

U.S. Department of Labor

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Issue Date: 06 May 2009

Case No.: 2008-LCA-00046

In the Matter of:

ADMINISTRATOR, WAGE AND
HOUR DIVISION

Prosecuting Party,

v.

ITEK CONSULTING, INC.
Respondent.

Appearances:

Andrew Karonis, Esq.
For Prosecuting Party

Pro Se
For Respondent

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(n) (2001) (“INA” or “the Act”), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I, C.F.R. § 655.700 et seq.

The case involves a complaint filed by the Administrator, Wage and Hour Division (“Administrator”) against Itek Consulting, Incorporated (“Itek”).¹ The Administrator issued a Notice of Determination on August 5, 2008, finding that Itek failed to pay wages as required, failed to cooperate in the investigation and failed to

¹ For purposes of this Decision and Order, I use “Itek,” “Varghese” and “Respondent” interchangeably. Varghese is Vice President of Itek and represented Itek at trial. (Tr. at 4).

comply with the provisions of subpart H or I. (ALJX-1). By letter dated August 20, 2008, Itek requested a hearing. (ALJX-2). I issued a Notice of Hearing on August 26, 2008, setting the hearing for December 10, 2008 in Philadelphia, Pennsylvania.² (ALJX-3).

The decision that follows is based upon the testimony at the hearing, all documentary evidence admitted into the record and the parties' post-hearing briefs.³

I. ISSUES

The issues presented for adjudication are:

1. Whether Ebenezer is entitled to unpaid wages for the period August 8, 2005 to December 11, 2005;
2. Whether Ebenezer is entitled to wages for the period December 12, 2005 to December 17, 2006, due to being underpaid;
3. Whether Ebenezer is entitled to unpaid wages for the period December 18, 2006 to February 22, 2007; and
4. Whether Itek should pay a \$1,000 civil money penalty for its failure to cooperate with the Administrator's investigation.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of H-1B Process

The Immigration and Nationality Act ("INA") H-1B visa program permits American employers to temporarily employ non-immigrant aliens to perform specialized occupations in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Act defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. § 1184(i)(1).

² The transcript consists of 99 pages and will be cited as "Tr. at --." I admitted into evidence four Administrative Law Judge Exhibits, which will be cited as "ALJX-1" through "ALJX-4." (Tr. at 7). The Administrator submitted 15 exhibits in conjunction with this claim. Exhibit 15 was then withdrawn from evidence. (Tr. at 27). The Administrator's remaining 14 exhibits were admitted into evidence and will be cited as "AX-1" through "AX-14." (Tr. at 10). At trial, I directed Respondent to submit any evidence to me within 10 days. (Tr. at 96). I received four exhibits from Respondent on March 24, 2009. In a letter dated March 26, 2009, the Administrator objected to Respondent's exhibits. I issued an Order on May 30, 2009 excusing Respondent's untimely exchange of evidence, and granted the Administrator 15 days to rebut Respondent's evidence. Therefore, I now receive and admit into evidence Respondent's four exhibits, which will be cited as "RX-1" through "RX-4."

³ The Administrator's post-hearing brief was received on March 25, 2009 and will be cited as "AB at --." The Respondent's post-hearing brief was received on March 24, 2009 and will be cited as "RB." The Administrator's post-hearing brief in rebuttal to Respondent's evidence was received on April 13, 2009 and will be cited as "AB2 at --."

To hire an H-1B nonimmigrant alien, the employer must first receive permission from the U.S. Department of Labor (“DOL”). To receive permission from the DOL, the Act requires an employer to submit a Labor Condition Application (“LCA”) to the DOL. § 8 U.S.C 1182(n)(1).

The LCA must represent the number of employees to be hired, their occupational classification, the actual wage rate, the prevailing wage rate and the source of such wage data, the period of employment and the date of need. 8 U.S.C. § 1182(n); 20 C.F.R. §§ 655.730-734. Further, the employer must offer to compensate the H-1B nonimmigrant wages that are 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. § 1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. § 655.731(a).

Certification of the LCA by the DOL and a nonimmigrant worker’s visa petition are sent to the Immigration and Naturalization Service (“INS”) for approval of an H-1B visa for the employee. 8 U.S.C. § 1101(a)(15)(H); 20 C.F.R. § 655.700. If INS approves, the employer may then hire the H-1B worker.

Employers are required to pay H-1B workers on the date on which the worker “enters into employment” with the employer. 20 C.F.R. § 655.731(c)(6). Employers are required to pay H-1B employees the required wage for both productive and non-productive time. Employment-related nonproductive time, or “benching,” results from lack of available work or lack of the individual’s license or permit. 8 U.S.C. § 1182(n)(2)(c)(vii); 20 C.F.R. § 655.731(c)(7)(i). An employer need not pay wages for H-1B visa workers in nonproductive status due to conditions unrelated to employment or which render the employee unable to work. 20 C.F.R. § 655.731(c)(7)(ii).

An employer need not compensate a nonimmigrant if it has effected a “*bona fide* termination” of the employment relationship. 20 C.F.R. § 655.731(c)(7)(ii). The employer must notify the INS that it has terminated the employment relationship so that the INS may revoke approval of the H-1B visa. 8 C.F.R. § 214.2(h)(11); 8 C.F.R. 214.2(h)(4)(iii)(E); 20 C.F.R. § 655.731(c)(7)(ii).

B. Statement of the Case

Benly Ebenezer’s Testimony

Ebenezer has six years experience as a computer programmer and two master degrees in computer science. (Tr. at 30).

