U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 May 2004

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In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party,

Case No.: 2003-LCA-00020

v.

LAW OFFICES OF ANIL SHAW,
Respondent.
.....

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act H-1B visa program, 8 U.S.C. Sec. 1101 (a)(15)(H)(I)(b) ("Act") and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I, 20 C.F.R. § 655.700 et seq.

The Administrator of the Wage and Hour Division ("Administrator") issued a determination letter pursuant to 20 C.F.R. § 655.815 to the Law Offices of Anil Shah, PLLC, ("Respondent") owned by Anil Shah, Esquire, on April 14, 2003, asserting the following: that Respondent willfully failed to pay required wages to Meer Rahman, an H-1B non-immigrant alien; willfully misrepresented a material fact on the Labor Condition Application ("LCA"); required or accepted from the H1-B worker payment or remittance of the additional $500/$1000 fee for filing an H-1B petition; and failed to maintain a copy of the documentation the Respondent used to establish the 'prevailing wage.' The determination letter also assessed civil penalties against Respondent for the first three violations and ordered Respondent to pay back wages.

On April 25, 2003, the Respondent contested the Administrator's determination and requested a hearing in accordance with 20 C.F.R. § 655.820. A hearing was held in New York City, New York, on November 3, 2003. A post-hearing brief was received from the Administrator on January 28, 2004, and from the Respondent on February 3, 2004. The Administrator filed a response to the Respondent's Brief on February 4, 2004, objecting to the submission of Meer Rahman's application for Alien Employment Certification after the close of the record. After consideration of the objection an *Order Denying Request to Consider Document Produced Post-Hearing* was issued on March 8, 2004.

The decision in this matter is based on the testimony at the hearing, all documentary evidence admitted into the record at the hearing, and the post-hearing submissions by the parties,

not including the evidence excluded from Respondent's Brief as set forth in the aforementioned Order.[1]

Statutory Framework

The H-1B visa program permits employers to temporarily employ non-immigrants to fill specialized jobs in the United States. The Act requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage, in order to protect U.S. workers and their wages. Under the Act, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must receive permission from the U.S. Department of Labor ("DOL") before the alien may obtain an H-1B visa. 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). To receive permission from the DOL, the Act requires an employer seeking permission to employ an H-1B worker to submit a Labor Condition Application ("LCA") to the DOL. *See* 8 U.S.C. §1182(n)(1); *In the Matter of Eva Kolbusz-Kline v. Technical Career Institute*, Case No. 93-LCA-004, 1994 WL 897284, at *3 (July 18, 1994). Only after the employer receives the Department's certification of its LCA may the INS approve an alien's H-1B visa petition. 8 U.S.C. § 1101(a)(15)(H)(1)(B); 20 C.F.R. § 655.700.

The Act provides that the LCA filed by the employer with the Department must include a statement to the effect that the employer is offering to an alien provided status as an H-1B non-immigrant wages that are at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is higher, based on the best information available at the time of filing the application. 8 U.S.C. § 1182(n)(1)(A).

The Act directs the Department of Labor to review the LCA only for completeness or obvious inaccuracies. Unless the Department finds that the application is incomplete or obviously inaccurate, the Department shall provide the certification described by the Act within seven days of the date of the filing of the application. 8 U.S.C. § 1182(n)(1) and 20 C.F.R. § 655.740.

The Department has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation of the required wages. *See* 20 C.F.R. Part 655 Subpart H. 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 and § 655.855.

[1] The documentary evidence admitted at the hearing includes Administrative Law Judge Exhibit 1 (ALJx. 1), Administrator's Exhibits (Ax.) 1-14, and Respondent's Exhibits (Rx.) A, D, E, and F. The transcript of the hearing is cited as "Tr." and by page number.

Statute of Limitations

At the hearing, Respondent raised the issue that this case may be based on a complaint filed untimely in violation of the statute of limitations. *Tr. 7-8*. Section 655.806(a)(5) of the Regulations requires a complaint to be filed no more than twelve months after the latest date on which an alleged violation was committed. 20 C.F.R. § 655.806(a)(5). In this case, the complaint does not bear a date-stamp from the Department of Labor showing when it was received. *ALJx.* 1. However, Mary Dodds, the Regional Enforcement Coordinator for the U.S. Department of Labor, Wage and Hour Division, testified that her Office received the complaint on either April 2 or April 3, 2002. *Tr. 131, 169*. Dodds' testimony on this issue is not contradicted and is credible.

In his post-hearing brief, Respondent argues that the last alleged violation occurred on April 1, 2001, because that is "the date for which the back wage calculation stops." *Respondent's Brief*, at 12. The back wage calculation was based, in part, on information gained from pay stub details and time cards that were turned over to the Department of Labor. *Tr. 156*. During the course of its investigation, the Administrator was never given records for the last three weeks of Rahman's employment, which may be why the back wage calculation stops on April 1, 2001. *Tr. 145*. Nevertheless, it is Rahman's actual termination date that provides a clear date of the cessation of any wage violation. Respondent conceded that Rahman was terminated on April 26, 2001. *Tr. 10*. Thus, the cut-off date for filing a timely complaint in this matter would be any time prior to April 26, 2002. Therefore, the complaint filed in this matter did not violate the statute of limitations at 20 C.F.R. § 655.806(a)(5). Accordingly, Respondent's objection is overruled.

