



**Issue Date: 16 July 2019**

Case No.: 2018-LCA-00039

In the Matter of

**DHEERAJ REDDY JINNA**  
Prosecuting Party

v.

**MPRSOFT, INC.**  
Respondent

**DECISION AND ORDER MODIFYING IN PART AND AFFIRMING IN PART  
ADMINISTRATOR'S DETERMINATION AND GRANTING REQUEST FOR  
ADDITIONAL BACK WAGES**

*Procedural History*

This matter arises under the Immigration and Nationality Act ("Act"), as amended, 8 U.S.C. § 1101 and § 1182, and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I.<sup>1</sup> The Administrator, Wage and Hour Division, U.S. Department of Labor ("Administrator") issued an Administrator's Determination on September 12, 2018, holding that MPRSoft, Inc. ("Respondent") failed to pay required wages to one (1) H-1B nonimmigrant worker (i.e., Dheeraj Reddy Jinna or "Prosecuting Party") in violation of 20 C.F.R. § 655.731, i.e., failure to pay the required wage rate for non-productive time, and ordered payment of back wages in the amount of \$53,220.06; the Administrator's Determination states that Respondent "has paid the back wages assessment in full." The Administrator did not assess a civil money penalty against Respondent.<sup>2</sup>

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<sup>1</sup> Regulations referred to herein are contained in that Title unless otherwise noted.

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

The Administrator's Determination, mailed to Respondent and Prosecuting Party as the employee party-in-interest, included instructions on the procedure for appealing the Administrator's determination and filing a request for hearing before the Department of Labor ("DOL" or "Department") Office of Administrative Law Judges ("OALJ").

In his letter dated September 22, 2018 appealing the Administrator's Determination, Mr. Jinna states that he was not paid the assessed back wages in full and while he understands "there were state and federal tax deductions to assessed amount...no such information [was] provided to [him] and there are more than 50% deductions" which he contends violates the law. Mr. Jinna enclosed with that letter a copy of a check he received from Respondent MPRSoft in the amount of \$25,234.83.

Respondent did not request a hearing.

A *de novo* formal hearing was held at the OALJ District Office in Cherry Hill, NJ on February 1, 2019. All parties were present and the following exhibits were received into evidence: Respondent's Exhibits ("RX") A - C (HT<sup>3</sup> at 9; 76); and Prosecuting Party's Exhibits ("PPX") 1- 10 (HT at 18; 77). Two witnesses, Messrs. Jinna and Mahadevapalli, testified at the hearing.<sup>4</sup> The parties made oral closing arguments at the hearing and the record in this matter then closed. (HT at 86).

#### *Statutory and Regulatory Framework*

The H-1B visa program allows U.S. employers to temporarily hire non-immigrants to fill specialized jobs in the United States. Specialized occupations are those occupations that require "theoretical and practical application of a body of highly specialized knowledge, and ...attainment of a bachelor's or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732.

Employers who seek to hire an H-1B nonimmigrant in a specialty occupation must first submit to the Department of Labor (DOL), and obtain DOL certification of, a labor condition application ("LCA").<sup>4</sup> 20 C.F.R. § 655.700(b)(1); *In the Matter of Eva Kolbusz-Kline v. Technical Career Institute*, ALJ No. 93-LCA-4, 1994 WL 897284, at \*3 (Sec'y July 18, 1994). The application must specify the number of workers sought, the occupational classification in which they will be employed, and the wage rate and conditions under which they will be employed. 8 U.S.C.A. § 1182(n)(1)(D). In addition, the employer must attest that it is offering and will offer during the period of employment the greater of: (1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the prevailing wage level for the occupational classification in the area of employment. 8 U.S.C.A. §1182(n)(1)(A)(i)-(ii); 20 C.F.R. § 655.730(d). The

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<sup>3</sup> "HT" refers to the transcript of the hearing held on February 1, 2019.

<sup>4</sup> Mr. Mahadevapalli is referred to by his first name, "Girish," by Prosecuting Party in both the HT as well as documentary evidence submitted in this matter.

employer must retain the original signed and certified LCA in its files, and must make a copy of the application, as well as specified necessary supporting documentation, available for public examination. 20 C.F.R. § 655.705(c)(2). Once DOL certifies the LCA, the employer submits paperwork to the United States Citizenship and Immigration Services (“USCIS”) and requests an H1-B visa for the workers. The non-immigrant workers are then admitted to the United States.

The Act directs the DOL to review the LCA only for completeness or obvious inaccuracies. Unless the DOL finds that the application is incomplete or obviously inaccurate, it 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 DOL has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation of the required wages. *See* 20 C.F.R. Part 655 Subpart H. The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid, debarment of the employer from future employment of aliens, civil money penalties, and other relief that the Department deems appropriate. 20 C.F.R. §§ 655.810, 655.855. An employer also has a duty to notify INS “immediately” of any changes in the terms and conditions of an H-1B nonimmigrant’s employment. 8 C.F.R. § 214.2(h)(11). The Employer’s obligation to pay H-1B workers the required wages begins on the date on which the worker “enters into employment with the employer.” 20 C.F.R. § 655.731(c)(6). The H-1B worker is considered to “enter into employment” when he first makes himself available to work or otherwise comes under the control of the employer. *Id.* at § 655.731(c)(6)(i). Alternatively, even if the worker has not yet “entered into employment,” where the worker is present in the U.S. on the date of the approval of the H-1B petition, the employer shall pay to the worker the required wage beginning 60 days after the date the worker becomes eligible to work for the employer. *Id.* § 655.731(c)(6)(ii).

The H-1B worker becomes eligible to work for employer on the date set forth in the approved H-1B petition filed by the employer. *Id.* Under the INA’s “no benching provision,” the employer is obligated to pay the required wage even if the H-1B nonimmigrant is in “nonproductive status due to a decision by the employer (e.g., because of lack of assigned work).” 20 C.F.R. § 655.731(c)(7)(i); *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-010 through 01-LCA-025, slip op. at 7 (ARB May 31, 2005); *Rajan v. International Bus Solutions, Ltd.*, ARB No.03-104, ALJ No. 03-LCA-12, slip op. at 7 (ARB Aug. 31,2004). However, the employer does not need to pay compensation if the “H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant).” 20 C.F.R. § 655.731(c)(7)(ii). The employer’s obligation to pay the required wage ends when there is a “bona fide termination” of the employment relationship. *Id.* at §655.731(c)(7)(ii).

In order to effectuate the termination, the employer under the H-1B program, must notify the Department of Homeland Security (DHS) that the employment relationship has been terminated so that the petition is canceled. 8 C.F.R. § 214.2(h)(11). Where appropriate, the employer must provide the nonimmigrant employee with payment for transportation back home.

After investigation, the WHD Administrator issues a determination letter, which is served on the interested parties, including the H-1B nonimmigrant who's LCA was the subject of the investigation. § 655.815(a). The determination letter sets out the Administrator's conclusions; in the event the Administrator finds that an employer committed violation(s), the Administrator's letter will prescribe remedies. § 655.815(b)(1).

