prosecuting Party,*

vs.

**ACI INFOTECH, INC.,**  
*Respondent.*

**DECISION AND ORDER AWARDING RELIEF**

This is a claim arising under the Immigration and Nationality Act (“the Act”), 8 U.S.C. §1182, subsection (n)(2), with implementing regulations at 20 C.F.R. § 655, filed by Prosecuting Party Nikhil Jain (“Prosecuting Party” or “Mr. Jain”) against Respondent ACI Infotech, Inc. (“Respondent”).

**Ruling on Order to Show Cause**

First, I rule on my November 13, 2018, Order to Show Cause. On November 8, 2018, Respondent, through its counsel Shawn D. Edwards, filed a motion for continuance of the hearing asserting it had engaged Mr. Edwards solely to negotiate a resolution of the claim. On November 9, 2018, I denied the motion for continuance, citing the untimely filing of the motion, my previous continuance of the hearing, the fact that Mr. Edwards’ notice of appearance contained no such limitations on representation, and the strict time limitations that apply to hearings under 8 U.S.C. § 1182(n)(2).

At the hearing on November 13, 2018, Attorney John Cowan made a special appearance on behalf of Respondent for the limited purpose of renewing Respondent’s motion to continue the hearing. I denied the renewed motion, and Mr. Cowan stated he was not prepared to participate in the hearing. I proceeded with the hearing, allowing Prosecuting Party to present its case. After the hearing, on November 13, 2018, I issued an Order to Show Cause directing Respondent, and its attorney of record, to:

show cause, in writing filed with the court no later than November 23, 2018, why you failed to appear at the hearing in this matter held on November 13, 2018, in San Francisco, California.

I notified Respondent that if it failed to establish good cause for its failure to appear, I would enter a decision and order in this matter without further proceedings as permitted under 29 C.F.R. § 18.21(c).

On November 20, 2018, Respondent, through Mandy Dantuluri,<sup>1</sup> responded in writing to the Order to Show Cause. The response is inadequate. Ms. Dantuluri asserts Respondent had engaged in settlement negotiations with the Prosecuting Party up until a week before the hearing, that Respondent was unaware the motion to continue had been decided, and that its attempt to locate a California attorney beginning on November 7, 2018, had failed. Respondent further asserts it “is not in a financial position to purchase expensive airlines *[sic]* tickets, hotels, etc. for either ACI representatives or its attorneys to travel from New Jersey to California.”

I will address each explanation offered by Respondent. First, settlement negotiations are an expected part of the litigation process, and in no way sever a party’s obligation to be prepared for and attend a scheduled hearing. Respondent’s assertion it did not appear because it was “unaware that the motion had taken place until [it] received the court’s order...on November 13” is also unpersuasive. It filed the motion only five days before trial; I issued the Order Denying Continuance one day later on November 9, 2018; and Respondent could have contacted the court if it had any doubts as to whether the hearing would proceed. A party cannot simply file an eleventh-hour motion to continue, and then justify its failure to appear on the basis it has yet to receive the court’s response.

Moreover, I am not persuaded by Respondent’s attempt to justify its failure to appear on the basis it was unable to retain a California attorney. Respondent had an attorney, albeit a New Jersey attorney, who could have represented it at the hearing. By its own admission Respondent did not begin its search for a California attorney until November 7, 2018 – only six days before the hearing. Respondent’s initial non-attorney representative, P.K. Ramachandran, stipulated to the November 13, 2018, hearing date, and in his subsequent notice of appearance, counsel Shawn Edwards did not object to the hearing date. Respondent had been aware of the November 13, 2018, hearing date since October 1, 2018, and its imprudent decision to wait until six days before the hearing to try to find a California attorney hardly constitutes good cause.

Finally, Respondent’s argument that it is not in a financial position to attend a hearing in California also falls short. A corporation should have adequate capital

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<sup>1</sup> In the filing Ms. Dantuluri signed on behalf of ACI, but did not list her position with the company.

to meet the debts that may reasonably be expected to arise in the normal course of business, including wage disputes. *See Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Service, Inc.*, 736 F.2d 516, 524-525 (9th Cir. 1984). At the very least, upon receiving notice of the hearing, Respondent could have expressed its financial hardship to the court, so the court could address the possibility of a telephonic hearing. Instead, Respondent waited to raise this financial hardship argument until after it failed to appear at the hearing.

As I stated in my Order Denying Continuance, hearings under 8 U.S.C. § 1182, subsection (n)(2), are subject to strict time limitations. Respondent chose not to be ready or appear for the hearing on a date to which it agreed, and has not proffered any credible reason for its failure to do so.

Respondent having failed to show good cause, I will enter a decision and order in this matter without further proceedings or briefings.

### **I. PROCEDURAL BACKGROUND**

On June 15, 2018, the Administrator issued a Determination finding Respondent violated 20 C.F.R. § 655.731 by failing to pay Prosecuting Party's required wage. The Administrator ordered Respondent pay back wages in the amount of \$15,852.22, and assessed no civil penalties. Prosecuting Party appealed the determination on the basis that the Administrator erred in the calculation of back pay owed. This case was assigned to me on August 16, 2018, and I scheduled the hearing for October 10, 2018. I held a telephonic status conference with the parties on September 28, 2018, and continued the hearing to November 13, 2018. Respondent filed a second motion for continuance on November 8, 2018, and I issued an order denying Respondent's motion on November 9, 2018.

I held the hearing on November 13, 2018. The Prosecuting Party, Nikhil Jain, appeared with his counsel, Attorney Ashima Duggal. Attorney John Cowan specially appeared on behalf of Respondent for the sole purpose of the renewing Respondent's motion to continue, which I denied. Respondent was not represented and presented no case at the hearing.<sup>2</sup> I received Prosecuting Party's Exhibits ("PX") 1-19 into evidence. The findings and conclusions which follow are based on a complete review of the entire record, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed at length below, I carefully considered each in arriving at this decision.

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<sup>2</sup> Mr. Cowan later returned to the hearing and stated he wanted to "submit on the record," as a defense, that Respondent never received Prosecuting Party's time sheets. (HT, p. 22.) He stated he had no evidence to support that assertion. While statements of counsel can serve as argument, they are not treated as evidence.