In a letter dated March 14, 2005, Itek made Ebenezer an offer to work for it, which Ebenezer accepted.⁴ (Tr. at 31-32; AX-4). After Ebenezer completed filling out

⁴ Ebenezer testified that Itek is a company whose clients – subcontractors – would hire Ebenezer as a computer programmer, and then Ebenezer would work at the client locations. (Tr. at 31).

the appropriate documentation and giving it to the consulate, he obtained an H-1B visa. (Tr. at 33)

Ebenezer worked as an H-1B employee for Itek as a computer programmer from August 8, 2005 to February 22, 2007. (Tr. at 29-30). During that time, Ebenezer said he did not work for any other employer as an H-1B employee. (Tr. at 30). Further, this was the first time Ebenezer had been employed as an H-1B employee in the United States. (Tr. at 30).

On August 4, 2005, Ebenezer arrived in the United States. (Tr. at 33). With his H-1B visa already approved, Ebenezer spoke to Varghese and made himself available to work on August 8, 2005. (Tr. at 33-34, 47). However, Ebenezer testified that he was not assigned any work until December 12, 2005, when he was assigned to work in Manhattan,⁵ New York as a computer programmer for JPMorgan Chase (“JPMorgan”). (Tr. at 34).

Sometime between August 8, 2005 and December 12, 2005, Ebenezer asked Varghese why he was not working. (Tr. at 34-35). Varghese told Ebenezer that he needed to procure a Social Security number before he could work for Itek. (Tr. at 35). Ebenezer applied for and received his Social Security number on November 12, 2005. (Tr. at 35, 88).

From August 8, 2005 and December 12, 2005, Ebenezer went once to Itek’s office and once to Varghese’s home to work on Varghese’s personal computers. (Tr. at 54). Other than that, Ebenezer was not assigned any other projects for Itek or to any other company. (Tr. at 35, 47).

During that time, Ebenezer never told Itek that he was unavailable for work, never took a leave of absence, never refused to work for Itek and was never paid by Itek. (Tr. at 35-36, 48). Further, Itek never told Ebenezer it had work available for him, nor did it ask him to come into its office. (Tr. at 36). Ebenezer’s understanding was that if he did not have a Social Security number then he could not perform any work. (Tr. at 36, 57).

Ebenezer worked in Manhattan, New York for JPMorgan from December 12, 2005 until February 22, 2007. (Tr. at 36). This work was done on Itek’s behalf. (Tr. at 37).

Ebenezer received a 2006 W-2 Form from Itek, which includes payment for the work he performed from December 12, 2005 to December 31, 2005, and all of the payments he received in 2006. (Tr. at 37-39; AX-6).

Ebenezer would fax Itek a weekly timesheet report informing Itek the amount of hours he worked. (Tr. at 39-40; AX-9). However, Ebenezer was not paid by Itek or anyone else for the work he performed at JPMorgan from December 18, 2006 to

⁵ Manhattan and New York City are used interchangeably throughout this opinion.

February 22, 2007. (Tr. at 48). The following timesheets were submitted: December 26, 2006 for 40 hours worked;⁶ January 1, 2007 for 32 hours worked; January 8, 2007 for 32 hours worked; January 16, 2007 for 40 hours worked;⁷ January 26, 2007 for 40 hours worked;⁸ February 1, 2007 for 32 hours worked;⁹ February 6, 2007 for 40 hours worked; February 12, 2007 for 32 hours worked; February 21, 2007 for 32 hours worked; and February 26, 2007 for 32 hours worked.¹⁰ (Tr. at 41-47; AX-9).

At some point before February 23, 2007, Ebenezer spoke with Varghese about terminating his contract, being removed from the JPMorgan project and being placed on a new project.¹¹ (Tr. at 48-51, 54). However, even though Ebenezer and Varghese agreed to terminate Ebenezer's contract, Ebenezer testified that Itek never advised him nor gave him notification regarding the date of his termination. (Tr. at 47-50). This includes Varghese's failure to send Ebenezer a letter or any other documentation telling Ebenezer what day to stop working at JPMorgan. (Tr. at 55-56).

Ebenezer wanted written notification of his termination date. (Tr. at 49). Since Ebenezer did not receive any instructions or notifications from Varghese to stop working at JPMorgan on February 9, 2007, he continued working at JPMorgan until February 22, 2007. (Tr. at 56). Further, Ebenezer never received a phone call or notification from Varghese after February 9, 2007 telling him to cease working at JPMorgan. (Tr. at 56-57).

Ebenezer was not paid by Itek for the work he performed at JPMorgan after February 9, 2007.¹² (Tr. at 56). Therefore, after a futile effort to reach Varghese and remedy his problem, Ebenezer notified Varghese that he was leaving Itek and, starting February 23, 2007, would be working for someone else. (Tr. at 57).

Currently, Ebenezer is still working at JPMorgan as a computer programmer, but on behalf of SBM – his new H-1B sponsor. (Tr. at 29, 36-37). SBM has been Ebenezer's sponsor since February 23, 2007.¹³ (Tr. at 37).

Joseph Varghese's Testimony

Ebenezer came to the United States in August 2005. (Tr. at 17-18). Varghese then told Ebenezer that the first thing he must do when he arrived in the United States

⁶ Ebenezer testified he worked 20 hours, but the exhibit shows he worked 40 hours. (Tr. at 41-42; AX-9).

⁷ Ebenezer testified he worked 20 hours, but the exhibit shows he worked 40 hours. (Tr. at 43; AX-9).

⁸ Ebenezer testified he worked 30 hours, but the exhibit shows he worked 40 hours. (Tr. at 44; AX-9).

⁹ Ebenezer testified he submitted this report on February 4, 2007, but the exhibit shows he submitted the report on February 1, 2007. (Tr. at 43-44; AX-9).