For back wage obligations, under the regulation, the amount owed is defined as the difference between the amount the employee should have been paid and the amount actually paid. § 655.810(a). The Administrator also may assess civil-money penalties and other remedies, as listed in § 655.810. § 655.815(c)(1). An interested party requests a hearing under procedures set out in § 655.840. The regulation indicates that a hearing relates to "review of a[n] Administrator's] determination issued under §§ 655 and 655.815." § 655.840(a).

Under § 655.840(b), an administrative law judge has the authority to affirm, deny, reverse, or modify, in whole or in part, the determinations of the Administrator. The administrative law judge is not authorized to render findings on the "legality of a regulatory provision or the constitutionality of a statutory provision." § 655.840(d).

If a party disagrees with Administrator's Determination, that party may appeal to the DOL, Office of Administrative Law Judges.<sup>5</sup> In this proceeding, Mr. Jinna is the Prosecuting Party and MPRSoft, Inc. is the Respondent.

The party who requests a hearing before an ALJ is the prosecuting party and as such, bears the burden of proof at hearing. 20 C.F.R. § 655.820(b)(1). *See also Santiglia v. Sun Microsystems, Inc.*, ARB No. 03-076, ALJ No. 2003-LCA-2 (ARB July 29, 2005), *citing* 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* §63 (2d ed. 1994) ("[The] broadest and most accepted idea [is] .... that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims."). Nonetheless, in *Anderson v. Mt. Clemens Pottery Co.*,<sup>6</sup> the United States Supreme Court has held that "when an employer fails to provide adequate records, a prosecuting party meets its initial

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<sup>5</sup> Parties may request a hearing under two circumstances. First, the complainant, or any other interested party, may request a hearing where the Administrator determines, after investigation, that there is no basis for finding that an employer has committed violations of the INA. Second, the employer, or any other interested party, may request a hearing where the Administrator determines, after investigation, that the employer has committed violations of the INA. 20 C.F.R. § 655.820(b). An "interested party" is defined as "a person or entity who or which may be affected by the actions of an H-1B employer or by the outcome of a particular investigation and includes any person, organization, or entity who or which has notified the Department of his/her/its interest in the Administrator's determination." 20 C.F.R. § 655.715.

<sup>6</sup>328 U.S. 680 (1946).

burden of proving that [he] performed work for which [he was] not properly compensated if ‘he proves that [an employee] has in fact performed work for which [the employee] was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.’” *Id.*<sup>7</sup> (citing *Mt. Clemens*, at 687).

At the hearing, Prosecuting Party Exhibit (“PPX”) numbers 1 through 10 were admitted (HT at 18; 77), as well as Respondent’s Exhibit (“RX”) letters A through C (HT at 9; 76) as described below:

#### Prosecuting Party’s Exhibits (PPX)

- PPX 1 – a letter dated June 22, 2018 to Mr. Jinna from the WHD Assistant District Director, i.e., the Administrator’s Determination
- PPX 2 – a 2017 W-2 (Federal Wage and Tax Statement) for Mr. Jinna with MPRSoft, Inc. listed as “Employer”
- PPX 3 (4 pages total) - includes a 3-page document entitled “Request for Evidence” from U.S. Department of Homeland Security to MPRSoft, Inc. dated July 15, 2015 and a one-page letter dated November 11, 2015 from Sai Deepak Gadwal at HCL America Inc., Sunnyvale, CA, addressed or entitled “To Whomsoever Concerned” and confirming Mr. Jinna’s selection “to work at a client site 500 Staples Dr Framingham, MA upon his H1B approval[.]”
- PPX 4 (7 pages total) – emails from Mr. Jinna to WHD with Excel spreadsheets
- PPX 5 (22 pages total, including handwritten cover sheet) – Mr. Jinna’s time sheets showing hours worked various dates in April through September 2017
- PPX 6 (44 pages total, including handwritten cover sheet) – Mr. Jinna’s timecard covering a period from May 2017 to February 2018
- PPX 7 (17 pages total, including typed cover sheet) – correspondence between Mr. Jinna and WHD regarding Mr. Jinna’s request for U Visa certification made to WHD
- PPX 8 (6 pages total) – including a 3-page WHD Form WH-4 (Nonimmigrant Worker Information Form) identifying Mr. Jinna as the person submitting information and Respondent as the “Employer Committing Alleged Violation(s).”
- PPX 9 (2 pages) – an email correspondence between Mr. Jinna and “Girish”, Senior HR Manager, MPRSoft Inc., i.e., an email from Girish to Mr. Jinna dated February 3, 2018 stating that Mr. Jinna’s employment is terminated “as of 12/31/2017 because of company policy violation” and an email from Mr. Jinna to Girish dated February 5, 2018 regarding

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<sup>7</sup> The Administrative Review Board (“ARB” or “Board”) has applied the *Mt. Clemens* burden shifting principles to other labor statutes requiring payment of specified wages including wage determinations in Davis-Bacon Act cases, as well as those in the context of LCA claims. See, e.g., *Pythagoras Gen. Contracting Corp. v. Adm’r*, ARB Nos. 08-107, 09-007; ALJ No. 2005-DBA-014, slip op. at 5 (ARB Feb. 10, 2011) (as reissued Mar. 1, 2011), *aff’d*, 926 F. Supp. 2d 490 (S.D.N.Y. 2013); *Adm’r v. Pegasus Consulting Group, Inc.*, ARB Nos. 03-032, 03-033; ALJ No. 2001-LCA-029, slip op. at 7 (ARB June 30, 2005); *Cody-Zeigler, Inc., v. Adm’r, Wage & Hour Div.*, ARB Nos. 01-014, -015; ALJ No. 1997-DBA-017, slip op. at 8 (ARB Dec. 19, 2003).

the termination notice and citing concern about the termination of health insurance benefits.

- PPX 10 (2 pages total) – WHD Employer Personal Interview Statement dated June 27, 2018 documenting a WHD investigator phone interview of Mr. Jinna.

#### Respondent's Exhibits (RX)

- RX A (12 pages total) – two different Labor Condition Applications (“LCA”) for Nonimmigrant Workers (ETA Form 9035/9035E): one identifying a job title as “Programmer Analyst” – a full-time position beginning 9/1/2015 and ending 8/31/2018 with a “prevailing wage” listed of \$59,842.00 and a wage rate of \$60,000.00 per year and noting MPRSoft, Inc. as the Employer; the other identifying a job title as “SAP Master Data Governance/Management Consultant” – a full-time position beginning 6/8/2015 and ending 6/7/2019 with a “prevailing wage” listed of \$104,146.00 and a wage rate of \$105,000.00 per year and noting MPRSoft, Inc. as the Employer
- RX B – 2018 W-2 and Earnings Summary for Mr. Jinna, identifying MPRSoft Inc as the Employer with a “Preview” watermark
- RX C – 2018 W-2 and Earnings Summary for Mr. Jinna, identifying MPRSoft Inc. as the Employer.

