U.S. Department of Labor

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Issue Date: 23 December 2003

CASE NO.: 2003-LCA-00029

In the Matter of:

DEPARTMENT OF LABOR, ADMINISTRATOR,
WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

I-TECH INNOVATIONS, INC.,
Respondent.

Appearances: Mark V. Swirsky, Esquire — For the Prosecuting Party/Administrator
Bhoop Sehrawat — Pro Se

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. The case involves a complaint by Mohamed Zacki Anwer Arifulla ("Zacki" or "Complainant") filed against I-Tech Innovations, Inc. ("Respondent") with the Department of Labor, Administrator, Wage and Hour Division ("Prosecuting Party" or "Administrator"). The Administrator issued a Notice of Determination on June 20, 2003, and it was filed with the Office of Administrative Law Judges ("OALJ") on June 24, 2003. (ALJX1.)[1] The matter was assigned to me on July 25, 2003. In the Notice of Determination, the Administrator concluded that that Respondent, *inter alia*, committed the following violations: failed to pay wages in violation of 20 C.F.R. § 655.731[2] and required or accepted payment from an H-1B worker in violation of § 655.731(c)(10)(ii). (ALJX1.)

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[1] I held a hearing in this matter in Philadelphia, Pennsylvania on September 17, 2003. The transcript of the 17 September hearing will be cited as "Tr.--." Received into evidence at the time of the hearing were nine Administrative Law Judge Exhibits, 23 Government Exhibits, and one Respondent Exhibit. (Tr. at 8, 9, 23.) The exhibits were marked and will be cited throughout this Decision and Order as follows: "ALJX1-ALJX9," "GX1-GX23," and "RX1."

[2] Unless indicated otherwise, all applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations, and are cited by part or section only.

On July 3, 2003, the Respondent requested a hearing based on the Administrator's determination, in accordance with § 655.820. (ALJX2.) A hearing was held in Philadelphia, Pennsylvania on September 17, 2003. The decision that follows is based upon the testimony at the hearing, all documentary evidence admitted into the record at the hearing, and the parties post-hearing briefs.

I. STATUTORY FRAMEWORK

Under the INA, an employer may hire workers from "specialty occupations" to work in the United States for prescribed periods of time. 8 U.S.C. § 1101(a)(15)(H)(i)(b); § 655.700. These workers are issued H-1B visas by the Department of State upon approval by the Immigration and Naturalization Service ("INS"). § 655.705(b). An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the United States Department of Labor ("DOL") by filing a Labor Condition Application ("LCA") before the worker is given an H-1B visa. 8 U.S.C. § 1182(n). An LCA filed by an employer must set forth, *inter alia*, the wage rate and working conditions for the H-1B employee. 8 U.S.C. § 1182(n)(1)(D); §§ 655.731 and 655.732. Upon certification of the LCA by the 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); § 655.731(c)(7).

II. ISSUES

The issues presented for adjudication are:

(1) whether Respondent violated the Act by failing to pay wages to Zacki between July 14, 2001 and August 11, 2001;
(2) whether Respondent violated the Act by impermissibly withholding wages from Zacki for the H-1B filing fee and deportation;
(3) if so, the appropriate penalty.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statement of the Case

Zacki's Testimony

Zacki testified that he is a software engineer born in India who came to the United States in 1996 for graduate school. (Tr. at 24-25.) He has a degree in computer information systems from Georgia State University. (Tr. at 26.) He worked as a consultant in Atlanta, Georgia until 2001 at which time he posted his resume online and was contacted by Gagan Walia from Apar Info Tech. (Tr. at 26-28.) During a conference call arranged by Mr. Walia, Zacki was introduced to Bhoop Sehrawat[3] who offered Zacki a position with Respondent to work at a

[3] Any reference to Respondent in this Decision and Order should be understood to mean both Mr. Bhoop Sehrawat and I-Tech Innovations, Inc.. (Tr. at 80; GX19; GX20.)

company called Lab Safety and Supply ("LSS") in Janesville, Wisconsin. (Tr. at 27-29.)[4] Under the terms of his agreement with Respondent, Zacki was to receive $65.00 an hour. (Tr. at 31.)