¹⁰ The February 26, 2007 report looks different from the previous reports because Ebenezer submitted this timesheet online. (Tr. at 46; AX-9).

¹¹ Ebenezer said Varghese wanted to terminate his contract with JPMorgan because Itek was not receiving payment from its subcontractor. (Tr. at 53).

¹² Any timesheet after February 11, 2007 was not invoiced by Varghese. (Tr. at 55).

¹³ Ebenezer was unsure whether or not Itek stopped being his sponsor on February 23, 2007, but knows Itek's sponsorship was valid until May 2007. (Tr. at 37).

was to obtain a Social Security number. (Tr. at 90). He said that a Social Security number was necessary to work at client locations, as almost ninety-nine percent of Itek's clients require an H-1B employee to have a Social Security number. (Tr. at 89-90).

From August 8, 2005 to December 11, 2005, except for one occasion when he worked on Varghese's personal computers, Ebenezer did not show up at Itek's office. (Tr. at 17-28, 22). However, Varghese said that even though Ebenezer did not have a Social Security number yet, he should have come to the office everyday because there was always work for Ebenezer to do at the office. (Tr. at 90-91).

Varghese did not send Ebenezer any letters, e-mails, documents or call him on the phone asking him to come to the office between August 8, 2005 and December 11, 2005. (Tr. at 91). However, Varghese said their employment contract stipulates that Ebenezer was supposed to work every day. (Tr. at 91).

Varghese testified, and his defense is, that an employer cannot be expected to pay an employee who does not come to work. (Tr. at 18, 22, 91). Therefore, Varghese did not pay Ebenezer from August 8, 2005 to December 12, 2005. (Tr. at 18).

In December 2005, Ebenezer was placed on assignment at JPMorgan. (Tr. at 18). Varghese testified that Ebenezer was unhappy with the pay rate, and the subcontracting company delayed payments to Itek. (Tr. at 19). However, Varghese said he paid Ebenezer \$50,000 – the prevailing wage – for the period December 12, 2005 and December 17, 2006. (Tr. at 23).

Varghese acknowledged that the reported wages on Ebenezer's 2006 W-2 Form were \$44,174.09. (Tr. at 95; AX-6). Varghese testified that Ebenezer's salary was \$50,000, but the last paycheck of the year was not reflected on his 2006 W-2 Form. (Tr. at 95-96; AX-6). However, Ebenezer's last paycheck from 2005 would be reflected on his 2006 W-2 form. (Tr. at 96).

From December 18, 2006 until February 9, 2007, Ebenezer worked at JPMorgan on Itek's behalf, but was not paid any wages because Varghese had terminated his payroll. (Tr. at 93-94; AX-14). Varghese's termination letter, dated March 2, 2007, was sent to US Citizenship and Immigration Services. (Tr. at 94; AX-5). Ebenezer did not receive this termination letter. (Tr. at 95). Varghese testified that the effective termination date was February 8, 2007, but acknowledged that the termination letter does not give a date of termination.¹⁴ (Tr. at 94; AX-5).

Varghese testified that he and Ebenezer came to an agreement where Ebenezer's assignment at JPMorgan would be terminated on February 9, 2007. (Tr. at 19, 23-24). Ebenezer would then begin working on a new project. (Tr. at 19, 23-24). Varghese said that he sent a termination notice to the subcontracting company, dated sometime in January, stating that Ebenezer's last day at JPMorgan would be February

¹⁴ The termination letter merely states, "effective Feb'2007." (AX-5).

9, 2007. (Tr. at 19, 24, 92, RX-2). Varghese said that Ebenezer has a copy of this letter. (Tr. at 19; RX-3). Also, Varghese sent an e-mail to Ebenezer. (Tr. at 92; RX-3; RX-4).

Varghese said that Ebenezer did not show up for work after February 9, 2007, with his last time sheet being for the week of February 11, 2007. (Tr. at 20, 25). However, Ebenezer continued working at JPMorgan after February 9, 2007 in violation of his employment contract and the contract that Itek had with its subcontracting company - SBM. (Tr. at 25).

Varghese testified that his company was not paid by the subcontracting company for the final two weeks, January 29, 2006 to February 11, 2007, because the subcontracting company felt Ebenezer violated its contract. (Tr. at 20-21, 26). This caused Itek to lose their existing business with SBM. (Tr. at 20). Therefore, to adjust for the damage Ebenezer allegedly caused Itek, Itek did not pay Ebenezer from December 16, 2006 to February 11, 2007. (Tr. at 20).

When Ebenezer's termination came into effect, Varghese did not offer to pay Ebenezer's plane fare back to India. (Tr. at 95). Varghese said he did not offer plane fare because he knew Ebenezer was continuing to work at JPMorgan and was not returning to India. (Tr. at 95).

Varghese testified that Estacio, the Administrator's investigator, was at his office twice, and that he gave her complete sets of all H-1B petitions he filed, including all of Ebenezer's payroll records and INS H-1 papers, and all other documents and information that he had. (Tr. at 15-17). Varghese said that he completely cooperated with Estacio's investigation. (Tr. at 22). To prove his helpfulness in Estacio's investigation, Varghese testified that he has a letter of appreciation and cooperation from Estacio.¹⁵ (Tr. at 17).

Linda Estacio's Testimony

Estacio is an investigator for the U.S. Department of Labor, Wage and Hour Division and has been employed as an investigator for the past eight years. (Tr. at 58-59). As an investigator, Estacio's duties are to determine compliance with labor laws, including H-1B laws. (Tr. at 58). Additionally, last year Estacio completed a training course that taught her about the various H-1B laws, H-1B forms and how to conduct a proper investigation. (Tr. at 59).