#### ALJ Exhibits (ALJX)<sup>8</sup>

- ALJX 1(10 pages total) – ADP Earnings Statements dated December 29, 2017.
- ALJX 2 (7 pages total) – Appeal of Administrator’s Determination dated September 22, 2018 and Notice of Administrator’s Determination (“Determination Letter”) to Prosecuting Party and Respondent dated September 12, 2018 with enclosures

#### *Allegations Raised before the Administrator: Issues Presented at Hearing*

In the Form WH-4 of record, multiple violations are alleged to have occurred; they are described and summarized as follows:

1. Employer supplied incorrect or false information on the LCA;
2. Employer failed to pay nonimmigrant worker(s) the higher of the prevailing or actual wage;
3. Employer failed to pay nonimmigrant worker(s) for time off due to a decision by the employer (e.g., for lack of work) or for time needed by the nonimmigrant worker(s) to acquire a license or permit;
4. Employer made deductions from nonimmigrant worker’s wage (e.g. for nonimmigrant petition processing, for food and housing expenses when the nonimmigrant worker is traveling on the employer’s business; for tools and equipment necessary to perform

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<sup>8</sup> These ALJ Exhibits were marked and entered into record post-hearing based on the undersigned’s determination that record in this matter would benefit from their inclusion; both Prosecuting Party and Respondent had these documents prior to the hearing.

employer's work) that caused the wages paid to fall below the nonimmigrant worker's required wage;

5. Employer failed to provide fringe benefits to nonimmigrant worker(s) equivalent to those provide to U.S. worker(s), for e.g., health benefits and insurance;
6. Employer failed to comply with "no strike/lockout" requirement by placing nonimmigrant worker(s) during a valid LCA period into employment where there is a labor dispute, failing to DOL of such a dispute or allowing nonimmigrant worker(s) to work at such a site before DOL determined labor dispute resolved;
7. Employer failed to provide notice of its intentions to hire nonimmigrant worker(s) to employees or their collective bargaining unit representative or failed to provide nonimmigrant worker with a copy of the LCA;
8. Employer retaliated or discriminated against an employee...for disclosing information, filing a complaint, or cooperating in an in an investigation or proceeding about a violation of the applicable nonimmigrant program laws and regulations.

See PPX 8 at 5.

As there is no indication in the record that the Administrator declined to investigate any of the above-listed alleged violations, it is presumed that the Administrator investigated all such alleged violations prior to issuance of the Administrator's Determination in this matter.<sup>9</sup> Therefore, this Administrative Law Judge has the authority to review every claim contained in the complaint filed. See *Puri v. University of Alabama Birmingham Huntsville*, ARB No. 10-004, ALJ Nos. 2008-LCA-8 and 43 (ARB Nov. 30, 2011).

Because they are *pro se* (self-represented) parties lacking in apparent legal expertise, Prosecuting Party and Respondent have been afforded "a degree of adjudicative latitude" as it relates to this case. *Hyman v. KD Resources, Inc., et al.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip. op. at 8 (ARB March 28, 2010)(citing *Ubinger v. CAE Int'l*, ARB No. 07-083, ALJ No. 2007-SOX-036, slip op. at 6 (ARB Aug. 27, 2008)). Therefore, it is presumed, Mr. Jinna continues to assert at this hearing stage before the OALJ all claims the Administrator investigated prior to issuance of the Administrator's Determination. He has not, however, presented any evidence supporting allegation numbers 2, 6 and 7 above and it is he (as Prosecuting Party) who bears the burden of proof as the party requesting the hearing. *Santiglia v. Sun Microsystems, Inc.*, ARB No. 03-076, ALJ No. 2003-LCA-2 (ARB July 29, 2005). Therefore, Mr. Jinna cannot prevail as to those claims raised in those allegations. The remaining claims will be addressed below.

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<sup>9</sup> The June 22, 2018 letter from WHD Assistant Director to Mr. Jinna constitutes a response to the information Mr. Jinna provided to WHD and states that WHD determined "there is reasonable cause to conduct an investigation based on" such information: it does not exclude any of the violation allegations referenced in the Form WH-4. PPX 1.

Position of the Parties

Prosecuting Party (Mr. Jinna's hearing testimony):

Mr. Jinna testified that Mr. Mahadevapalli offered him a position with Staples in Framingham, MA upon Mr. Jinna's return to the United States in January 2016. HT at 23-24. Mr. Mahadevapalli later advised him that the job no longer existed and that Mr. Jinna had to find another job. HT at 24. Mr. Jinna was later assigned to a software development project Respondent had in California. HT at 25. He maintained that his work on that project ended in November or December of 2016. *Id.*

Mr. Jinna maintains that he did not work again for Respondent until March or April 2017, but he continued to incur debt to Mr. Mahadevapalli who discouraged his return to India and required Mr. Jinna pay him "bench taxes and the insurance cost of 1,300 per month[.]" HT at 26. During this period of non-work, Mr. Jinna averred that Respondent paid him "partial salaries[.]" *Id.*

Later, Respondent placed Mr. Jinna in a job with Microsoft in Seattle, WA, and in a job with "SRPAmerica" in Detroit, Michigan, simultaneously. HT at 27. Mr. Jinna averred that he worked 16 hours daily for about six months "to pay off his debts." *Id.* The job he performed for Respondent in Detroit ended sometime in October 2017. *Id.*

According to Mr. Jinna, the 2017 W-2 he received from Respondent does not reflect what Respondent actually paid him. HT at 28-29; *see also*, PPX 2. Mr. Jinna averred that, although the 2017 W-2 from Respondent indicates he received compensation in the amount of \$105,000.00 for that year, he did not receive that amount. HT at 34-35.

Mr. Jinna initially averred that he told Mr. Mahadevapalli via telephone if he were not paid the amount reflected on the 2017 W-2, he would "complain to DOL." HT at 29-30; 31. According to Mr. Jinna, Mr. Mahadevapalli informed him of his termination via email "on the same night" and "within couple of hours" of his stating his intention to go to "legal authorities". HT at 30-31; *see also* PPX 9. Mr. Jinna revised his earlier testimony of threatening to complain to DOL about his pay from Respondent because he acknowledged that he was unaware of DOL at the time of his discussion with Mr. Mahadevapalli. HT at 31. Mr. Jinna stated that his health insurance was canceled when Respondent terminated him, at time when his child was ill and his wife was in need of medication. *Id.*

Mr. Jinna testified that Respondent collected his "H-1 fees and whatever fees cost for his lawyers filing H-1, as well as other "premium processing cost and [his] travel expenses." HT at 36. He provided an Excel spreadsheet which shows, according to Mr. Jinna, the actual manner in which Respondent withheld wage payment from him during the relevant period. *Id.*; *see also* PPX 4.

Mr. Jinna averred that PPX 5 and PPX 6 consist of timesheets reflecting work he performed “for the different clients in Detroit and Washington,” which he maintains were not covered in the LCA; Mr. Jinna also averred that correspondence related to his request for a U visa certification<sup>10</sup> constitutes PPX 7. HT at 36-37. Mr. Jinna acknowledged that he was not granted his request for U visa certification. HT at 39.