## II. LEGAL BACKGROUND

The Immigration and Nationality Act (“the Act”) permits employers to temporarily hire nonimmigrant alien workers in certain occupations. The Act requires employers fill out a Labor Condition Application (“LCA”) with the Department of Labor (“DOL”), setting the worker’s wage level and working conditions. 8 U.S.C. §1182(n). In the LCA the employer must attest it will pay the nonimmigrant worker the “required wage,” the greater of the actual wage or the prevailing wage for the occupational classification in the area of employment. *See* 20 C.F.R. §§ 655.730(d)(1); 655.731(a). The employer must also attest to offering nonimmigrant employees the same benefits on the same basis, and in accordance with the same criteria, as it offers to U.S. workers. 20 C.F.R. § 655.730(d)(2). The DOL certifies the LCA if the items on the form are completed and “not obviously inaccurate.” 20 § C.F.R. 655.740(a)(1). Following certification of the LCA, the employer can petition the Department of State for an H-1B visa, and upon approval may employ the nonimmigrant. Unless an exception applies, the employer must provide the required wage set in the LCA for the entire period of authorized employment. The employer is obligated to pay the worker his or her salary even if the worker is in nonproductive status due to a decision by the employer, such as lack of assigned work. 20 C.F.R. § 655.731(c)(7)(i).

If an employer fails to pay wages or provide benefits, the Administrator shall assess and oversee the payment of back wages or benefits to any H-1B nonimmigrant. 20 C.F.R. § 655.810(a). The Administrator may also assess civil money penalties not to exceed \$1,848 per violation for violations including the misrepresentation of a material fact on the labor condition application and payment by the employee of the LCA filing fee. 20 C.F.R. § 655.810(b)(1)(iii),(v). Civil money penalties not to exceed \$7,520 per violation may be assessed for a willful failure pertaining to wages/working conditions, willful misrepresentation of a material fact on the labor condition application, and discrimination against an employee. 20 C.F.R. § 655.810(b)(2).

## III. FACTUAL BACKGROUND

### The Labor Condition Applications

#### 1. Respondent’s First LCA

In November, 2015, Respondent filed its first Labor Condition Application (“LCA”) on behalf of Mr. Jain for an H-1B visa for a three-year period of employment from November 3, 2015, to November 3, 2018. (PX 2.) The job title listed is Quality Assurance Engineer, with a Standard Occupational Classification (“SOC”) of “Computer Occupations, All other,” with an assigned code of 15-1199 at wage level I. (PX 2.) The listed employer name is ACI Infotech, Inc, with a Piscataway, New

Jersey address. (PX 2.) The employer's point of contact is the Senior Vice President, Sanjay Gupta, and attorney Diya Matthews with law firm Chugh, LLP represented Respondent in the application. (PX 2.) Respondent listed the applicable wage level as level I with a prevailing wage of \$51,792 per year.<sup>3</sup> Respondent obtained the prevailing wage from the Occupational Employment Statistics ("OES") and the OFLC Online Data Center. Respondent attested it would pay an actual wage rate of \$65,000 per year. (*Id.*) On November 9, 2015, the LCA was certified by the Office of Foreign Labor Certification. (PX 2.) An addendum to the application lists the place of employment as Piscataway, New Jersey, with a prevailing wage of \$53,518. (PX 2).

## 2. Respondent's Amended LCA

Respondent filed an amended LCA for Mr. Jain for the employment period of July 21, 2016, to November 3, 2018. (PX 3.) Respondent was not represented by an attorney in the filing of the application, and listed Easwari Nalli, a human resources officer, as its point of contact. (PX 3.) The place of employment for the amended LCA was San Jose, California, with a wage level I and prevailing wage of \$66,518. (PX 3.) The wage rate Respondent attested it would pay was \$66,700. (PX 3.)

## 3. ITC Infotech's LCA

In September, 2016, Mr. Jain was hired to work directly with ITC InfoTech ("ITC,") which filed a new LCA for him. (PX 4.) The basis for the visa was a change in employer, and the job title was IT Consultant with an SOC of "Computer Programmers," and an assigned code of 15-1131. (PX 4.) The listed period of intended employment was September 1, 2016, to August 31, 2019. The employer's point of contact was Suchita Jeeten Pador, a human resources manager, and attorney Michelle Burns represented ITC InfoTech in the filing of the application. (PX 4.) The listed place of employment is San Jose, California. The wage level was listed as II, with a prevailing wage rate of \$73,091 based on the OES and OFLC online data center. The wage rate ITC Infotech attested it would pay was \$75,000 per year. (PX 4.)

### Description of Employment

Mr. Jain worked for Respondent from December 1, 2015, to mid-September 2016. (Hearing Transcript "HT", p. 13.) Respondent listed Kent, Ohio, as a place of

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<sup>3</sup> The Employment and Training Administration's "Prevailing Wage Determination Policy Guidance" describes Level I wage rates as rates for entry-level workers, which should be "assigned to job offers for beginning level employees who have only a basic understanding of the occupation." (PX 6.) It describes Level II wage rates as rates for qualified workers, which should be "assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation." It further states that "a requirement for years of education and/or experience" is an indicator that a job warrants a level II wage (PX 6.)

employment on its first LCA, but Mr. Jain testified he never worked for the Respondent in Kent, Ohio. (HT, p. 17.) He was located at the company's New Jersey office from December, 2015, to February, 2016. (HT, p. 13.) He testified Respondent told him they had in-house projects that he could work on at the New Jersey office, but that when he showed up Respondent had no projects for him. (HT, p. 13.) The record demonstrates that Respondent acts as an "employment contractor," employing workers but assigning them to work at a different location than its own place of business, based on the terms of a contract with a different entity seeking the employer's services.<sup>4</sup> The record suggests that from December, 2015, to February, 2016, Respondent did not have a client with which to place Mr. Jain. He testified he was not paid a salary during these three months. (HT, p. 14.)