Zacki arrived in Janesville, Wisconsin on April 1, 2001 and began full-time employment at LSS on April 2, 2001. (Tr. at 31-32.) He testified that, although Respondent said he would be paid monthly, he received no paycheck during April, 2001.[5] (Tr. at 32.) When Zacki was not paid by the end of April, he telephoned Respondent several times seeking his paycheck. (Tr. at 32-33.) During these phone conversations, Respondent asked Zacki to sign a modification of the original employment agreement. (Tr. at 33.) He did so on May 9, 2001. (Tr. at 33-34.) He testified that he signed the modification, because he was without pay. (Tr. at 33-34.)[6]

Towards the end of June, the manager at LSS told Zacki that he would be "[r]olling off" on July 13, 2001. (Tr. at 39.) When Zacki told the Respondent he would be finishing his assignment, Respondent told him to send his resume to Mr. Walia who would market him for the next project. (Tr. at 39-40.) At this point, Zacki was living in Wisconsin, and he had told Respondent that he would be leaving Wisconsin for Atlanta two to three days after July 13, 2001. (Tr. at 41-43.) When Zacki asked Respondent whether he had work for him, Respondent said they were looking for work. (Tr. at 43.)

Zacki left Wisconsin on July 20, 2001 having notified Respondent he was "going to Atlanta and going [to] Chicago" and that he was available for work. (Tr. at 45-46.) When Zacki called Respondent seeking his H-1B documents, Respondent refused and said he would give him the documents if he stayed on three to six months after he was rolled off.[7] (Tr. at 46-47.)

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[4] Zacki identified GX4 as a letter sent to him by Respondent offering Zacki employment with Respondent. Included with the letter sent to Zacki was GX13, an employment agreement between Zacki and Respondent.

[5] Zacki testified that Respondent ultimately direct deposited his wages and sent his expenses by check to his Wisconsin address. (Tr. at 44.)

[6] Zacki identified GX5 as the modification, which broke down his $65.00 per hour compensation into wages and expenses. (Tr. at 34-35.) Under the terms of the modification, Zacki was to produce receipts for all his expenses and Zacki would receive $47.00 per hour in wages and up to $18.00 per hour worked in expenses. (GX5.)

[7] GX2 was Zacki's cell phone records from July 30, 2001 to August 8, 2001. (Tr. at 47-48.) The records show several phone calls made to Respondent. The first was made on July 30, at 7:12 p.m.; the second was made on August 6, at 12:26 p.m.; the third was made on August 6, at 10:19; and the last was made on August 7 at 5:51 p.m.. (Tr. at 48-49.) Zacki testified that these calls were made in an effort to get his H-1B documents, which Respondent refused to give him. (Tr. at 49-50.)

Zacki learned that he was terminated from Respondent by letter dated August 11, 2001, which he received on August 16, 2001. (Tr. at 50-51; GX10.)[8] Between July 13 and August 16, 2001, Zacki received no money from Respondent. (Tr. at 51.)

On cross-examination, Zacki stated that he had never seen Respondent before the hearing. (Tr. at 51.) He testified that he signed the employment agreement during his first couple of days at LSS and faxed it to Respondent on April 5, 2001, his first day of work at LSS. (Tr. at 55-57; GX13.) He stated that he was first paid on May 15, 2001, knew that he would be paid monthly, and was paid on the 15th of every month thereafter. (Tr. at 60-61.) He knew, moreover, that his work assignment would only last for four to six months (Tr. at 66), but he expected another work assignment after the LSS project ended (Id.). He stated, "usually wherever we work, we just go to one assignment, and then we move to another assignment, and from there move to another assignment." (Tr. at 68.) Zacki stated, "[t]his is the world of consulting" (Tr. at 66), but also he knew that an H-1B assignment is for a temporary period. (Id.)