Mr. Jinna confirmed that, on the WH-4 found at PPX 8, he “just filled out all the allegations what [he felt] are relevant to [him] in this particular case.” HT at 40.

On cross-examination, Mr. Jinna stated that Respondent paid expenses for his travel between Detroit and Seattle. HT at 41. Mr. Jinna also acknowledged that Respondent provided him with a copy of the LCA, but maintained that he received it after completing the project in December 2017. HT at 41-42.

Mr. Jinna stated that he negotiated his pay rate for the projects in Detroit and Respondent negotiated his pay rate with Microsoft in Seattle. HT at 42.

Mr. Jinna stayed with Mr. Mahadevapalli, as well as his own family members upon his arrival to the U.S. HT at 43-44.

According to Mr. Jinna, he experienced Respondent’s charges etc. as shown on the excel spreadsheets found at PPX 4 “four months after coming to U.S.,” but did not complain to DOL until December 2017 because he “was fully under control of [Mr. Mahadevapalli].” HT at 51-52.

Mr. Jinna acknowledged that he worked on the “Delphi project” for Respondent in April 2017 until October 2017 and that the Seattle project began “a couple weeks before that.” HT at 55. He maintained that he did not resign one of the two projects because he was told by Mr. Mahadevapalli that he owed him “\$25,000.00” and moreover, he worked for Respondent and not the clients for whom the projects were to be done. HT at 56-57.

Mr. Jinna answered negatively when asked if he were given any information about “COBRA” health care coverage available to him post-termination at his expense from United Healthcare after he received notice of his termination from Respondent. HT at 60.

Mr. Mahadevapalli testified on behalf of Respondent.<sup>11</sup> He averred that Respondent was established in 2014 and became involved with the H-1B visa process in 2015. HT at 61. He acknowledged that he was unaware “the LCA approval is the date where we have to change the

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<sup>10</sup> A U visa provides eligible crime victims who are willing to assist law enforcement and government officials in investigation or prosecution of criminal activity, with nonimmigrant status.

<sup>11</sup> The undersigned has also provided Respondent, which was represented in this matter by Girish Mahadevapalli, as a party lacking legal expertise, the same degree of adjudicative latitude given Mr. Jinna. *See* footnote 1, *supra*. In his sworn hearing testimony, Mr. Mahadevapalli identified himself as “a senior HR manager” for Respondent. HT at 5.

pay[.]” HT at 62. He maintained that when the LCA was filed in April, Respondent had a project, but by the time the visas arrived, Respondent had lost the project and could not place Mr. Jinna. *Id.*

RX A constitute both LCAs Respondent filed; Mr. Mahadevapalli averred that these LCAs were given to Mr. Jinna. HT at 63. According to Mr. Mahadevapalli, the LCAs which comprise RX A reflect “the initial project in May 2015, for the Staples project in Framingham, Massachusetts” which Respondent “lost” and the California project was for a medical client. HT at 64.

As for Mr. Jinna’s work on projects in Detroit and Seattle, Mr. Mahadevapalli offered the following testimony:

So he joined there. And then coming to the two projects, he was – the Michigan and the Seattle one, so the candidate operated on his own, and we didn’t have much of the exact location to file the LCAs there. And it do[es] happens [sic] with employers like us with senior employees like [Mr. Jinna] where they end up showing up to work and not producing exact details for us to proceed further. And that’s the reason we couldn’t do any LCA and for the document process. And then, you know, it end [sic] up here.

HT at 64.

He acknowledged that the USCIS rejected LCAs Respondent had filed “with general characteristics” finding clients did not exist. HT at 67. According to Mr. Mahadevapalli, Respondent “never found a project” for Mr. Jinna, but “realized we have to match the LCA price...and did that” after which Respondent started contemplating the termination of Mr. Jinna’s employment. *Id.*

Mr. Mahadevapalli presented 2018 W-2 Form for Mr. Jinna as RX B (“preview” version) and RX C (“actual” version). He testified that these W-2 Form demonstrates the back wages Respondent paid to Mr. Jinna based on DOL WHD’s assessment of back wages Respondent owed to Mr. Jinna. HT at 68-69. Mr. Mahadevapalli answered affirmatively when asked by the undersigned if the 2018 W-2 Forms offered as RX B and RX C reflect the state and federal taxes withheld from the back wage amount owed to Mr. Jinna as assessed in the Administrator’s Determination. HT at 70.

He was not aware of emails Mr. Jinna sent to Respondent’s HR inquiring about payment of wages. HT at 73.

In asked to explain why Respondent terminated Mr. Jinna’s employment, Mr. Mahadevapalli stated the following:

So whenever we have where employees coming back to us for asking for more money, it’s clearly written in our handbook that, you know, the employees cannot ask for more favors, more payment, more – actually, without even submitting the timesheets that they

want to get paid. And the several requests were made by [Mr. Jinna] to have more advancements – the salary advancement. So we depart him. HT at 74.

According to Mr. Mahadevapalli maintained that decision to terminate Mr. Jinna was made “earlier” than when Mr. Jinna complained to DOL WHD and “December was the time frame we put it.” HT at 74.

On examination by the undersigned, Mr. Mahadevapalli offered testimony about PPX 4 (i.e., Excel spreadsheets). He maintained that the spreadsheets are used by Respondent to track work hours for invoicing or billing purposes, but the right side of the documents was not completed by [Respondent]; it is rather an area where employees can note their personal transactions. HT at 81. He maintained that “we don’t collect any fees related to immigration from all of our employees, not just [Mr. Jinna].” HT at 82. Mr. Mahadevapalli maintained that “people can Google” law firm fees reflected on the Excel spreadsheets at PPX 4. HT at 84.

In rebuttal, Mr. Jinna testified that the entire Excel spreadsheet was prepared by Respondent. HT at 82-83. Mr. Jinna averred that the “bench taxes” referenced in PPX 4 refer to “the federal and state governments for running payroll” which he could not possibly know. HT at 85.

At hearing, Mr. Jinna submitted records of hours he worked for Respondent. PPX 5 and 6. Specifically, he submitted timecards covering the period from May 8, 2017 to March 4, 2018. PPX 6. For the customer “Delphi,” Mr. Jinna’s hours worked as a consultant were reflected on documents each entitled “Supplier Activity Report” covering the period from April 24, 2017 to June 2, 2017. PPX 5. For the project referenced as “SAP America,” Mr. Jinna provided weekly timesheets reflecting the number of hours he worked during the period from June 5, 2017 to September 17, 2017. *Id.*

Prior to the hearing, Mr. Jinna submitted 10 earnings statements indicating his “federal taxable wages” and “Statutory Deductions” – nine reflecting gross pay of \$4,000.00 and one reflecting gross pay of \$2,000.00. ALJX 1. Each earning statement notes a different payroll check number but the same pay date of December 29, 2017.