Beginning on February 29, 2016, Respondent placed Mr. Jain in a contractor position with ITC InfoTech, an end client of Respondent, located in San Jose, California. Mr. Jain testified that despite his job title in the LCA being "Quality Assurance Engineer," he never worked as a quality assurance engineer. Rather he testified he worked as an IT consultant with the responsibility of software development. (HT, pp. 18-20.) To support his argument that Respondent misclassified his position, placing him at a lower wage level than he should have been, Mr. Jain provided a letter written by Suchita Jeeten Padore, a Senior HR Manager at ITC InfoTech. The letter was dated November 5, 2018, and addressed "To Whom It May Concern." (PX 5.) According to that letter,

From February 29, 2016 to September 8, 2017, Mr. Jain's role, job duties and assignments remained the same. His title was IT consultant, IS3 level. IS3 is a designation for senior level, experienced employees who lead and coordinate teams and have greater responsibilities than entry-level employees.

His position required technical experience of minimum 3 Years in the digital manufacturing solutions, connected manufacturing, IOT domain, industry 4.0, industrial internet, cloud services, [and] MES... (PX 5.)

Ms. Padore further stated in the letter that Mr. Jain's job responsibilities included software development, working as a team-lead for offshore and onsite teams, direct engagement with clients throughout the project life cycle, and working on development of different proof of concepts. (PX 5.) The letter also indicates the posi-

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<sup>4</sup> It is illegal for an H1-B employer to place a nonimmigrant worker with another employer where the nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer, and where there are indicia of an employment relationship between the nonimmigrant and such other employer. *Vinayagam v. Cronous Solutions, Inc.*, ARB No. 15-045, ALJ No. 2013-LCA-29 (ARB Feb. 14, 2017)(E. Cooper Brown, concurring); 8 U.S.C.A. § 1182(n)(1)(F). The evidence in the record suggests Respondent's business model could be suspect, but I do not consider the issue because it is not properly before me.

tion required three years of relevant experience and a Masters Degree in Engineering. (PX 5.) Mr. Jain testified that when he worked as a contractor with ITC InfoTech through Respondent he was doing the exact same work as he was when he worked directly for ITC InfoTech beginning in September, 2016. (HT, p. 24.)

### Description of Payments

#### 1. December, 2015 – February, 2016

Mr. Jain testified Respondent paid him no earnings for his work from December, 2015, to February, 2016 when he was based in New Jersey.<sup>5</sup> (HT, p. 14.) Mr. Jain testified to receiving a loan for living expenses from December, 2015, to February, 2016, which Respondent later deducted from his checks. (HT, p. 14.) Mr. Jain did not testify as to the amount of that loan, but his bank statement shows he received a deposit of \$900 in February, 2016, and his earning statement from March, 2016 reflects a “voluntary deduction” of \$900.00 entitled “loan.” (PX 10);(PX 17.) Further, Mr. Jain’s banking statement for March, 2016, shows Respondent placed a deposit of \$1,225.00 into the account. (PX 10.) Respondent’s deposit of \$1,225.00 into Mr. Jain’s bank account on March 17, 2016, is not reflected in any of his earning statements or explained by any other evidence in the record. (PX 10);(PX 17.) I cannot determine that this amount was paid for any reason other than wages, and therefore conclude Respondent paid him the \$1,225.00 for work completed in February.

#### 2. March, 2016 – September, 2016

At the end of February, 2016, Respondent placed Mr. Jain in a position with end client ITC Infotech in San Jose, California. While working as a contractor for ITC InfoTech, from the end of February, 2016, to September 2016, Mr. Jain submitted his timesheets to Respondent. (HT, p. 40.) Respondent directly deposited Mr. Jain’s wages into his CHASE checking account. (PX 11.) According to the LCA, while based in San Jose, California, the prevailing wage rate was \$66,518.00 per year, or gross pay of \$5,543.16 per month. (PX 3.) His bank statements reflect his receipt of only \$4,583.33 per month in gross pay. Mr. Jain received monthly earning statements from Respondent, and introduced six of them into evidence. (PX 17)<sup>6</sup>. Mr. Jain’s W-2 for Respondent from 2016 reflects gross pay of \$28,426.65. (PX 9.)

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<sup>5</sup> Mr. Jain testified that the earning statement for December, 2015, showing Respondent paid Mr. Jain \$3,000.00, is inaccurate. (HT, pp. 33-34.) There is no evidence in the record he was paid this amount. His testimony is supported by the fact that no such deposit is reflected in his bank statements. (HT, p. 34);(PX 10.)

<sup>6</sup> The earning statement for the months of November, January, February, August, and September were not provided. (PX 17.)

The table below summarizes Mr. Jain's earning statements and the deposits Respondent placed in his bank account.

<b>Month</b>	<b>Earning Statements<sup>7</sup></b>	<b>Bank Statements<sup>8</sup></b>
November, 2015	N/A	No Deposit
December, 2015	Gross Pay: \$3,000 Net Pay: \$2,419.04	\$858.96
January, 2016	N/A	No Deposit
February, 2016	N/A	\$900.00
March, 2016	Gross Pay: \$4,583.33 Net Pay: \$2,388.19	\$1,225.00
April, 2016	Gross Pay: \$4,583.33 Net Pay: \$3,288.22	\$2,388.19
May, 2016	Gross Pay: \$4,583.33 Net Pay: \$3,278.03	\$3,288.22
June, 2016	Gross Pay: \$4,583.33 Net Pay: \$3,278.02	\$3,278.03
July, 2016	Gross Pay: \$2,510.00 Net Pay: \$1,817.89	\$3,278.02
August, 2016	N/A	\$1,817.89
September, 2016	N/A	\$3,278.04
October, 2016	N/A	No Deposit

The net pay on his earning statements starting in March, 2016, reflect deductions for federal income tax, state tax, social security, Medicare, and a \$300.00 medical deduction. (PX 17.) The net pay for March also reflects the \$900.00 deduction for repayment of the living expense loan Respondent gave him in February, 2016. (PX 17.) In July, 2016, Mr. Jain took two weeks of vacation, and was not paid for those two weeks, thus his earnings for that month are much lower. The deposits Mr. Jain received in his banking statements that are not reflected in his earning statements include the payments of \$858.96 in December and \$1,225.00 in March. Mr. Jain testified the deposit of \$858.96 was an expense reimbursement. (HT, pp.

<sup>7</sup> The earning statements can be found at PX 17.