On May 1, 2007, Estacio became the lead investigator in investigating Itek, a computer consulting company.¹⁶ (Tr. at 59-60). Her assignment was to determine whether or not Itek was complying with H-1B regulations. (Tr. at 60). To begin her investigation, Estacio reviewed the case file, set up an initial conference with Varghese and reviewed records Varghese provided. (Tr. at 60-61).

¹⁵ This letter is not part of the record.

¹⁶ Varghese is the person who predominately runs Itek, but his wife is President of the company. (Tr. at 60).

Estacio sent Varghese a letter on May 1, 2007 confirming their initial conference and requested certain documents and files. (Tr. at 61-62; AX-10). Itek was cooperative in providing some documents, but failed to provide all the documents Estacio requested. (Tr. at 62). Itek provided the labor condition application (“LCA”), some payroll records, “some of the other immigration-type documents” and employee information. (Tr. at 62).

The LCA states that Itek is seeking an H-1B employee to work as computer programmer. (Tr. at 63; AX-1). The LCA also says that the prevailing wage was \$45,000, the wage rate was \$50,000 and the expected time period needed for this employee was between June 18, 2004 and May 17, 2007. (Tr. at 63; AX-1). Finally, the LCA states that Princeton, New Jersey is the work location, with no other sites listed. (Tr. at 63-64; AX-1).

Estacio received a Petition for a Nonimmigrant Worker from Itek. (Tr. at 64; AX-2). This form identified Benly Ebenezer as the H-1B worker Itek intended to hire. (Tr. at 64; AX-2).

Estacio reviewed a Petition for a Nonimmigrant Worker from the Department of Justice. (Tr. at 64; AX-3). This document gave Ebenezer permission to receive his visa. (Tr. at 64-65; AX-3). The document also states that Ebenezer’s effective dates of employment at Itek was from November 19, 2004 to May 17, 2007. (Tr. at 65-66; AX-3). According to Estacio, the above dates represent the time period Itek must pay Ebenezer, unless it terminates him. (Tr. at 66).

Itek provided Estacio with a letter, dated March 14, 2005, confirming their offer of employment to Ebenezer. (Tr. at 65; AX-4). The letter stated Ebenezer’s position to be a programmer, his responsibilities as a programmer and that his starting salary is \$50,000 based upon 40 hours per week. (Tr. at 65; AX-4).

In the course of her investigation, Estacio concluded that Itek violated the H-1B regulations. (Tr. at 66). She determined that from August 8, 2005 to December 11, 2005 Itek did not pay Ebenezer any compensation; from December 12, 2005 to December 17, 2006 Itek paid Ebenezer the incorrect prevailing wage; and from December 18, 2006 to February 22, 2007 Itek did not pay Ebenezer any compensation. (Tr. at 66-67).

The first violation Estacio determined occurred between August 8, 2005 and December 11, 2005. (Tr. at 67). Estacio testified that Ebenezer made himself available to work for Itek, but Itek failed to pay him for this 18 week period of time. (Tr. at 67). Estacio’s source for this information is directly from Ebenezer, but Varghese has admitted that Itek did not pay Ebenezer. (Tr. at 67-68; AX-14). Estacio calculated the amount Ebenezer was due for this period to be \$15,576.04.¹⁷ (Tr. at 68).

¹⁷ Estacio found the prevailing wage from the LCA for Princeton, New Jersey in 2002 to be \$45,000. She divided \$45,000 by 52 weeks to get a rate of \$865.38 per week. Estacio then multiplied \$865.38 per week by the 18 weeks Ebenezer was not paid, which gave her a total amount due of \$15,576.04. (Tr. at 68).

The second violation Estacio determined occurred between December 12, 2005 and December 17, 2006, because Itek did not pay Ebenezer the correct prevailing wage. (Tr. at 69). During that time, Ebenezer was working for Itek in New York City, New York as a computer programmer – not Princeton, New Jersey. (Tr. at 69). Estacio testified that Itek should have been paying Ebenezer the prevailing wage in New York City, which is \$48,214.00 per year, rather than the \$44,474.38 per year wage rate that Itek paid Ebenezer. (Tr. at 69-71; AX-6; AX-8). Therefore, Estacio concluded that Ebenezer is owed an additional \$4,666.69 for the time he worked between December 12, 2005 and December 17, 2006.¹⁸ (Tr. at 71).

On cross-examination, Estacio admitted that Ebenezer's pay stub says his hourly rate is \$24.04. (Tr. at 80; AX-7). At an hourly rate of \$24.04, total compensation for a year would equate to a little more than \$50,000. (Tr. at 81). However, even though Estacio acknowledged this information, she reiterated that Ebenezer's 2006 W-2 Form stated that he made \$44,474.38, and only wages reported to the Internal Revenue Service count as payment. (Tr. at 83-84).

The third violation Estacio determined occurred between December 18, 2006 and February 22, 2007, because Itek failed to pay Ebenezer any wages. (Tr. at 72). Further, Itek failed to provide Ebenezer's 2007 W-2 Form. (Tr. at 75). Estacio concluded the amount owed to Ebenezer for this time period is \$8,158.36.¹⁹ (Tr. at 73).

Itek provided Estacio with Ebenezer's termination letter. (Tr. at 73; AX-5). The letter, dated March 2, 2007, was sent to U.S. Citizenship and Immigration Services with the effective date of termination being "Feb' 2007." (Tr. at 73-74; AX-5).