#### Factual Findings and Legal Conclusions

The applicable H-1B employment period in this matter runs from June 8, 2016 to June 7, 2019. RX A. The evidence of record shows that this was a period for which DOL certification was obtained.<sup>12</sup> It listed a job location of Los Angeles, CA and a job title of “SAP Master Data

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<sup>12</sup> Respondent submitted another LCA at hearing which purports to cover the period from September 1, 2015 to August 31, 2018, for a job title of “Programmer Analyst” and a job location in Framingham, MA, but it does not include any indication that it was actually certified by DOL. RX A. Both witnesses at hearing confirmed that Mr. Jinna was never placed in Framingham, MA as initially anticipated by both Respondent and Prosecuting Party. HT at 24; 64.

Governance/Management Consultant.” RX A. The wage rate is listed as \$105,000.00 and the prevailing wage is listed as \$104,146.00. *Id.*

The Department of Labor has cognizance only over the period of employment covered by an *approved* LCA petition. § 655.805; *see also Vojtisek-Lom v. Clean Air Technologies Int’l, Inc.*, ARB No. 07-097, ALJ No. 2006-LCA-9 (ARB July 30, 2009), slip op at 16. Therefore, the employment period for which the Prosecuting Party may seek enforcement remedies in this matter extends from June 8, 2016 to June 7, 2019. Accordingly, this Decision and Order will address Respondent’s wage and employment obligations to Prosecuting Party only for that period.

From the testimony of the witnesses, it is difficult to glean precisely what occurred during Mr. Jinna’s tenure with Respondent but Respondent’s witness, Mr. Mahadevapalli, did concede that Respondent failed to pay Mr. Jinna at some point. Moreover, Mr. Jinna met his initial burden of demonstrating he failed to receive proper compensation from Respondent for work performed during the approved LCA period, including his testimony as well as documentary evidence, i.e., timecards found at PPX 5 and PPX 6. Mr. Jinna averred that he was “paid partial salaries” at hearing. HT at 26. Mr. Mahadevapalli conceded that Mr. Jinna received only two checks for 2017. HT at 68.

According to Mr. Jinna, Respondent had no work for him from the time of his arrival in the U.S. at the end of January 2016 and that he searched for and found a job in Minneapolis “within three months” on a short-term project which lasted three to four weeks. HT at 24. According to Mr. Jinna, he obtained a project through Respondent in California as an “SAP MDG”<sup>13</sup> which lasted until November 2016. HT at 25. Mr. Jinna averred that when the California project ended, he asked to return to India because “his debts to Girish was [sic] increasing” and that “whenever [he] stayed idle,” he was required to pay him the bench taxes and insurance cost of 1,300 per month,” as well as “house rent.” HT at 26. Mr. Jinna described his “debt” to Mr. Mahadevapalli totaled about \$25,000 as of April 2017 “because of the bench taxes and health insurance costs and the payroll he ran for this period.” HT at 27. Mr. Jinna stated Respondent placed him in a job with Microsoft in Seattle and a job in Detroit. HT at 27. Mr. Jinna proffered an Excel spreadsheet as a depiction of impermissible deductions Respondent made from his salary in 2016 and 2017, including for attorney fees, USCIS fees, travel expenses in 2016. PPX 4.

According to the Employee Personal Interview Statement dated June 27, 2018 which Mr. Jinna provided to WHD during its investigation conducted in the instant matter, Mr. Jinna was to be paid by Respondent \$4,000 bi-weekly. PPX 10 at 1. The Interview Statement further provides that “[f]rom December 2016 through April 2017, Mr. Jinna was paid \$2,000 per month and he did not receive the wages reflected on the earnings statements which comprise ALJX 1. *Id.*

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<sup>13</sup> This is referred to erroneously in the HT as “SAP MVG” but review of the documentary evidence, i.e., the timecards which constitute PPX 6, show the correct acronym.

The Interview Statement also Jinna indicates that at the time it was obtained, Mr. Jinna was “currently working on an H-1B visa but with a different employer than [Respondent]” and that he “immediately found a new employer after leaving [Respondent].” PPX 10 at 1. He identified the new employer as “Pro-worqs.” *Id.* He also indicates in the Interview Statement that “[t]he new employer filed an LCA” and “[i]t took two weeks and [he] did not receive any pay between the time [he] left [Respondent] and began working for the new employer.” *Id.*

#### Incorrect or false information on LCA claim

The H-1B nonimmigrant’s first location of employment must be at the location specified in the approved LCA. 20 C.F.R. § 655.735(e). However, an employer may later place an H-1B nonimmigrant at another location for a maximum of 30 days per year, provided that the employer pays the H-1B nonimmigrant the required wage for the permanent worksite and pays the actual costs of meals and lodging. § 655.735(b)(3), (c). Once the H-1B nonimmigrant’s short-term placement has reached this limit, the employer must either file a new LCA for the new location or terminate the H-1B nonimmigrant’s placement in the other location.<sup>14</sup> § 655.735(f). The regulation also requires that an employer provide each H-1B employee with a copy of the LCA (form ETA 9035 or 9035E), certified by the Department of Labor and signed by the employer or its representative. § 655.734(a)(3).

Here, the approved LCA noted a work location of Los Angeles, CA. RX A. When Mr. Jinna arrived in the U.S. in January 2016, Mr. Mahadevapalli picked him at the airport but Mr. Jinna averred he “was accommodated in one of [his] cousin’s homes.” HT at 24. Mr. Jinna’s Employee Personal Interview Statement to WHD indicates that, in April or May 2016, Mr. Jinna began working for Respondent in Los Angeles. PPX 10 at 1. He testified at hearing that he remained there until November or December of 2016. HT at 25. Mr. Jinna also maintains that he later worked at other locations including Seattle, WA (“Microsoft” project) and Detroit, MI (“Delphi” project) from April to September 2017. PPX 8 at 1.

At hearing, Mr. Jinna provided timecards generated during that time period which support his testimony that he worked at these locations for more than 30 days. PPX 6. Respondent has presented no LCAs for these other locations. It must then be concluded that Respondent failed to comply with the applicable regulations requiring.

#### Failure to pay the higher of the prevailing or actual wage

Under the regulation, an employer must pay an H-1B employee the “required wage” for the entire time period up to the *bona fide* termination of employment, except for time periods during which the employee was not available for work based on personal circumstances unrelated to his employment. § 655.731(c)(7)(ii).

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<sup>14</sup> If the H-1B nonimmigrant maintains an abode in the United States at the permanent worksite location and spends a substantial amount of time at that location, the employer may station the H-1B nonimmigrant for up to 60 days per year at a location other than the permanent worksite. § 655.735(c).

In addition, an employer's obligation to pay wages to an employee is extinguished when there has been a *bona fide* termination of the employment relationship. *Id.* However, up to the time that there has been a *bona fide* termination, an employer's wage obligation to an H-1B continues unabated, up to the end of the authorized period of employment. *Id.*; *see also Mao v. Nasser Eng'g & Computing Svcs.*, ARB No. 06-121, ALJ No. 2005-LCA-36 (ARB Nov. 26, 2008), slip op. at 10.