<sup>8</sup> The bank statements can be found at PX 10. The figures stated only represent the deposits made by Respondent. The earnings from one month are reflected in Mr. Jain's bank statement the next month. For example, if he earned money in January, then those earnings would be reflected in his February bank statement.

34-35);(PX 10.) As noted above, Mr. Jain provided no description of the \$1,225.00 deposit in March.

### Description of Deductions and Benefits

#### 1. Training Fee

On November 3, 2015, Sanjay Gupta, Respondent's Senior Vice President, sent an email to Mr. Jain directing him to send a \$3,000.00 check under the memo "Training and Development Deposit." (PX 13.) In the email Mr. Gupta stated that upon completion of three months on the project Mr. Jain would receive a refund of \$1,000.00 every month for three months. (PX 13.) The email also stated an HR employee would be filing the LCA on that day. (PX 13.) On November 4, 2015, Mr. Jain issued a check to Respondent in the amount of \$2,000.00 for a "Training and development deposit." (PX 12.) On November 16, 2015, Mr. Jain wrote another check to Respondent in the amount of \$1,000.00 for "Training and Development." (PX 12.) Mr. Jain testified that despite several requests for a refund of the training fee, he never received one. (HT, p. 37.) Mr. Jain did not testify as to whether he received any training.

#### 2. Benefits

Respondent provided Mr. Jain with a sheet summarizing employee benefits. (PX 15.) The "Employee Benefits Summary—2014" states that "[e]mployees are eligible to participate in the available options as part of the Company Benefits Package\*," with the asterisk stating at the bottom of the page that the company's contribution towards the benefit "will vary depending on the Salary Package and the Role in which the employee joins." (PX 15.) The benefits listed in the summary include, inter alia, health coverage and vacation time. The listing for medical on the summary states "Health Coverage through Horizon. Both PP and HMO Plans offered." (PX 15.) On November 3, 2015, a HR employee for Respondent, Kamala, sent Mr. Jain an email with the HR team and Senior Vice President Sanjay Gupta copied, stating in part that "for the health insurance, employer contribution is 50% for the employee towards the premium." (PX 16);(HT, p. 30.) Mr. Jain did not receive health coverage from December, 2015, to February, 2016. (HT, p. 30.) He began receiving health coverage in March 2016, and continued receiving it through August, 2016. (HT, p. 30-31.) Respondent deducted \$300.00 monthly, for a total of six months, from Mr. Jain's pay checks to cover his health insurance premium. (HT, p. 32-33); (PX 17.) Mr. Jain testified he was told that the total premium was \$300.00, and that despite his requests Respondent never reimbursed him. (HT, p. 33.) The listing for "vacation, holidays and sick leave" states "[s]alaried employees are entitled to ten days of paid vacation per calendar year...employees can take up to 3 sick leave days per calendar year." (PX 15.) Mr. Jain took ten working days off for vacation in July, and Respondent did not pay him for those days. (PX 17.)

### 3. Travel Expenses

On June 3, 2016, Mr. Jain filled out an expense sheet for the pay period dates from 1/1/2016 to 5/31/2016 requesting a total reimbursement of \$1,692.77. (PX 14.) The listed expenses include “taxi airport,” “house rent” and “Woodward client visit.” (PX 14.) The documented expenses for the Woodward client visit include \$37.83 in fuel, \$274.70 in meals, \$502.82 in transportation, and \$234.42 in uncategorized. (PX 14.)

#### Description of Alleged Retaliation

Prosecuting Party contends Respondent retaliated against him for filing his complaint by threatening to sue him for breach of contract, issuing a cease and desist letter, and drafting a complaint which they stated they would file unless Mr. Jain withdrew his complaint with the Department of Labor. Respondent’s prior attorney, Natalie S. Watson of McCarter & English, sent Mr. Jain a cease and desist demand letter on February 1, 2017. (PX 18.) The letter accuses Mr. Jain of defamation and violation of his non-compete and non-solicitation agreement. (PX 18.) On October 22, 2018, Respondent’s counsel in this case, Shawn D. Edwards, sent an email to Prosecuting Party’s counsel responding to Mr. Jain’s complaints against Respondent. (PX 19.) In the email he references Mr. Jain’s alleged violation of the non-compete agreement, and proposes a settlement in which both parties exchange mutual general releases as to all claims between them. (PX 19.) The email explicitly states it is “being sent for settlement purposes only.” (PX 19.)

### IV. ANALYSIS

#### Misclassification

First, Prosecuting Party contends that in the two LCAs Respondent filed it improperly classified him as a Quality Assurance Engineer at wage level I, when he was actually performing the duties of an IT Consultant developing software at wage level II. Level I wage rates are for entry-level workers, which should be “assigned to job offers for beginning level employees who have only a basic understanding of the occupation.” (PX 6.) Level II wage rates are for qualified workers, which should be “assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation.” (PX 6.) Mr. Jain argues he performed the same job duties while working for ITC Infotech as a contractor through Respondent as he did when he was hired by ITC Infotech directly. He maintains ITC InfoTech’s subsequent LCA classifying him as wage level II, therefore, shows Respondent wrongly classified him as wage level I. Mr. Jain testified Respondent did not select the correct occupational code in filling out the two LCAs, and that Respondent should have paid him the prevailing wage based on a Level II wage rate. (HT, p. 27-29.) The letter from the HR manager at ITC Infotech supports his assertion that he performed the same work when he was acting as a

contractor through Respondent, and that his work qualified as wage level II work. He argues this misclassification, and resulting underpayment, is a violation of the Act, and that he should receive the difference in pay.

While Mr. Jain's argument of misclassification is supported by the facts, it is not sustainable under the Act. Pursuant to the Act:

If the employee works in an occupation other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.

20 C.F.R. § 655.731(c)(8).

The ARB has further confirmed an employer's required wage obligation is based on the job description identified on the LCA, even where an employee performs the duties of a different position. *See Amtel v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-00006 (Sept. 29, 2006); *Wage and Hour Division v. Gardner Family Care Corp.*, ALJ No. 2007-LCA-00006 (April 25, 2008); *Vojtisek-Lom v. Clean Air Technologies Int'l*, ALJ No. 2006-LCA-00009 (June 18, 2007.)