Next, Respondent questioned Zacki concerning two letters. (GX20.)[9] Zacki denied receiving the letters but admitted to receiving the checks enclosed with the letters. (Tr. at 77-78.)

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[8] GX10 is a letter from Respondent to Zacki dated August 11, 2001 and mailed to Zacki's Atlanta address. The letter reads as follows:

> The last day you worked for i-Tech Innovations, Inc. was on July 13, 2001. After that date your whereabouts and activities are not known to ITI. This is unprofessional and being without work for last 30 days, renders you out-of-status as per INS regulations.
>
> An intimation to this effect is being sent to INS and you are hereby advised to return to India. I have enquired about your travel arrangements for going back to India. Available flights are on August 17th and 20th, 2001. Please let me know the convenient date so that I can purchase the ticket and mail you accordingly.

(GX10.)

[9] Attached to GX20 were Respondent's responses to the Administrator's interrogatories and request for admissions. Among the responses were two letters dated June 15, 2001 and July 15, 2001 mailed to Zacki's Atlanta address. The June 15 letter explains that Zacki's assignment would end at "the end of your current engagement with our client at Jacksonville [sic], WI" (attached to GX20 as "Exhibit-8") and advises Zacki "to visit us at the office on completing your current assignment" (Id.). The letter also made reference to an attached "[c]heck #1036 dated June 15, 2001 for $3312.00 towards expense reimbursement for the month of May 2001." (Id.) The July 15 letter requests additional information from Zacki with respect to his expense claims and references an enclosed "[c]heck # 1046 dated July 15, 2001 for $3312.00 towards expense reimbursement for the month of June 2001." (Attached to GX20 at "Exhibit-9.")

Zacki also admitted that Respondent called him in August, 2001. (Tr. at 80-81.) When the undersigned asked Zacki whether he got any calls before July 13, 2001, he stated, "[w]hen I was employed at LSS we were in conversation, and I used to call him to let him know that the project is ending, and I would be going back to Atlanta because we were in conversation until July 13th, since I was at work at LSS."[10] (Tr. at 83.) Zacki later admitted that Respondent called him on July 7 and August 8, 2001. (Tr. at 91-92.)

Zacki stated that he was not working for Respondent between July 13 and July 30, 2001 and that the assignment with Respondent ended on July 13. (Tr. at 95.)

Zacki also identified nine receipts attached to GX20 as expenses he incurred. (Tr. at 108.) He admitted to authoring those receipts and did not mean for Respondent to understand them to have been authored by the receiver. (Tr. at 108-110.)

Roberto Quintana's Testimony

Mr. Quintana is an investigator with the DOL Wage and Hour Division with thirteen years experience. (Tr. at 120-21.) He has training as an H-1B investigator. (Tr. at 122.)

He started his investigation of Respondent at the end of June 2002 when District Director John Dumont told him to follow-up on Zacki's complaints. (Tr. at 122-23.) His investigation included interviewing Zacki, the Respondent, and asking the Respondent for anything and everything related to his H-1B employees. (Tr. at 123-24.) He reviewed all of Respondent's H-1B documentation and after completing his investigation made certain recommendations. (Tr. at 124-25.) His recommendations were shared with Respondent in the June 20, 2003 determination letter. (Tr. at 125; ALJX1.)

He discussed two violations. (Tr. at 126.) The first was Respondent's failure to pay the required wage rate for non-productive time between July 14, 2001 and August 11, 2001. (Tr. at 126-27.) The second was illegal deductions for the H-1B filing fee and deportation costs. (Id.)

He also discussed GX17. (Tr. at 130-131.) On this document he computed the average number of hours Zacki worked in a week while employed by Respondent between April 7, 2001 and July 14, 2001. (GX17.) The average was 42.8 hours. (Id.) Using this number, he multiplied Zacki's ETA rate ($28.62)[11] by 42.8 hours for four weeks between July 21, 2001 and August 11, 2001. (Id.) He referred to this as "nonproductive work, called bench time." (Tr. at 130.) The total back wages for these four weeks of bench time was $4899.76. (GX17; Tr. at 133.)