Finally, Estacio assessed a \$1,000 civil money penalty against Itek, because Itek was uncooperative in furthering her investigation. (Tr. at 75). Estacio testified that she tried to contact Itek eight times between September 21, 2007 and February 14, 2008. (Tr. at 75). Itek did not respond to any of these attempts. (Tr. at 75). Further, Estacio sent Itek letters dated September 21, 2007 and January 15, 2008, asking for additional documents, which included an LCA for New York City, New York. (Tr. at 76, 78; AX-11; AX-12). Itek did not respond to either of these requests. (Tr. at 76-77). Also, Varghese failed to respond to Estacio's inquires about whether Ebenezer was working in New York City, New York. (Tr. at 77-78). Estacio testified that Itek's failure to respond and cooperate impeded her ability to perform her work more effectively. (Tr. at 77).

¹⁸ Estacio took the prevailing New York City wage rate of \$48,214.00 per year and divided it by 52 weeks to get a wage rate of \$927.19 per week. (Tr. at 70). Then, she multiplied the \$927.19 rate per week by 53 weeks to get an answer of \$49,141.07. (Tr. at 72). Finally, Estacio subtracted the \$44,474.38 that Ebenezer was paid in 2006 (as per his W-2 form) from the \$49,141.07 to arrive at \$4,666.69. (Tr. at 72).

¹⁹ Ebenezer worked 352 hours during this period. (Tr. at 73; AX-9). The hourly prevailing wage rate for New York City, New York in 2005 was \$23.18. (Tr. at 73). 352 hours worked multiplied by \$23.18 per hour equals \$8,159.36. (Tr. at 73).

C. Discussion

August 8, 2005 to December 11, 2005

The first issue concerns the amount of back pay, if any, owed to Ebenezer from August 8, 2005 until December 11, 2005. (AB at 9; RB). The Administrator determined that Ebenezer is owed \$15,576.84 in back pay for the period of August 8, 2005 to December 11, 2005. (AB at 9). Respondent argues that Ebenezer should not have been paid during this time because he did not have a Social Security number and failed to show up for work. (RB).

An employer is required to pay an H-1B nonimmigrant the wages set forth in the approved LCA. 8 U.S.C. 1182(n)(1)(A)(i); 20 C.F.R. § 655.731(a). The wage requirement is established by ascertaining the higher of the actual or prevailing wage. 8 U.S.C. 1182(n)(1)(A)(i); 20 C.F.R. § 655.731(a).

Under the INA, an H-1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant “enters into employment” with the employer. 20 C.F.R. § 655.731(c)(6). The H-1B nonimmigrant is considered to have “enter[ed] into employment” when he first makes himself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter. 20 C.F.R. § 655.731(c)(6)(i).

“Benching” an H-1B nonimmigrant, that is, placing him in nonproductive status without pay “due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license,” is a violation of the INA and its implementing regulations. 20 C.F.R. § 655.731(c)(7)(i); 8 U.S.C. § 1182(n)(2)(C)(vii)(I). If this occurs, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA. 20 C.F.R. § 655.731(c)(7)(i).

There are circumstances where the Employer is not required to pay an H-1B nonimmigrant during nonproductive status. This includes a nonproductive status due to conditions unrelated to employment,²⁰ the nonimmigrant is rendered unable to work²¹ or there has been a *bona fide* termination of the employment relationship.²² 20 C.F.R. § 655.731(c)(7)(ii).

²⁰ Examples include touring the United States or caring for an ill relative. 20 C.F.R. § 655.731(c)(7)(ii).

²¹ Examples include maternity leave or an automobile accident which temporarily incapacitates the nonimmigrant. 20 C.F.R. § 655.731(c)(7)(ii).

²² DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is cancelled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)). 20 C.F.R. § 655.731(c)(7)(ii).

The Administrator has provided information from the Social Security Administration (“SSA”) and the Internal Revenue Service (“IRS”) rebutting Respondent’s insistence that Ebenezer needed a Social Security number before he could work for Itek. (AB at 14-15).

A SSA Publication titled “Foreign Workers and Social Security Numbers” states:

We do not require you to have a Social Security number before you start work. However, the Internal Revenue Service requires employers to report wages using a Social Security number. While you wait for your Social Security number, your employer can use a letter from us stating that you applied for a number. Your employer may use your immigration documents as proof of your authorization to work in the United States.

SSA Publication No. 05-10107 (December 2005), “Foreign Workers and Social Security Numbers.”²³

The IRS gives directions as to what an employer should do when it employs an employee who applied for a Social Security number but has yet to receive their Social Security number. The W-2 Form instructions state:

Box a – Employees social security number. Enter the number shown on the employee’s social security card. If the employee does not have a card, he or she should apply for one by completing form SS-5, Application for a Social Security Card.

If the employee has applied for a card but the number is not received in time for filing, enter “Applied For” in box a on paper Forms W-2 filed with the SSA. (Enter zeros (000-00-0000) if Form W-2 is filed electronically with the SSA.).

Ask the employee to inform you of the number and name as they are shown on the social security card when it is received. Then correct your previous report by filing Form W-2c showing the employee’s SSN.

IRS, “2008 Instructions for Forms W-2 and W-3” (Cat. No. 25979S), p. 9.²⁴

Ebenezer obtained an H-1B visa, arrived in the United States on August 4, 2005 and told Varghese that he was available to begin working on August 8, 2005. (Tr. at 33-

²³ This document can be found at <http://www.ssa.gov/pubs/10107.pdf>.

²⁴ This document can be found at http://www.irs.gov/pub/irs-pdf/iw2w3_08.pdf

34; AX-3). Varghese then negated Ebenezer's attempt to begin working by informing him that he could not work with any clients until he obtained a Social Security number. (Tr. at 35). Because he thought he needed a Social Security number before he could work at Itek, Ebenezer never showed up to work at Itek's office. (Tr. at 35-36, 57). Ebenezer first received work on December 12, 2005, some time after he received his Social Security number. (Tr. at 36).