Respondent submitted two LCAs seeking approval of an H-1B visa for Mr. Jain for a Quality Assurance Engineer Position at wage level I. (PX 2, 3.) In holding that the worker was only entitled to the wage level listed on the LCA, the ARB in *Amtel* emphasized the worker, before termination, made no complaint regarding the employer's failure to accurately title her position or pay her the appropriate wage rate. ARB No. 04-087, slip. op at 6-7. Similarly, Mr. Jain introduced no evidence that, before his termination, he ever complained that the two LCAs filed by Respondent listed an inaccurate position or contained the wrong wage rate. Mr. Jain may have refrained from making such complaints out of fear of retaliation, but, as the ARB asserted in *Amtel*, the statute contains whistleblower protections precisely to combat such fear.<sup>9</sup>

Following the plain language of 20 C.F.R. § 655.731(c)(8) and *Amtel* I must base the required wage obligation on the job description identified on the only two LCAs filed by Respondent, which is Quality Assurance Engineer at wage level I.

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<sup>9</sup> No employer shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discrimination against an employee (which term includes a former employee or an applicant for employment) because the employee has (1) disclosed information to the employer or to any other person, that the employee reasonably believes evidences a violation... (2) cooperated or sought to cooperate in an investigation or other proceeding... 20 C.F.R. § 655.801(a).

## Benching: Payment of Wages during Nonproductive Status

Next, Prosecuting Party contends Respondent violated the Act by failing to pay him for the first three months of his employment, where he made himself available to work but was not yet placed with a client. An employer must pay an H-1B employee the prevailing wage listed on the employee's LCA starting on the date the employee "enters into employment." 20 C.F.R. § 655.731(c)(6)(ii). An H-1B worker "enters into employment" when he first makes himself available for work or otherwise comes under the control of his employer. 20 C.F.R. § 655.731(c)(6). The "no benching" provision of the Act requires that an employer pay the required wage even if the employee is in a nonproductive status because of lack of assigned work or for some other employment-related reason. 20 C.F.R. § 655.731(c)(6)(ii), (7)(i).

If the employer can show the H-1B worker is unavailable to work for reasons *unrelated* to his employment, and *not caused by the employer*, then it is excused from its obligation to pay the required wage rate. *See* 20 C.F.R. § 655.731(c)(7)(ii) (emphasis added). To invoke this unavailability exception to wage liability, the employer must prove both that the H-1B employee was assigned work and that the employee requested to be away from those duties for reasons unrelated to his or her employment. *See Gupta v. Compunnel Software Group, Inc.*, ARB No. 12-149, ALJ No. 2011-LCA-45 (ARB May 29, 2014); *Admin., Wage and Hour Div. vs. Parsetek, Inc.*, ARB No. 16-001, ALJ No. 2013-LCA-010 (Nov. 7, 2017).

The first LCA Respondent filed lists the start date for Mr. Jain's period of intended employment as November 3, 2015. (PX 2.) But Mr. Jain testified he first made himself available to work on December 1, 2015. (HT, p. 13.) Thus, I find he entered into employment with Respondent on December 1, 2015. In determining whether he "entered into employment" it is immaterial that he had not yet been assigned to one of Respondent's clients. *See Vyasabattu v. eSemantiks*, ARB No. 10-117, ALJ No. 2008-LCA-22 (ARB Feb. 11, 2015)(rejecting the employer's argument that the employee had not "entered into employment" because he was not yet selected for a position with one of the employer's clients.)

Therefore, Respondent's obligation to pay Mr. Jain began on December 1, 2015, unless the unavailability exception applies. *See* 20 C.F.R. § 655.731(c)(7)(ii). There is no evidence in the record that Respondent assigned Mr. Jain work from December, 2015, to February, 2016, or that he had assigned work which he was unavailable to do because of personal or other non-employment related reasons. Rather, the record indicates that Respondent, essentially a staffing agency, had not yet located a client with whom to place Mr. Jain. Further, Mr. Jain testified that Respondent told him it had projects he could work on, but had no actual work for him when he showed up to the office. (HT, p. 13.) I find the unavailability exception does not apply, and under the Act Respondent is required to pay Mr. Jain's wages for the three months he was in nonproductive status because of lack of assigned work.

While Respondent may find the requirement to pay Mr. Jain when he was not yet generating any profits unfair, the underlying policies of the H-1B visa program support this outcome. The H-1B process prohibits the use of the visa for speculative employment, emphasizing the employer's burden to ensure actual assignable work for the nonimmigrant. *See* Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419 (Proposed June 4, 1998) (codified at 8 C.F.R. § 214)(the regulation states that “[f]or an H-1B nonimmigrant to be authorized to work in more than one location, the employer must file an itinerary with the dates and locations of the services or training with United States Citizenship and Immigration Services. 8 C.F.R. § 214.2(h)(2)(i)(B)). I find Respondent must pay Mr. Jain for his work in New Jersey from December, 2015, through February, 2016.

### Required Wage Rate

Prosecuting Party argues that Respondent failed to pay him the correct wage. Under the Act the enforceable wage obligation is the “actual wage” or the “prevailing wage,” whichever is greater. 20 C.F.R. § 655.731(a). “Actual wage” is the wage the employer pays to “all other individuals with similar experience and qualifications for the specific employment in question,” but “[w]here no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B non-immigrant.” 20 C.F.R. § 655.731(a)(1); *see Jain v. Empower IT, Inc.*, ARB No. 08-077, ALJ No. 2008-LCA-8, slip op. at 10-11 (ARB Oct. 30, 2009). The employer shall determine the prevailing wage for the occupation classification in the area of intended employment at the time it files the LCA. 20 C.F.R. § 655.731(a)(2). It must base the prevailing wage on the best information available as of the time of filing the application, and may utilize a wage obtained from an OFLC NPC (OES), an independent authoritative source, or other legitimate sources of wage data. 20 C.F.R. § 655.731(a)(2).

The prevailing wage for Mr. Jain's positions were listed on the LCAs filed by Respondent. Respondent properly obtained the prevailing wages from the Occupational Employment Statistics (“OES”) and the OFLC Online Data Center. (PX 2, 3.) As to actual wage, Prosecuting Party introduced no evidence as to whether other individuals were employed in a similar position, or the level of pay of any other existing employees with similar experience and qualifications. Thus, the actual wage for purposes of determining the enforceable wage obligation is the wage Respondent paid Mr. Jain.