There was no evidence presented at hearing that Mr. Jinna was unavailable for work based on personal circumstances unrelated to his employment during any of the certified period.<sup>15</sup> And as for Prosecuting Party's termination, the record does include an email dated February 3, 2018 from Respondent's sole hearing witness to Mr. Jinna informing him that his "employment is terminated as of 12/31/2017 because of company policy violation." PPX 9 at 2. The email further states that Mr. Jinna's "H1B will be terminated and fli[h] [sic] back tickets will be provided with effective date of 2/7/2017."

The Administrative Review Board ("ARB" or "Board") has held that there are three elements to establish a *bona fide* termination of employment: first, unequivocal notice to the employee that the employment relationship has been terminated; second, the employer's notice to immigration officials of the terminated employment relationship; and third, payment for transportation back to the employee's home country.<sup>16</sup> *Amtel Group of Fla. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-06 (ARB, Sept. 29, 2006), slip op. at 11-12, *aff'd on recon*, ARB No. 07-104 (Jan. 29, 2008); *see also Gupta v. Jain Software Consulting, Inc.* ARB No. 05-008, ALJ No. 2004-LCA-39 (ARB, Mar. 30, 2007), slip op. at 5-6. The Board also has held that the burden is on the employer to establish each element of the *bona fide* termination. *Gupta v. Jain*, slip op. at 5 n. 3.

The February 3, 2018 e-mail does constitute unequivocal notice to Mr. Jinna that his employment relationship with Respondent had been terminated. However, Respondent presented no evidence that it provided both notice to the proper immigration officials of the terminated employment relationship and actual payment to Mr. Jinna for reasonable transportation costs back to his home country.<sup>17</sup> There is no evidence of record that Respondent provided notification Department of Homeland Security of the terminated employment relationship with Mr. Jinna. Moreover, stating that return flight tickets 'will be provided' does not constitute proof of actual payment of the reasonable transportation cost for Mr. Jinna's return to his home country. Therefore, Respondent has failed to establish all the elements of a *bona fide* termination in this matter and its wage obligation to Mr. Jinna would continue until the expiration of the certified LCA period at issue.

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<sup>15</sup> In his opening statement on behalf of Respondent, Respondent's witness alluded to Mr. Jinna's having a gambling addiction, but Respondent present no evidence to support such an assertion and made no clear argument as to its relevance to this proceeding. *See* HT at 45-56.

<sup>16</sup> Section 655.731(c)(7)(ii) states that payment for transportation back to the employee's home must be tendered under certain circumstances, and cited 8 C.F.R. § 214.2(h)(4)(iii)(E). This provision states that transportation must be provided when the employee has been dismissed prior to the expiration of the approved LCA period.

<sup>17</sup> The regulation does not require that an employer provide a ticket for an employee; rather, under the regulation, an employer must provide the "reasonable cost" of return transportation. § 655.731(c)(7)(iii).

The question then remains: what did Respondent pay Prosecuting Party during that certified LCA period until such time as Prosecuting Party was unavailable?

The Board has held that, as a matter of law, an employee cannot be granted the right to work concurrently for two H-1B employers. *Batyrbekov v. Barclays Capital*, ARB No. 13-013, ALJ No. 2011-LCA-25 (ARB July 16, 2014), slip op. at 13. As a practical matter, employment with a second employer effectively renders an employee unavailable for work with his original employer. According to his own statement to WHD, Mr. Jinna found another H-1B employer, i.e., Pro-worqs “immediately” after leaving Respondent. So, even if Respondent had not effected a *bona fide* termination of the Prosecuting Party’s employment, Mr. Jinna was not available for work with Respondent once he began working for “Pro-worqs” and Respondent would not have any wage obligation to him after that. *See* § 655.731(c)(7)(ii).

Mr. Jinna did not provide any evidence as to the specific date upon which he began employment with his employer after leaving Respondent; his Personal Employee Interview Statement indicates that it took two weeks for the LCA submitted by Mr. Jinna’s new employer to be approved and that Mr. Jinna did not receive any pay between leaving Respondent and starting with his new employer. PPX 10 at 1.

Based on the evidence of record, including the Personal Employee Interview Statement, it is reasonable then to find Mr. Jinna began working for his new employer two weeks after receiving the email notice of his termination from Respondent on February 3, 2018. Therefore, Respondent’s wage obligation to Prosecuting Party would be deemed to end as of February 17, 2018.

The required wage is defined as the higher of the actual wage for the specific employment in question or the prevailing wage at the geographic location. § 655.715. For Prosecuting Party’s position under the applicable approved LCA, the prevailing wage listed was \$104,146.00 per year which is lower than the Prosecuting Party’s actual wage listed of \$105,000.00 per year. Therefore, the back wages owed (if any) should be calculated based on Prosecuting Party’s actual wages of \$105,000.00 per year, or \$8,750.00 per month. *Vojtisek-Lom v. Clean Air Technologies Int’l, Inc.*, ARB No. 07097, ALJ No. 2006-LCA-9 (ARB July 30, 2009), slip op at 14 (computation of back wages may be based on wage rate paid to the employee).

The earnings statements which comprise ALJX 1 indicate that Prosecuting Party was to be paid a total of \$38,000 (minus deductions for federal income tax, social security, Medicare, CA State income tax and CA State DI) in December 2017. According to Mr. Jinna’s Interview Statement, he did not receive the wages described in those earnings statements: he maintains Respondent had those earnings statements generated, but did not deposit any of corresponding payments into his account. PPX 10 at 1. Respondent presented no evidence to refute Mr. Jinna’s assertions regarding non-payment of wages.

Mr. Jinna testified at hearing that he received partial salary during his tenure with Respondent. In his correspondence of record, Mr. Jinna indicated that he was paid \$2,000 per month for January and February of 2017. PPX 8. Prosecuting Party presented a 2017 W-2 and Earnings Summary which indicates his employer as Respondent and his wages as \$105,000.00, as well as the various withholdings for federal income tax, social security, Medicare and state income tax. PPX 2.

The WHD Determination includes a back wage calculation of \$53,220.06, but does not explain how that number was derived. ALJX 2.

The 2018 W-2 and Earnings Summary for Mr. Jinna proffered by Respondent at hearing reflects wages in the amount of \$61,220.06 – and not the amount assessed by WHD as owed to Mr. Jinna as back wages. Nonetheless, it was the hearing testimony of Respondent’s witness that the 2018 W-2 and Earnings Summary was generated to the payment of back wages as WHD had assessed as owed to Mr. Jinna in this matter. HT at 68-69. Respondent’s witness also confirmed at hearing that Mr. Jinna “had only two paychecks in 2017.” HT at 68. Respondent’s witness also averred that Mr. Jinna was paid bi-monthly during his tenure with Respondent. *Id.*

Respondent’s wage obligations to Prosecuting Party run from June 8, 2016 (the “begin date” noted of the certified LCA at issue) until Mr. Jinna began his employment with another H-1B employer, in the absence of a *bona fide* termination. For reasons discussed above, the undersigned has found such employment to have commenced on February 17, 2018.