Here, Ebenezer made himself available to work on August 8, 2005. He was not given any work because he did not have a Social Security number. I find Ebenezer's lack of a Social Security number to be an employment-related reason why he did not work, analogous to the lack of a license or permit. Therefore, Ebenezer was in an employment-related nonproductive status that required Itek to pay him. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 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).

Further, the SSA and IRS make it clear that an H-1B employee does not need a Social Security number before he begins work, only evidence that the employee applied for a number. SSA Publication No. 05-10107 (December 2005), "Foreign Workers and Social Security Numbers;" IRS, "2008 Instructions for Forms W-2 and W-3" (Cat. No. 25979S), p. 9. Therefore, whether or not Ebenezer reported to the office is irrelevant because he was in an employment-related nonproductive status. Itek was required to pay Ebenezer his wages due under the LCA. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(6)(ii), (7)(i); *Kutty*, slip op. at 7; *Rajan*, slip op. at 7; *Administrator v. Synergy Systems, Inc.*, ARB No. 04-076, ALJ No. 03-LCA-022, slip op. at 10 (ARB June 30, 2006).

I find Ebenezer entered into employment with Itek on August 8, 2005 and was not paid any compensation until after December 11, 2005. The prevailing wage on Ebenezer's LCA is \$45,000 per year. (AX-1). Therefore, Ebenezer is owed a total of \$15,576.84 in back pay from August 8, 2005 to December 11, 2005.²⁵

December 12, 2005 to December 17, 2006

The next issue involves the amount of payment Ebenezer received from December 12, 2005 to December 17, 2006. (AB at 9; RB). The Administrator argues that from December 12, 2005 to December 17, 2006, Respondent did not pay Ebenezer the required wage rate. (AB at 17). The Administrator asserts that Ebenezer was only paid \$44,474.38, when he should have been paid a total of \$49,141.07. (AB at 17-18). Thus, Ebenezer is owed an additional \$4,666.69. (AB at 18). Respondent claims that Ebenezer was paid an annual salary of \$50,000. (RB). Therefore, Ebenezer was not underpaid, and is not entitled to any back wages for this time period. (RB).

²⁵ I arrive at \$15,576.84 by following Estacio's formula: dividing Ebenezer's \$45,000 prevailing wage by 52 weeks to get a salary of \$865.38 per week; and multiplying the \$865.38 by 18 weeks of missed salary. (Tr. at 68).

Pursuant to 20 C.F.R. § 655.731(c)(1), the required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.

Required wage is defined as the rate of pay which is the higher of:

- (1) the actual wage for the specific employment in question; or
- (2) the prevailing wage rate (determined as of the time of filing the application) for the occupation in which the H-1B nonimmigrant is to be employed in the geographic area of intended employment.

20 C.F.R. § 655.715.

Under 20 C.F.R. § 655.731(c)(2), "Cash wages paid," for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:

- (i) payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;
- (ii) payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS.

Ebenezer's LCA states Princeton, New Jersey as his work location. (AX-1). Both Ebenezer and Varghese testified that Ebenezer was working at JPMorgan in New York City, New York, at this time. (Tr. at 18, 37). Therefore, pursuant to 20 C.F.R. § 655.715, Ebenezer is entitled to the prevailing wage of New York City, New York.

The Administrator presented the prevailing wage for New York City, New York in 2005 to be \$48,214 per year.²⁶ (AX-8). Since December 12, 2005 to December 15, 2006 spans 53 weeks, the total prevailing wage for New York City, New York for this period of time amounts to \$49,141.07.²⁷ (Tr. at 71). Ebenezer's 2006 W-2 Form shows that he was paid \$44,474.38, which includes the hours he worked in December 2005. (AX-6).

Respondent has produced twelve Itek payroll checks to Ebenezer from December 16, 2005 to December 15, 2006. These checks total \$50,387.84. (RX-1).

²⁶ After working at a different location for more than 60 days in a one-year period, Itek would be responsible for filing a new LCA on behalf of Ebenezer at his new work location, New York City, New York in this instance. 20 C.F.R. § 655.735(f)(1). Therefore, I find New York City, New York is the correct prevailing wage area for this time period.

²⁷ \$927.19 per week multiplied by 53 weeks equals \$49,141.07.

However, numerous times, Varghese testified that payroll lags behind the W-2's. (Tr. at 96). Therefore, it is likely that the November 16, 2006 to December 15, 2006 paycheck that was received on January 2, 2007 would show up in Ebenezer's 2007 W-2,²⁸ the way his 2005 final paycheck showed up on his 2006 W-2. (Tr. at 96; RB).

Itek provided Ebenezer's paychecks, which totaled \$50,387.84. (RX-1). Despite the fact that Itek has submitted paychecks totaling an amount in excess of the prevailing wage,²⁹ I am constrained by the regulations to dismiss their facial value because they were not reported to the IRS. 20 C.F.R. § 655.731(c)(2)(ii); Administrator v. Pegasus Consulting Group, Inc., ARB Case Nos. 03-032, 03-033, ALJ No. 2001-LCA-29, slip op. at 11 (ARB June 30, 2005). The only wages reported to the IRS are contained on the 2006 W-2 Form totaling \$44,474.38. The evidence is void of a 2007 W-2 Form or any other evidence supporting that fact that Itek reported any other payments to the IRS.