While located at the New Jersey office Respondent did not pay Mr. Jain, therefore his actual wage was \$0.00. The prevailing wage for the position in Middlesex, New Jersey was \$53,518.00 annually, or \$4,459.83 per month. The prevailing wage for Mr. Jain was greater than the actual wage, and thus the enforceable wage obligation for December, 2015, through February, 2016, is \$4,459.83 per month.

The earning and bank statements show that when Mr. Jain relocated to San Jose, California, for a position beginning in March, 2016, his actual wage, what Respondent paid him, was a monthly gross pay of \$4,583.33, or \$55,000 annualized. The prevailing wage for the position in San Jose, California, was a monthly gross pay of \$5,543.17, or \$66,518 annualized. (PX 3.) Thus, because the prevailing wage is higher than the actual wage paid, the enforceable wage obligation for the period in which Mr. Jain worked in San Jose, California, is the prevailing wage of \$5,543.17 per month.

### Benefits and Deductions

Prosecuting Party alleges that Respondent either improperly deducted from his pay, charged him for, or did not provide: training fees, health insurance contributions, paid vacation, and travel expenses.

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) are 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. 20 C.F.R. § 655.731(c)(3). An employer may make authorized deductions from an employee's wages. An authorized deduction can be a deduction either required by law (e.g., income tax; FICA), or authorized by a collective bargaining agreement, or a deduction that is reasonable and customary in the occupation. 20 C.F.R. § 655.731(c)(9)(ii). A deduction is not authorized if it is to recoup a business expense of the employer, including attorney fees and costs connected to the H-1B program. 20 C.F.R. § 655.731(c)(9)(ii). Further, a deduction must be made against wages of U.S. workers as well as H-1B nonimmigrants. 20 C.F.R. § 655.731(c)(9)(ii).

Any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and in the event of an investigation, will result in back wage assessment. 20 C.F.R. § 655.731(c)(11). Further, where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expenses(s), the Department will consider the amount to be an unauthorized deduction from wages even if the matter is not shown in the employer's payroll records as a deduction. 20 C.F.R. § 655.731(c)(11).

Further, under the Act the employer is required to develop and maintain documentation of offers of benefits and eligibility for benefits. *See* 20 CFR § 655.731(b)(viii). The required documentation includes “ a copy of all benefit plans or other documentation describing benefit plans and any rules the employer may have for differentiating benefits among groups of workers,” and “evidence as to what benefits are actually provided to U.S. workers and H-1B nonimmigrants...” 20 C.F.R. § 655.731(b)(viii)(B)-(C). As noted above, Respondent failed to appear for the hearing

without good cause, and thus introduced no evidence into the record. It failed to meet its burden of providing documentation of its benefits plans, and thus I will interpret any uncertainty in the evidence in the favor of the Prosecuting Party.

## 1. Health Insurance

Prosecuting Party argues Respondent failed to offer him health insurance on the same basis as U.S. workers. He contends he was not offered any health insurance for the first three months of his employment, and that for the next six months Respondent improperly deducted the full insurance cost from his earnings.

The Prosecuting Party has the burden of providing sufficient evidence such that the requisite calculations can be made. *Batyrbekov v. Barclays Capital*, ARB No. 13-013, slip op. at 16, ALJ No. 2011-LCA-25 (ARB July 16, 2014). To support his argument Mr. Jain supplied Respondent's "Employee Benefits Summary—2014." The summary lists as a potential benefit, "Health Coverage through Horizon. Both PP and HMO Plans offered," but includes no dollar figures as to the amount of coverage (PX 15.) But Mr. Jain also provided an email sent to him from an HR employee for Respondent, with the HR team and Senior Vice President Sanjay Gupta copied, which states in part that "for the health insurance, employer contribution is 50% for the employee towards the premium." (PX 16);(HT, p. 30.) Mr. Jain testified he was told that the total premium was \$300.00, and the earning statements show that Respondent deducted \$300.00 monthly, for a total of six months, from Mr. Jain's earnings to cover his health insurance premium. (HT, p. 32-33); (PX 17.) He testified he began receiving health coverage in March 2016, and continued receiving it through August, 2016. (HT, p. 30-31.) Mr. Jain testified that despite his requests Respondent never reimbursed him. (HT, p. 33) There is no evidence in the record contradicting Mr. Jain's testimony, and thus coupled with the HR email and benefits summary he has met his burden of providing sufficient evidence such that the requisite calculations can be made.

Employers under the H-1B nonimmigrant worker program ... are authorized to deduct from that worker's wages contribution[s] to premium[s] for health insurance policy covering all employees. 20 C.F.R. § 655.731(c)(9)(ii); *see Jain v. Empower IT, Inc.*, ARB No. 08-077, slip op. at 12, ALJ No. 2008-LCA-8 (ARB Oct. 30, 2009)(decided on different grounds.) But if Respondent offers the benefit of 50% of health insurance premiums it must offer that benefit on the same basis, and in accordance with the same criteria, as it does for U.S. workers. I find Respondent had a policy of covering 50% of workers health insurance costs, and that for six months it improperly deducted the entire \$300 from Mr. Jain's earnings when it should have only deducted \$150. Thus, Respondent owe Mr. Jain \$900.00 for the six months of improper deductions.

Further, even when in nonproductive status H-1B nonimmigrant workers are entitled to all fringe benefits afforded U.S. workers during the course of employ-

ment. *Gupta v. Compunnel Software Group, Inc.*, ARB No. 12-149, slip op. at 18, ALJ No. 2011-LCA-45, (ARB May 29, 2014). Mr. Jain testified he did not receive any health coverage from December, 2015, to February, 2016. (HT, p. 30.) Although he was in nonproductive status during this time, Respondent still owe Mr. Jain \$150 per month, or \$450.00 total, for the three-month period.

## 2. Paid Vacation

Mr. Jain contends Respondent improperly deducted pay for his two weeks of leave in July, 2016. Respondent's "Employee Benefits Summary—2014" includes "vacations, holidays and sick leave." (PX 15.) The listing states "[s]alaried employees are entitled to ten days of paid vacation per calendar year...employees can take up to 3 sick leave days per calendar year." (PX 15.) Mr. Jain was a salaried employee, and thus was entitled to ten days of paid vacation. His two weeks of leave would have included ten working days, and thus Mr. Jain should have been paid at the total prevailing monthly rate for July, 2016.