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[10] I find Zacki's response to this simple question, as well as others, to be evasive and confusing.

[11] He identified GX23 as a letter "listing the prevailing wage rates for the job in question and the location in question." (Tr. at 132.) The letter listed the occupation as "Systems Analyst," the location as "Janesville, Wisconsin," and the effective date as "12/21/00." (GX23.) The wage determination is $28.62 per hour. (Id.) He used that rate to compute what Respondent owed Zacki for back wages. (Tr. at 132.)

Mr. Quintana also assessed a $2,010.00 fine and a $735.00 fine. (Tr. at 133.) He assessed the $2,010.00 penalty, because Respondent admitted in an October 25, 2001 letter to withholding this money from Zacki's wages. (Tr. at 134; GX3.) He assessed the $735.00 fine, because Respondent, in the same letter, admitted to withholding $735.00 from Zacki's wages for deportation costs. (Tr. at 134; GX3.) Mr. Quintana also discussed assessing a $500.00 civil money penalty on the basis of the same letter. (Tr. at 135.) He explained the procedure by which the Administrator assesses such a penalty. (Tr. at 135-37.)

During cross-examination, Mr. Quintana stated that he visited Respondent three times. (Tr. at 139.) The first visit occurred on August 2, 2002 at which time he requested certain documents, which Respondent produced at the time of the second visit on August 20, 2002. (Tr. at 139-140.) During this second visit, he learned that Respondent works out of an apartment and that Respondent felt he was exploited by Zacki. (Tr. at 140-41.) He also acknowledged that Respondent had spoken to him about false claims made by Zacki and had provided documents to that effect. (Tr. at 142.)

Respondent questioned Mr. Quintana regarding GX10. (Tr. at 149.) Mr. Quintana construed this letter as a letter of termination. (Tr. at 147-49.) He admitted, however, that on August 2, 2002 when he asked Respondent when Zacki was terminated, Respondent "listed it as July 13th 2001." (Tr. at 150.)

On re-direct, Mr. Quintana discussed GX9[12] and GX10. (Tr. at 157.) He stated that he used these letters as the basis upon which he determined that Zacki was terminated on August 11, 2001. (Tr. at 157-58.)

When the undersigned asked him why he used August 11 as the date of termination over July 13, he explained that he used August 11, because the letters dated August 11, 2001 were the

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[12] GX9 is an August 11, 2001 letter from Respondent to the INS in Nebraska. (GX9.) It reads as follows:

> This has reference to the H1B1 petition for Mohammed Zaki Anwer Arifulla, vide [sic] reference # LIN-01-146-50864. The beneficiary, Mr. Mohammed Zaki Anwer Arifulla is no longer working for i-Tech Innovations, Inc. since July 14, 2001. Also after July 13, 2001 his whereabouts and activities are not known to i-Tech Innovations, Inc. He is without work for last 30 days, rendering him out-of-status as per INS regulations.
>
> It is therefore, requested to revoke his H1B1 status as i-Tech Innovations, Inc. is no longer responsible for his work and conduct after July 13, 2001. I am posting him a letter to this effect (copy attached) at his available address on records advising him to travel back to India. Also INS is requested to take appropriate action as the law demands for his repatriation.

(GX9.)

first letters discussing termination. (Tr. at 158-59.) The undersigned also asked him if GX17 reflected a July 13, 2001 termination and he explained that July 13 is "how far his payroll records go to." (Tr. at 160-61.)

Mr. Quintana was recalled as a rebuttal witness and testified that during the course of his investigation he reviewed the payroll records of Respondent for the period of Zacki's employment. (Tr. at 191.) He testified that he observed an "entry called overpayment/withholding equal to the amount of 2,745." (Tr. at 191.) He testified that the date of that deduction was "August 13 of 2001" and that "when you add the 2,010 H1-B processing fee with the 735 plane ticket, that will give you 2,745." (Id.)

Respondent explained the $2,745.00 entry as an amount "withheld towards the excess payment that has been made to Mr. Zacki already." (Tr. at 192.) He explained it as being "towards the expenses, which he has falsely claimed." (Id.)