For 2017 – the year which is the subject of Mr. Jinna’s complaint to WHD and therefore the instant matter before the undersigned – both Respondent’s witness and Prosecuting Party agree that Prosecuting Party received only two pay checks.<sup>18</sup> PPX 8; HT at 68. According to Mr. Jinna, the amount of those checks were each \$2,000 for a total of \$4,000. PPX 8. Respondent offered no evidence to rebut Mr. Jinna’s assertions as to the amount Prosecuting Party was paid in 2017.

When asked if subtracting the deductions from the wages reflected on the 2018 W-2 and Earnings Statement Respondent presented at hearing would yield the net amount Mr. Jinna received by check from Respondent in 2018 after the WHD investigation, Respondent’s witness responded affirmatively. HT at 70. However, this is not true. Along with his letter appealing the WHD Determination in this matter, Mr. Jinna included a copy of the check dated August 30, 2018 in the amount of \$25,234.83 he received from Respondent. ALJX 2. When the total deductions noted on the 2018 W-2 submitted at hearing by Respondent (i.e., \$29,334.20) are

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<sup>18</sup> Mr. Jinna appears to assert that Respondent paid him in 2016, albeit in a delayed fashion: his Employee Personal Interview Statement to WHD reads as follows: “I started working for [Respondent] on February 1, 2016. He [Girish] did not pay me immediately. He said he was waiting for my SSN. He waited until my SSN arrive then he ran all of the paychecks.” PPX 10 at 1.

subtracted from the wages noted on that same W-2 (i.e., \$61,220.06<sup>19</sup>), the result is \$31,885.86, and not \$25,234.83. There is a discrepancy between the documentary evidence and the testimony of Respondent's witness which undermines that witness' credibility in this matter.

Employers must pay prescribed wages to employees in a "nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or any other [unaccepted] reason," 20 C.F.R. § 655.731(c)(7)(i)—a decision referred to as "benching."

The ARB has held that, in calculating back wages owed, it is Respondent's burden to demonstrate that it was *not* obligated to pay the amounts required by the approved LCA. *Administrator, WHD v. Xcel Solutions Corp.*, ARB No. 12-076, ALJ No. 2011-LCA-16 (ARB July 16, 2014), slip op. at 10, *citing Gupta v. Compunnel Software Group, Inc.*, ARB No. 12-049, ALJ No. 2011-LCA-45 (ARB May 29, 2014). Here, the record includes no evidence of Mr. Jinna's unavailability to work during the period of the approved LCA at issue until he obtained employment with another H-1B employer.

Therefore, the back wages Respondent owed to Prosecuting Party must be calculated as follows:

January 1, 2017 to December 31, 2017:	\$105,000.00
January 2018:	\$ 8,750.00
February 1 to 17, 2018:	\$ 4,375.00
<b>TOTAL:</b>	<b>\$118,125.00</b>

The record supports finding Respondent paid Prosecuting Party \$4,000 in 2017 and \$25,234.83 in 2018 (which was intended to cover the back wages owed to Prosecuting Party from 2017). Accordingly, the total amount in back wages owed to Prosecuting Party must be reduced to **\$88,890.17**.

While many things are not clear from the testimony of Prosecuting Party and Respondent's witness, both agree that after Mr. Jinna arrived to U.S. in January 2016 and during his tenure with Respondent, he looked for and obtained work on his own before he began working in CA for Respondent. It might be inferred from the circumstances surrounding this case that Respondent conducted itself more like a job placement service than an employer requiring Mr. Jinna's services as a "SAP Master Data Governance/ Management Consultant" – the job identified in the approved LCA. *See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models*, 65 Fed. Reg. 80,144 (Dec. 20, 2000) (codified at 20 C.F.R. Parts 655-656) (quoting 144 Cong. Rec. H8584 (Sept. 24, 1998)) ("The employers most prone to abusing the H-1B program

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<sup>19</sup> It is not clear from record how Respondent derived this amount as due Mr. Jinna: his actual annual wage rate per the certified LCA at issue was \$105,000.00 and the 2017 W-2 and Earnings Summary which Prosecuting Party submitted at hearing reflects his "wages, tips and other comp." as \$105,000.00. PPX 2

are called job contractors or job shops[.] They are in business to contract their H1Bs out to other companies. The companies to which the H-1Bs are contracted benefit by paying wages to the foreign workers often well below what comparable Americans would receive.”); Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,420 (proposed June 4, 1998) (codified at 8 C.F.R. Part 214) (“Recruitment agencies and entities which merely locate an alien for employers . . . may not file an H-1B petition . . . . The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs....”). However, the issue of whether Respondent was committing such violations of the H-1B program is not before the undersigned to adjudicate in this matter but Respondent should consider itself cautioned regarding its future use of the H-1B program.

As outlined above, the undersigned disagrees with the WHD Determination as to the assessment of back wages owed and Respondent’s payment in full of such wages and finds the calculations herein to reflect the back wages owed to Prosecuting Party.

#### *Improper Employer deductions from wages*

Mr. Jinna contends that MPRSoft made improper deductions from the amount of back wages which WHD assessed as owed him due to Respondent’s failure to pay him in violation of 20 C.F.R. § 655.731. He also contends generally that Respondent improperly collected fees related the H-1B filings. PPX 8. Mr. Jinna offered Excel spreadsheet for 2016 and 2017 at PPX 4 which he maintains are proof of the various fees Respondent deducted from wages due to him.

As for any such fees withheld in 2016, Prosecuting Party’s claim would be untimely: his complaint in this matter was filed in 2018. *See, e.g., Administrator, WHD v. Avenue Dental Care*, ARB No. 07-101, ALJ No. 2006-LCA-29 (ARB Jan. 7, 2010)(a claim for reimbursement of filing fees was time barred under the 12-month statute of limitations). As for any claim of improper deductions of fees, travel expenses or costs of equipment necessary for Respondent’s business in 2017, Prosecuting Party’s documentary proof offered at hearing is insufficient to clearly establish that Respondent required Prosecuting Party to pay attorney fees, costs, or other business expenses incurred in filing LCA and H-1B petition in this matter as to result in Mr. Jinna’s wages paid to fall below the required wage.

The Administrator’s Determination states that Respondent had been assessed back wages in the amount of \$53,220.06 and that it had paid that amount in full. However, Mr. Jinna included with his hearing request in this matter a copy of a check payable to him from Respondent dated August 30, 2018 in the amount of \$25,234.83.

At hearing, Respondent, through its sole witness, Mr. Mahadevapalli, presented 2018 W-2 and Earnings Summary documents marked and received into evidence as RX B and RX C: RX B includes a “preview” watermark and RX C does not, but otherwise includes the same information as RX B. Mr. Mahadevapalli testified that those documents demonstrate the wages due Mr. Jinna per the WHD Determination, as well as the withholdings from those wages.

RX B and RX C both note “wages, tips, other comp.” in the amount of \$61,220.06 and withholdings for federal income tax (\$17,460.89), social security tax (\$3,795.64), Medicare tax (\$887.69), and CA state income tax (\$7,189.98) for total withholdings in the amount of \$29,334.20. *See* RX B and RX C. Therefore, according to the documentation Respondent itself provided, Claimant should have received a net of \$31,886.75 in wages owed him.