## 3. Training Fee

Prosecuting Party maintains Respondent improperly charged him a \$3,000.00 fee which it claimed was for training, but which in reality was for H1-B visa processing and attorney fees. The \$3,000.00 was not deducted from his earnings, but where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expenses(s), even if not shown as a deduction in the payroll records, the amount is treated as an unauthorized deduction from wages. 20 C.F.R. § 655.731(c)(11). Thus, if Prosecuting Party can show the fee was in fact not for training, but rather was a business expense of Respondent, he is entitled to a repayment.

On November 3, 2015, Respondent's Senior Vice President, sent an email to Mr. Jain directing him to send a \$3,000.00 check under the memo "Training and Development Deposit." (PX 13.) In the email he stated that upon completion of three months on the project Mr. Jain would receive a refund of \$1,000.00 every month for three months. (PX 13.) The email also stated that an HR employee would be filing the LCA on that same day. (PX 13.) Mr. Jain testified he paid Respondent \$3,000, but never received the promised refund despite several requests. (HT, p. 37.)

Mr. Jain argues this \$3,000.00 payment was improperly used to pay the attorney's fee and costs for his H-1B visa process. Attorney's fees and other costs connected to the preparation and filing of the H-1B petition are specifically considered to be a business expense of the employer, and cannot be authorized deductions. 20 C.F.R. § 655.731(c)(9). But the only evidence Mr. Jain introduced to support his argument that the fee was for H-1B costs instead of training is the circumstantial evidence that the email requesting the \$3,000.00 for training also mentioned that another HR employee was filing the LCA. (PX 13.) I find this temporal proximity alone

insufficient to establish the fee was for H-1B costs. Mr. Jain did not testify or introduce any evidence as to whether he received any training or the type and extent of training if he did receive it. Prosecuting Party's counsel stated in her opening statement that "Mr. Jain did receive very minimal training, of which he never applied in any position, and which was not necessary," but there is no documentation to support this assertion and statements of counsel are treated as argument, not evidence (HT, p. 10.) Thus, I find Mr. Jain has failed to provide sufficient evidence to demonstrate that the fee was for H-1B costs.

While Mr. Jain was perhaps wronged by Respondent's failure to refund him the training fee, the agreement between Mr. Jain and Respondent in regards to the training fee and future reimbursement exists beyond my authority under the Act. *See generally Kersten v. LaGard, Inc. and Masco Corp.*, ARB No. 06-111, ALJ No. 2005-LCA-017, slip op. at 7-8 n.23 (ARB Oct. 17, 2008); *Administrator, Wage and Hour Div., USDOL v. Integrated Informatics, Inc.*, ARB No. 08-127, ALJ No. 2007-LCA-26 (ARB Jan. 31, 2011).

#### 4. Travel Expenses

Prosecuting Party argues Respondent owes him reimbursement for work-related travel expenses. As stated above, where the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expenses(s), the Department considers the amount an unauthorized deduction from wages even if the matter is not shown in the employer's payroll records as a deduction. 20 C.F.R. § 655.731(c)(11). The evidence in the record demonstrates Respondent imposed its business expense of work-related travel costs onto Mr. Jain.

On June 3, 2016, Mr. Jain filled out an expense sheet for the pay period dates from 1/1/2016 to 5/31/2016 requesting a total reimbursement of \$1,692.77. (PX 14.) The listed expenses include "taxi airport," "house rent" and "Woodward client visit." (PX 14.) The documented expenses for the Woodward client visit include \$37.83 in fuel, \$274.70 in meals, \$502.82 in transportation, and \$234.42 in uncategorized. (PX 14.) I find these documented costs work-related and reasonable, and Respondent must pay him the total of \$1,692.77.

#### Retaliation

Prosecuting Party contends Respondent retaliated against him by threatening to sue him for breach of his employment contract, issuing a cease and desist letter, and emailing him a drafted complaint which it threatened to file unless Mr. Jain withdrew his complaint with the Department of Labor.

Under 20 C.F.R. § 655.801 employers are prohibited from intimidating, threatening, restraining, coercing, blacklisting, discharging or in any other manner discriminating against an employee, including a former employee, because he dis-

closed information he believed to be a violation of the Act or because he cooperated or sought to cooperate in an investigation.

The retaliation to which Mr. Jain points – the potential breach of contract claim and cease and desist letter – all relate to the employment contract between Mr. Jain and Respondent, and are thus outside my jurisdiction. *See Kersten v. LaGard, Inc. and Masco Corp.*, ARB No. 06-111, ALJ No. 2005-LCA-017, slip op. at 7-8 n.23 (ARB Oct. 17, 2008)(finding private employment agreements outside the scope of the Act and beyond the ALJ or ARB’s jurisdiction). Further, I will not consider the email Shawn D. Edwards sent to Prosecuting Party’s counsel as evidence because it explicitly states it is for settlement purposes only. I find Prosecuting Party has failed to introduce sufficient evidence to establish Respondent retaliated against him.

## V. CALCULATIONS

### 1. Backpay

The Administrator determined Respondent owes Mr. Jain \$15,852.22 in back wages, but provided no description of the calculation. Mr. Jain appealed, arguing that based on his calculations Respondent owe him \$30,004.00 in back pay and other fees. I find Respondent is owed \$25,801.22.

The evidence shows Mr. Jain worked for Respondent from December 1, 2015, to September 16, 2016. The table below summarizes my calculation of back wages owed based on Respondent’s wage rate obligation and wages actually paid during that period.

Period Covered	Wages Owed	Wages Paid <sup>10</sup>	Back Wages Owed
December, 2015	\$4,459.83	\$0	\$4,459.83
January, 2016	\$4,459.83	\$0	\$4,459.83
February, 2016	\$4,459.83	\$1,225.00 <sup>11</sup>	\$3,234.83

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<sup>10</sup> Mr. Jain’s wages were placed in his bank account the month after he earned them. For example, wages he earned in January would appear in his bank account in February. For the purposes of this table I place the “wages paid” in the same month as Mr. Jain earned them.