Respondent's Testimony

Respondent told his side of the story at the hearing. (Tr. at 164-69.)

Upon cross-examination, Respondent admitted to employing Zacki "between April of 2001, and either July or August of 2001." (Tr. at 169.) He also stated that Zacki gave him expense receipts for April, May, June, and July, 2001 and that he paid him for some of those expenses. (Tr. at 169-70.) He admitted that in August, 2002 when Mr. Quintana asked him for all documents pertaining to H-1B employees, he did not provide the letter attached to GX20 and identified as "Exhibit-9." (Tr. at 172.) Respondent admitted that he first provided that letter to the Administrator in late August, 2003. (Tr. at 173-74.)

On cross-examination, Respondent also discussed his June 15, 2001 letter to Zacki. (Attached to GX20 at "Exhibit-9.") He admitted knowing that Zacki was living in Janesville, Wisconsin "between April 2nd and at least July 13th, 2001" but, nevertheless, sent the June 15th letter to Zacki's Atlanta address. (Tr. at 175.) He, moreover, admitted that he did not provide the letter to the DOL until August, 2003 and did not make any reference to a phone call in his June 15 letter made to Zacki regarding the end of his employment. (Tr. at 176, 181.) Respondent also admitted that he did not have additional work assignments for Zacki after July 13, 2001 but wanted Zacki to come to his apartment in Illinois to discuss job opportunity "ideas." (Tr. at 187-88.)

Respondent also admitted to telling Zacki, in July and August 2001, that his H-1B papers were in process. (Tr. at 188.) The Administrator, however, directed Respondent's attention to GX11 and GX12, which was an INS letter and Notice of Action respectively. (Tr. at 188.) The letter stated that the H-1B petition was "approved by the Service on June 18, 2001" (GX11), and Respondent admitted that when he had the July and August conversations with Zacki, the petition had already been approved (Tr. at 188-89).

When the undersigned asked Respondent why he did not tell Zacki, during the July and August telephone conversations, that his H-1B had been finalized, he explained that he told

Zacki that his H-1B had been approved, but he had not gotten the notice from the INS. (Tr. at 189-90.) When he did get it, he "mailed it to him in December 2001." (Tr. at 190.)

B. Discussion

1. Respondent Did Not Violate the Act By Failing to Pay Wages to Zacki Between July 14, 2001 and August 11, 2001.

The LCA Regulations for Employers using nonimmigrants on H-1B visas require the Employer to pay the H-1B nonimmigrant the required wage rate, cash in hand, free and clear, when due, except for deductions made in accordance with 20 C.F.R. § 655.731(c)(9). § 655.731(c)(1). For salaried employees, wages will be due in prorated installments (*e.g.*, annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly. § 655.731(c)(4). The Regulations also provide:

> If the H-1B nonimmigrant is not performing work and is 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 reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, […] at the required wage for the occupation listed on the LCA.

§ 655.731(c)(7)(i). The Regulations at § 655.731(c)(7)(ii) state:

> If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the non-immigrant 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), then the employer shall not be obligated to pay the required wage rate during that period, *provided that* such period is not subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 *et seq.*) or the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*). Payment need not be made if there has been a *bona fide* termination of the employment relationship. INS regulations require the employer to notify the INS 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)).

§ 655.731(c)(7)(ii).

In this case, the record supports the conclusion that there was a *bona fide* termination of the employment relationship as of July 13, 2001. Zacki knew, before Respondent, that his position at LSS would be "rolled off" on July 13, 2003. (Tr. at 39.) Zacki also knew, before starting the assignment, that his H-1B work was temporary and would only last for four to six months. (Tr. at 66.) Zacki's July 20, 2001 departure from Janesville, Wisconsin for Atlanta,

moreover, reflects that his understanding was the same as Respondent's (*i.e.*, the project was over as of July 13, 2001).