The regulations make it clear that employers of non-immigrant workers must make appropriate tax withholdings and deductions from the wages of employees. The regulatory definition of “cash wages paid” requires that appropriate withholdings for taxes and other legal deductions be taken from earnings. 20 C.F.R. § 655.731(c)(2)(i) through (v). Respondent would have to demonstrate that appropriate withholdings for taxes and other legal deductions occurred in this matter and it did not do so with regard to the payment of back wages it made to Mr. Jinna in August 2018.

As for Mr. Jinna’s assertion that Respondent collected or deducted fees related to its H-1B filing from wages, he did provide statements during the investigation to that effect, as well as hearing testimony. PPX 8; HT at 36-37. He cites two Excel spreadsheets he provided to the WHD investigator tabbed as “Dheeraj Jinna 2017” and “Dheeraj Jinna 2016,” that include headings of “months,” “hours,” “Pay/Hr,” “Total,” “Actual Pay,” “Paid,” “Diff,” “Medical,” and “Salary Diff.” PPX 4. Under the “Salary Diff” heading, there are items listed on the left side of the spreadsheet such as “Sandeep Lawfirm fees,” “B Amend Murthy Fees,” “B Amend USCIS Fees.” *Id.*

Mr. Mahadevapalli testified that the “Salary Diff” column showed the profit Respondent made and that Respondent did not collect any fees related to immigration from its employees. HT at 81-82. He averred that Respondent did not complete the left side of the Excel spreadsheets Prosecuting Party submitted. HT at 83. Mr. Jinna testified that employees would not be aware of such fees; Mr. Mahadevapalli maintained that information about those fees would be accessible to employees. HT at 83-84.

Given the conflicting testimony, the documentary evidence alone is insufficient to establish Prosecuting Party’s assertion that improper deductions for fees related to H-1B processing were made during the relevant period.

*Failure to provide fringe benefits, i.e., health insurance*

Mr. Jinna testified at hearing that his health insurance benefits were terminated and presented an email from Mr. Mahadevapalli to him stating that such benefits would be “revoked as of 12/31/2017” PPX 9 at 2.

Section 655.731(c)(3) defines benefits as including cash bonuses, stock options, paid vacations and holidays, health, life, disability and other insurance plans, retirement and savings plans. It states 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) [sic].” 20 C.F.R. §655.731(c)(3)(i). Thus, under this section, the only way MPRSoft could have committed a violation is if it failed to provide Mr. Jinna equivalent fringe benefits to those it provided to U.S. workers.

Based on the exhibits and evidence presented at hearing, Mr. Jinna has not demonstrated that MPRSoft treated him any differently regarding the provision of health insurance benefits than it did to its U.S. workers. Therefore, the Prosecuting Party has not met his burden of proof regarding this alleged violation.

Unlawful retaliation under the INA for complaining about Respondent’s activities

Mr. Jinna has also alleged that he was retaliated against because he disclosed information, filed a complaint, or cooperated in an investigation or proceeding about a violation of the H-1B laws or regulations. He argues that the record contains evidence that Mr. Mahadevapalli terminated him because he disclosed MPRSoft’s violations of the H-1B provisions.

The INA protects H-1B workers who disclose information to the employer, or to any other person, “that the employee reasonably believes evidences a violation” of the INA’s H-1B provisions. It also protects employees who cooperate in an investigation or other proceeding concerning the employer’s compliance with the requirements of the H-1B provisions of the INA. H-1B employers may not “intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate” because the employee has engaged in protected activity.<sup>20</sup> To prevail on a retaliation claim, the employee must prove by a preponderance of the evidence that he engaged in protected activity, that his employer knew about this activity, and that his employer took adverse action against him because of his protected activity.<sup>21</sup> Both the Administrator made no finding that MPRSoft retaliated against Mr. Jinna.<sup>22</sup>

Mr. Jinna contends that he received the email terminating his employment from Mr. Mahadevapalli in February 2018 after he threatened “to go to legal authorities” about MPRSoft’s failure to pay him. HT at 29-30. The record however shows that Mr. Jinna was interviewed by WHD investigator on June 27, 2018. PPX 10.

Mr. Jinna’s generalized verbal threat to Mr. Mahadevapalli does not demonstrate Mr. Jinna held a reasonable belief that MPRSoft had violated the INA’s H-1B provisions or regulations. Mr. Jinna testified that it was only after his termination that he “spent a couple of months studying websites” and then learned of DOL’s procedures for complaints of “H-1

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<sup>20</sup> 8 U.S.C.A. § 1182(n)(2)(C)(iv); 20 C.F.R. § 655.801.

<sup>21</sup> *U.S. DOL, WHD v. Kuttly*, ARB No. 03-022, ALJ Nos. 2001-LCA-010 through 2001-LCA-025, slip op. at 13 (ARB May 31, 2005).

<sup>22</sup> The Administrator investigates and initially determines if the employer retaliated. 20 C.F.R. § 655.805(a)(13). The only specific violation Administrator found in this matter was a failure to pay wages as required in violation of 20 C.F.R. 655.731.

violations.” HT at 30. Therefore, even Mr. Jinna were credited with complaining to Mr. Mahadevapalli that he would contact ‘legal authorities’ about his employment conditions, such complaining cannot be deemed to constitute activity protected from retaliation under the INA.

#### Payment through the Administrator

The Secretary’s regulations prescribe that the Administrator shall “oversee the payment of back wages or fringe benefits to any H-1B non-immigrant who has not been paid as required.” 20 C.F.R. § 655.810(a). The amounts due shall be calculated by the Administrator, and the Administrator shall disburse the unpaid salary, benefits and associated compound interest to Mr. Jinna. *See also*, 20 C.F.R. § 655.810(f) (prescribing the Administrator’s involvement in the distribution of unpaid wages, and presumably unpaid benefits too). The undersigned finds the Administrator’s duties as described in these regulations do not depend on whether the Administrator participated as a litigant in the adjudication setting the wages and benefits to be paid. *Cf.*, 20 C.F.R. § 655.820(b)(1) (reposing discretion in the Administrator about whether to intervene when a H-1B worker is the prosecuting party).

#### Conclusion

Respondent failed to pay Mr. Jinna the actual wage identified in this decision in violation of 20 C.F.R. § 655.731 during the period from January 1, 2017 to February 17, 2018 as covered by the certified LCA at issue in this matter. Respondent also failed to obtain new LCAs for job placements exceeding 30 days during the period from April to September 2017. The evidence is in equipoise regarding whether Respondent made improper deductions of fees in violation of the applicable regulations, but it preponderantly fails to establish Prosecuting Party denied fringe benefits or retaliated against in violation of the applicable INA regulations.

#### **ORDER**

Administrator’s decision to not assess any civil money penalties is AFFIRMED. However, the Administrator’s Determination is MODIFIED as to the specific back pay amount, plus interest, owed to the Prosecuting Party.

It is ORDERED that Respondent must pay to Mr. Jinna:

1. A total of **\$88,890.17** 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.

**LYSTRA A. HARRIS**  
Administrative Law Judge

Cherry Hill, New Jersey

**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.