Therefore, because the 2006 W-2 Form is the only evidence of record that meets the requirements set forth in the regulations – shown on Itek's payroll and reported to the IRS – I find that Itek paid Ebenezer \$44,474.38 for his services from December 12, 2005 to December 16, 2006. As a result, Itek owes Ebenezer \$4,666.69 in back wages – the difference between what he was paid, \$44,474.38, and what he was owed, \$49,141.07.

December 18, 2006 to February 22, 2007

The third issue involves whether or not Ebenezer is entitled to any wages from December 18, 2006 to February 22, 2007. (AB at 9; RB).

Administrator claims that Itek never made a *bona fide* termination of Ebenezer, and therefore Itek is required to pay Ebenezer until he stopped working for them on February 22, 2007. (AB2 at 4-5). At the least, the Administrator argues, Ebenezer is entitled to back wages from December 18, 2006 to February 9, 2007, because Itek did not pay Ebenezer any wages during this time. (AB2 at 6).

Itek's defense is two-fold. First, Itek claims that it terminated Ebenezer from the JPMorgan project on February 9, 2007. (RB). Second, Itek claims that Ebenezer continued working at JPMorgaon past February 9, 2007 in violation of a contract, which resulted in the loss of income and damage to Itek's business. (RB). Therefore, Itek offset its alleged damages caused by Ebenezer with the amount of wages owed to Ebenezer from December 16, 2006 to February 9, 2007. (RB).

As already noted, pursuant to § 655.731(c)(1), the required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as

²⁸ Ebenezer's 2007 W-2 is not part of the record.

²⁹ The checks total \$50,387.84, whereas the prevailing wage for this period is \$49,141.07. (RX-1; Tr. at 71).

compensation for services must be offered in accordance with paragraph (c)(3) of this section.

Required wage is defined as the rate of pay which is the higher of:

- (1) the actual wage for the specific employment in question; or
- (2) the prevailing wage rate (determined as of the time of filing the application) for the occupation in which the H-1B nonimmigrant is to be employed in the geographic area of intended employment.

20 C.F.R. § 655.715.

There are circumstances where wages need not be paid to the H-1B employee. This includes a nonproductive status due to conditions unrelated to employment (touring the United States or an ill relative), the nonimmigrant is rendered unable to work (maternity leave or an automobile accident which temporarily incapacitates the nonimmigrant) or there has been a *bona fide* termination of the employment relationship. 20 C.F.R. § 655.731(c)(7)(ii).

Payment need not be made when a *bona fide* termination occurs. 20 C.F.R. § 655.731(c)(7)(ii). Pursuant to 20 C.F.R. § 655.731(c)(7)(ii):

Payment need not be made if there has been a *bona fide* termination of the employment relationship. DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).

The Administrative Review Board has expounded upon this rule, saying a “*bona fide* termination under the INA [does not] occur simply when an employee receives notice of his or her termination. While notice to the employee is a necessary concomitant to termination of the employment relationship, that alone is not sufficient to end the employer’s obligation to pay the required wages to an H-1B employee. The employer does not effect a ‘*bona fide* termination’ and, therefore, end its obligation to pay the required wages to the H-1B employee unless the employer has also notified the INS, so that the INS can cancel the H-1B employee’s visa.” *Amtel Group of Florida, Inc. v. Yongmahapakorn*, ARB No. 04-087 at 11 (ARB September 29, 2006).

Itek agrees that Ebenezer worked on Itek’s behalf from December 18, 2006 until February 9, 2007. (Tr. at 93-94). From December 18, 2006 to February 9, 2007, Ebenezer worked a total of 288 hours. (AX-9). The prevailing wage rate in New York

City, New York in 2005 was \$23.18 per hour. (AX-8). Therefore, an award for all the hours worked from December 18, 2006 to February 9, 2007 equates to \$6,675.84.³⁰

Ebenezer also worked 64 hours from February 10, 2007 to February 22, 2007. (AX-9). Ebenezer said he spoke with Varghese about terminating his employment at JPMorgan on February 9, 2007, but they never came to an agreement. (Tr. at 49-50, 53-54). Ebenezer wanted notice of the exact date to stop working at JPMorgan, but Varghese never sent Ebenezer a written notice or instructions about his termination. (Tr. at 55-56). Therefore, Ebenezer continued working at JPMorgan past February 9, 2007, and submitted two more time sheets. (AX-9; Tr. at 44-46, 56-57).

The prevailing wage rate in New York City, New York in 2005 was \$23.18 per hour. (AX-8). Therefore, an award for the hours Ebenezer worked from February 10, 2007 to February 22, 2007 equates to \$1,483.52.³¹

Multiple times Ebenezer asked Varghese what day would be his last day working at JPMorgan. (Tr. at 55-56). Varghese never gave Ebenezer a response, so Ebenezer continued to work at JPMorgan until February 22, 2007, when he found a new employer/H-1B sponsor. (Tr. at 56-57).

Itek insists that it terminated Ebenezer on February 9, 2007. (Tr. at 19). However, Itek did not perform all three actions required by the regulations to create a *bona fide* termination of Ebenezer. Itek provided three pieces of evidence to prove it terminated Ebenezer. First, a letter from Varghese notifying SBM – the subcontractor – that Ebenezer’s last day was on February 9, 2007. (RX-2). Second, the fact that Itek forwarded this notification to Ebenezer. (RX-3). Further, on February 12, 2007, Ebenezer e-mailed Itek informing it that he was going to join a new company that could provide him work. (RX-4). Taken together, this evidence does not explicitly establish when Ebenezer was put on notice that his last day at Itek would be February 9, 2007.

Assuming, *arguendo*, Itek timely notified Ebenezer of his termination, Itek still failed to prove that it notified the INS or attempted to pay Ebenezer’s transportation back to his home country.