As noted above, I found Zacki's answer to my question concerning phone conversations with Respondent prior to July 13, 2001 to be evasive and confusing. *See supra* n.2. While he represented that "we [Respondent and Zacki] were in conversation until July 13th" (Tr. at 83), he was also clear that Respondent did speak to him on July 7, 2001. Zacki also maintained that it was he who informed Respondent that his work assignment was coming to an end on July 13, 2001, but this is hardly an impressive distinction given his patently clear understanding that "the project is ending" on July 13, 2001. (Tr. at 83.) If anything, Zacki's telling Respondent about the conclusion of his project reflects the peculiarities of this employer-employee relationship. Zacki was an employee of Respondent, but it was LSS for whom Zacki was working. The undersigned views Zacki's termination at LSS as tantamount to a termination by the Respondent.

Furthermore, several documents of record indicate that Respondent made a *bona fide* termination as of July 13, 2001. Respondent's June 15, 2001 letter to Zacki explains that the assignment was coming to an end. (Attached to GX20 as "Exhibti-8.") While Respondent makes no reference to any phone conversations with Zacki in the letter, Zacki himself admitted to speaking to Respondent on July 7, 2001. (Tr. at 92.) Furthermore, in as much as Zacki denied receiving the letters, I find his testimony incredible, because he acknowledged receiving the checks that were included with those letters. (Tr. at 77-78.) Even if I did find Zacki credible in this regard, however, he still admitted to knowing that the project was ending on July 13, 2001 without having received any letter. (Tr. at 83.) An August 11, 2001 letter from Respondent to Zacki similarly explains that the last day that Zacki worked for Respondent was "July 13, 2001." (GX10.) An August 11, 2001 letter from Respondent to INS explains that Zacki has not worked for Respondent "since July 14, 2001." (GX9.) Finally, Respondents payroll records evidence that Zacki was not an employee after July 13, 2001. (Tr. at 161.)

The Administrator suggests that a *bona fide* termination of employment can only be made when an employer notifies INS that the employment relationship has terminated. In as much as the Administrator's brief can be read to make this argument, I disagree. The regulations only state, "[p]ayment need not be made if there has been a *bona fide* termination of the employment relationship." § 655.731(c)(7)(ii). A *bona fide* termination is one that is made "with good faith; honestly, openly, and sincerely." BLACK'S LAW DICTIONARY 177 (6th ed. 1990).

Here, the record supports a conclusion that Respondent was open, honest, and sincere with Zacki concerning the July 13, 2001 end date. While the record suggests that Respondent attempted to find additional work for Zacki after July 13, 2001, there is no evidence that Zacki relied on these representations to his detriment. Zacki left Janesville, Wisconsin for Atlanta almost immediately after his project ended, suggesting he knew he was out of work. His reliance on future work from Respondent seems to be more a product of his understanding of "the world of consulting" than any representations Respondent may have made. (Tr. at 66.) He also did not accept Respondent's invitation to come visit him at his office in Illinois. And while Respondent did not notify the INS of Zacki's termination until August 11, 2001, as noted above, the evidence of record supports a conclusion that Zacki's employment relationship with Respondent was terminated well-before August 11, 2001.

Employers are responsible for paying the salary of H-1B nonimmigrants in nonproductive status due to conditions out of the control of the visa holder. *See* § 655.731(c)(7)(i). Employers, however, are not responsible for paying the salary of the H-1B nonimmigrant where there has been a *bona fide* termination of the employment relationship. *See* § 655.731(c)(7)(ii). Because I find that Respondent made a *bona fide* termination of the employment relationship on July 13, 2001, I find that Zacki is not entitled to back wages between July 13, 2001 and August 11, 2001.

2. Respondent Violated the Act By Impermissibly Withholding Wages From Zacki for the H-1B Filing Fee and for Deportation Costs.

The Regulations state, in part:

> [t]he employer may not receive, and the H-1B nonimmigrant may not pay, any part of the $500 additional filing fee (for a petition filed prior to December 18, 2000) or $1,000 additional filing fee (for a petition filed on or subsequent to December 18, 2000), whether directly or indirectly, voluntarily or involuntarily. Thus, no deduction from or reduction in wages for purposes of a rebate of any part of this fee is permitted.