<sup>11</sup> Mr. Jain’s banking statement for March, 2016, shows that Respondent placed a deposit of \$1,225.00 into the account. (PX 10.) In his testimony Mr. Jain failed to identify or describe this payment, and also failed to provide the earning statement for February, 2016. Given Mr. Jain’s failure to show this payment did not constitute wages, I will treat it as payment for work completed in February.

March, 2016	\$5,543.17	\$4,583.33	\$959.84
April, 2016	\$5,543.17	\$4,583.33	\$959.84
May, 2016	\$5,543.17	\$4,583.33	\$959.84
June, 2016	\$5,543.17	\$4,583.33	\$959.84
July, 2016	\$5,543.17	\$2,510.00 <sup>12</sup>	\$3,033.17
August, 2016	\$5,543.17	\$4,583.33 <sup>13</sup>	\$959.84
September 2016 <sup>14</sup>	\$2,771.585	\$0.00	\$2,771.585
<b>TOTALS</b>	<b>\$49,410.10</b>	<b>\$26,651.65</b>	<b>\$22,758.45</b>

In addition to the above-calculated back wages owed, Respondent also owes Mr. Jain back wages for the medical insurance deductions it improperly withheld. Respondent had a policy of covering 50% of workers health insurance costs, which amounted to \$150.00. For three months, from December to February, it did not provide Mr. Jain with any medical insurance. For five months it improperly deducted the entire \$300.00 from Mr. Jain's earnings when it should have only deducted \$150.00. Thus, for the total nine months Respondent owes Mr. Jain \$1,350.00 for the failure to pay and improper deductions. It also owes Mr. Jain \$1,692.77 in business expenses for work-related travel.

<b>Unauthorized Deductions</b>	<b>Calculation</b>	<b>Amount Owed</b>
Health Insurance	\$150 x 10months	\$1,350.00
Work-Related Travel Expenses	\$1,049.77 + \$600.00 + \$43	\$1,692.77
<b>Total</b>		<b>\$3,042.77</b>

<sup>12</sup> In July, 2016, Mr. Jain took two weeks of vacation which he was not paid. As I found above, he was entitled to be paid for that vacation. Thus, Respondent must pay him the difference of what he was paid, \$2,510.00, and the prevailing gross wage.

<sup>13</sup> No earning statement was provided for August, 2016, but Mr. Jain's bank statement for the time period reflects a deposit of net pay from Respondent in the same amount as the other months in which he received gross pay of \$4,583.33.(PX 10.)

<sup>14</sup> Mr. Jain testified he worked for Respondent until September 16, 2016. (HT, p. 19.) Thus, I treat the amount he was owed in September as half of his monthly owed wage.

In total Respondent must pay **\$25,801.22** in back wages to Mr. Jain.

## 2. Interest

The INA does not authorize the award of interest on back pay awards, and the Prosecuting Party has not asked that interest be awarded in this case. However, the Administrative Review Board has awarded or affirmed awards of interest on back pay awards made for violations of the H-1B regulations, including pre-judgement and post-judgement interest. *Mao v. Nasser Engineering & Computing Services*, ARB No. 06-121, ALJ No. 2005-LCA-36, slip op. at 11 (ARB Nov. 26, 2008); *Inkwell v. American Information Technology Corp.*, ARB No. 04-165, ALJ No. 2004-LCA-13, slip op. at 8 (Sept. 29, 2006); *Amtel Group of Florida, Inc. v. Yongmahapakorn (Rung)*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op at 9-11 (ARB Sept. 29, 2006).

The intent of a back pay award is to make the employee whole, which logically requires the payment of interest. *See Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-022, slip op. at 16-18 (May 17, 2000)(a decision issued under the Energy Reorganization Act of 1974, 42 U.S.C.A. § 5851, (“ERA”), which also does not authorize interest on back pay awards). In *Doyle*, the ARB decided that because of the remedial nature of the whistleblower provisions of the ERA and the “make whole” goal of back pay, interest should be awarded for back pay awards to compensate the affected employee for the loss of any compound interest that might have been earned if the affected employee had had the back wages available to invest. *Doyle*, ARB No. 06-121, slip op. at 18.

Thus, I find Mr. Jain entitled to interest on the back wages owed to him. The interest rate is the federal short term rate plus 3%, as specified in 26 U.S.C. §6621, compounded and posted quarterly. *Doyle*, ARB No. 06-121, slip op. at 16-18; *Mao*, ARB No. 06-121 at 11-12.

## 3. Civil Money Penalties

Under the Act, the Administrator may assess civil money penalties for both willful and non-willful violations. 20 C.F.R. § 655.810. The regulations specify seven factors that may be considered in determining the amount of the civil money penalties to be assessed: previous history of violations by the employer, the number of workers affected, the gravity of the violations, the employer’s good faith efforts to comply, the employer’s explanation, the employer’s commitment to future compliance, the employer’s financial gain due to the violations or potential financial loss, injury or adverse effect to others. 20 C.F.R. § 655.810(c).

Here, the Administrator did not assess a civil money penalty and provided no discussion on the issue. There is no evidence of prior violations, and the evidence only demonstrates one worker has been affected. While the failure to pay Mr. Jain his correct wages is serious, it is not a violation of such gravity as to require penal-

ties. I find the Administrator's decision to not assess any civil money penalties appropriate.

## **VI. CONCLUSION**

I find Respondent failed to pay Mr. Jain the prevailing wage identified in this decision in violation of 20 C.F.R. § 655.731. Further, I find Respondent, in violation of 20 C.F.R. § 655.731(c)(11), improperly deducted the entire medical care premium from Mr. Jain's gross pay, when it should have only deducted half, failed to pay him for 10 days of vacation, and failed to reimburse him for business expenses. I affirm the Administrator's decision to not assess any civil money penalties.

Accordingly, the Administrator's Determination is MODIFIED as to the specific back pay amount, plus interest, owed to the Prosecuting Party.

## **VII. ORDER**

I ORDER that Respondent must pay to Mr. Jain

1. A total of \$25,801.22 in back wages.
2. Interest, at the applicable rate of interest as specified in 26 U.S.C. § 6621, on the wages that were not timely paid from the date the wages were due until paid.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge

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

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](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.