Itek sent a letter to the US Citizenship and Immigration Services on March 2, 2007, informing it that “Ebenezer is no longer employer with ITEK Consulting effective Feb’2007. Please cancel his H1B with ITEK Consulting Inc..” (AX-5). Therefore, Itek could not have completed this element of a *bona fide* termination until at least March 2, 2007.³²

³⁰ 288 hours multiplied by \$23.18 per hour equals \$6,675.84.

³¹ 64 hours multiplied by \$23.18 per hour equals \$1,483.52.

³² Itek’s letter does not state an exact date for Ebenezer’s termination, but instead says Ebenezer was no longer employed effective “Feb’2007.” (AX-5). The vagueness of Ebenezer’s termination letter can be interpreted to mean either February 9, 2007, February 22, 2007, or any other day in the month of February.

Finally, Itek failed to provide payment for transportation home for Ebenezer. Varghese said he did not need to provide transportation to Ebenezer because Ebenezer was going to continue working in New York City, New York. (Tr. at 95). However, Itek still did not even offer to pay Ebenezer's transportation back to his home country.

I find Itek failed to terminate Ebenezer before February 22, 2007. Ebenezer worked a total of 352 hours on Itek's behalf from December 18, 2006 to February 22, 2007. Thus, Ebenezer is owed \$8,159.36 in back wages for the time he worked between December 18, 2006 and February 22, 2007.³³

Itek asserts a defense that Ebenezer continued working at JPMorgan, which was in violation of Itek's agreement with SBM – Itek's subcontractor. (Tr. at 20-21, 26). Ebenezer's contractual violation allegedly caused Itek monetary damages. (Tr. at 20). Therefore, Itek offset their monetary damages caused by Ebenezer by not paying Ebenezer for the work he performed. (Tr. at 20).

Itek's failure to pay Ebenezer was due to an alleged contractual violation by Ebenezer with SBM – a party with no relationship to the H-1B program. It has been held that Department of Labor's jurisdiction under the INA extends only to employment relationships that arise under, or are terminated pursuant to, the INA's H-1B provisions. See 8 U.S.C. § 1182(n) (1)-(2); 20 C.F.R. §§ 655.705(a)-(b), 655.731, 655.732, 655.845; Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); *Amtel*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 9-10 (ARB Sept.29, 2006). Therefore, although Itek may have a legal action or remedy at law against Ebenezer based upon a separate contract or agreement with SBM, that action is outside the scope of my jurisdiction. As a result, Itek's unilateral decision to offset Ebenezer's wages with the monetary loss he allegedly caused Itek is not a valid defense in this case.

Civil Money Penalty

The final issue is whether or not a \$1,000 fine shall be assessed against Respondent for its failure to cooperate with the Administrator's investigation. (AB at 9; RB). Varghese argues that he cooperated with the Administrator's investigation and provided all the documents he had. (RB). Administrator asserts that Varghese was uncooperative, because he did not provide all the information asked for and lacked communication. (AB at 26-27).

Pursuant to 20 C.F.R. § 655.800(c):

An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. No employer subject to the provisions

³³ 352 hours multiplied by \$23.18 per hour equals \$8,159.36.

of sections 212(n) or (t) of the INA and/or this subpart I or subpart H of this part shall interfere with any official of the Department of Labor performing an investigation, inspection or law enforcement function pursuant to 8 U.S.C. 1182(n) or (t) or this subpart I or subpart H of this part. Any such interference shall be a violation of the labor condition application and this subpart I and subpart H of this part, and the Administrator may take such further actions as the Administrator considers appropriate.

Further, an Administrator may assess civil money penalties for a violation of the requirements of the regulations in this subpart I and subpart H of this part or the provisions regarding public access (§ 655.760) where the violation impedes the ability of the Administrator to determine whether a violation of sections 212(n) or (t) of the INA has occurred or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of sections 212(n) or (t) of the INA. 20 C.F.R. § 655.810(b)(vi).

Under 20 C.F.R. § 655.840(b), an Administrative Law Judge has the authority to affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator. The Administrative Law Judge's authority to review the Administrator's assessment specifically includes a determination of the appropriateness of a civil penalty. See *Administrator, Wage and Hour Division v. Law Offices of Anil Shaw*, 2003-LCA-20 at 10 (ALJ May 19, 2004) (citing *Administrator v. Chrislin, Inc.*, 2002 WL 31751948 (DOLAdm.Rev.Bd.)).

After reviewing the record, I find that Varaghese did not respond promptly to requests by the Administrator, but "opened up his entire records" and gave the Administrator all information and documents in his possession. (Tr. at 17). I do not find that Varghese willfully tried to deny the Administrator any evidence or information. Further, the Administrator agrees that Varghese was cooperative in the beginning of her investigation, and that she eventually found all evidence she needed to conduct her investigation. (Tr. at 75). Therefore, I find the Administrator's assessment of a \$1,000 civil money penalty to be inappropriate in these circumstances.

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondent shall pay back wages to Ebenezer in the amount of **\$15,576.84** for unpaid wages from August 8, 2005 to December 11, 2005;
2. Respondent shall pay back wages to Ebenezer in the amount of **\$4,666.69** for unpaid wages from December 12, 2005 to December 17, 2006;

3. Respondent shall pay back wages to Ebenezer in the amount of **\$8,159.36** for unpaid wages from December 18, 2006 to February 22, 2007;
4. Respondent is not liable for civil money damages.

A

Ralph A. Romano
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within thirty (30) calendar days of the date of issuance of the administrative law judge’s decision. See 20 C.F.R. § 655.845(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. See 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge’s decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 655.840(a).