§ 655.731(c)(10)(ii). The Regulations also recognize "[a]uthorized deductions" from an H-1B employee's wages as those which comply with one of "three sets of criteria (*i.e.*, paragraph (c)(9)(i), (ii), or (iii))." § 655.731(c)(9). The first are deductions required by law. § 655.731(c)(9)(i). The second are those "authorized by a collective bargaining agreement" or those "reasonable and customary in the occupation and/or area of employment." § 655.731(c)(9)(ii). The third are those which meet five requirements. § 655.731(c)(9)(iii)(A)-(E).

(a.) The Filing Fee

The record supports a conclusion that Respondent impermissibly withheld wages from Zacki for the H-1B filing fee. First, in an October 25, 2001 letter, Respondent admitted to withholding "H 1B Visa filing/processing cost [of] $2010.00 and the deportation cost $735.00" from Zacki's wages. (GX3.) Second, Mr. Quintana observed an entry marked overpayment/withholding in Respondent's payroll records for Zacki in the amount of $2,745.00. (Tr. at 191.) While this alone does not reflect an inappropriate deduction, as Mr. Quintana observed, if you subtract $735 from $2,745, you get $2,010. (Id.) While Respondent maintained that this money was withheld to offset false expense claims made by Zacki (Tr. at 142, 107-113), I find Respondent's testimony in this regard to be incredible given the admission he made in the October 25, 2001 letter. Accordingly, I find that Respondent violated the Act by impermissibly deducting $2,010 from Zacki's wages.

(b.) Deportation Costs

I find that the Respondent made an impermissible deduction when it withheld the $735.00 from Zacki's wages. As noted, in the October 25, 2001 letter, Respondent admitted to

withholding "the deportation cost [of] $735.00" from Zacki's wages (GX3.) Respondent argues that this money was actually withheld to offset impermissible expenses claimed by Zacki. As noted above, however, his testimony in this regard is incredible given Mr. Quintana's testimony and Respondent's admission in the October 25, 2001 letter. Second, even if this expense were permissible, it is far from clear how that deduction falls within the ambit of § 655.731(c)(9)(i), (ii), or (iii) or outside of the ambit of § 655.731(c)(10)(unauthorized deductions). The only way it might be authorized is if it were "end-of-employment travel," § 655.731(c)(9)(iii)(C), but even if it fit into that peg, there is no evidence that Zacki authorized the deduction in writing, *see* § 655.731(c)(9)(iii)(A). Accordingly, I find that Respondent violated the Act by impermissibly deducting $735.00 from Zacki's wages.

3. Respondent Was Properly Assessed a $500.00 Civil Money Penalty.

The Regulations state:

> Any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and in the event of an investigation, will result in back wage assessment (plus *civil money penalties* and/or disqualification from H-1B and other immigration programs, if willful).

§ 655.731(c)(11)(emphasis added). The Regulations also state that the Administrator may assess civil money penalties in "[a]n amount not to exceed $1,000 per violation for: […] [p]ayment by the employee of the additional $500/$1000 filing fee (§ 655.731(c)(10)(ii))." § 655.810(b)(1)(v). In doing so, the Administrator must consider the violation and other relevant factors. *See generally* § 655.810(c).

As noted above, the Administrator established that Respondent made unauthorized deductions from Zacki's wages for the filing fee and deportation costs. On the basis of those violations, the Administrator assessed a $500.00 civil money penalty. As Mr. Quintana noted, and found herein, in doing so, he followed the procedures under "655.810." (Tr. at 136.) This is the lower end of the scale for Respondent's violations. Accordingly, I find that the $500.00 civil money penalty is appropriate.

ORDER

Respondent is HEREBY ORDERED:

- to pay the Administrator the sum of $2745.00, representing the total of wage deficiencies, for distribution to the Complainant noted herein;

- to pay the Administrator the sum of $500.00 in civil money penalties.

A

RALPH A. ROMANO
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calender days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the