Statement of the Case

The Respondent is the Law Offices of Anil Shah, PLLC, which is owned and managed by Anil Shah, Esquire. The Law Offices of Anil Shah practice predominantly immigration law.

Meer Rahman is an attorney-at-law originally from Bangladesh. *Tr. 16*. He attended law school at CUNY Law School at Queens College, in Flushing, New York, and graduated in May 1999. *Tr. 17*.

In December of 1998, Rahman interned without pay at the Respondent's law office, for four days during his winter vacation from law school. *Tr. 17*. Rahman started working again for Respondent sometime in May 1999.[2] *Tr. 18*. At that time, Rahman had a one-year optional practical training visa, which was included under his F-1 foreign student visa. *Tr. 18*. Rahman assisted with legal work in the area of immigration law, but did not perform the work of an attorney until after he was admitted to the bar in December 1999. *Tr. 33, 57-58*.

Respondent signed an LCA on December 16, 1999 declaring under penalty of perjury that he would pay the higher of the prevailing wage or the actual wage to one attorney. *Ax. 11*. The LCA executed by the Respondent stated that the prevailing wage for the attorney position was $52,707.20 per year and that the position was part time. *Ax. 11*. The Respondent sponsored

[2] Rahman began his employment in May 1999, but then took June and July off to prepare for the bar exam. *Tr. 34*.

a Petition for a Nonimmigrant Worker (H-1 Petition) for Rahman on January 11, 2000, for the position of attorney-at-law. *Ax. 1.* The Petition stated that Rahman would be a part time employee working 21 hours a week and would be paid $26,450 per year. *Ax. 1.*

Respondent and Rahman entered into an employment agreement on January 10, 2000, which provided that Rahman would be paid $35,000 per year, or the prevailing rate, whichever was higher. *Ax. 3; Tr. 23*. After the contract was executed, Rahman was paid at the rate of $16.82 per hour, which equates to approximately $35,000 per year. *Tr. 25*. The following November, 2000, Respondent required Rahman to sign a Rider to the employment contract that lowered his salary from $35,000 to $21,424. *Ax. 4*. Rahman testified that he was forced to sign the Rider or his employment would have been terminated when he left for a long-planned trip to Bangladesh in December 2000, to visit his family. *Tr. 27-29*. Rahman testified that he feared that his employment and immigration status would be terminated if he did not sign the Rider. *Tr. 31*. Rahman's hourly wage decreased to $10.30 after he signed the Rider in November, 2000. *Tr. 47; Ax. 8*.

Rahman's job was terminated on April 26, 2001 because the influx of legal work slowed. *Tr. 32-33*. After his termination, Rahman went to work for the law firm of Wilson & Associates. *Tr. 122*. Rahman now works at the law firm of Christopher and Associates, under an INS approved H1-B petition, and has been there since May 2002. *Tr. 120-21*.

Rahman testified that he was required to reimburse Respondent $610, the amount that Respondent had paid to the Immigration Department for Rahman's visa application. *Tr. 127, 128*. Rahman paid the amount in cash and was not given a receipt. *Tr. 127, 128*.

I. Misrepresentation on LCA of Part-time Work

Rahman consistently worked full-time, more than forty hours each week for Respondent. *Tr. 33-34*. He testified that from May 2000 through the end of his employment he worked an average of fifty hours per week, and he worked more than sixty hours a week for the four months that he worked in 2001. *Tr. 33-34*. Rahman testified that he never worked as few as twenty-one or thirty hours a week. *Tr. 34*. Respondent used a punch card system to keep track of the hours that Rahman worked, and provided payroll stubs to Rahman with his paycheck. *Tr. 43-48; Ax. 7; Ax. 8*. Rahman was paid weekly. *Tr. 51; Ax. 5*.

Respondent does not dispute that Rahman worked the hours reflected on the time cards and payroll documentation found in the record at Ax. 7 and Ax. 8. Instead, Respondent disputes the *type* of work Rahman completed during his work week. Respondent argues that only a portion of the hours reflected by Rahman's time cards designate hours that he worked as an attorney, and the rest of the hours specified by the time cards are indicative of work spent on non-attorney duties. *Respondent's Brief*, at 2.

Rahman testified that his work was the work of an attorney. *Tr. 106*. He filed LCAs, H-1B and L-1 petitions, handled asylum-based hearings, real estate closings, and matrimonial cases. *Tr. 33, 58, 85-91*. The January 11, 2000 letter Respondent submitted in support of his H-

1B Petition shows that Respondent was petitioning for an employee to perform solely legal services. *Ax. 1*. The letter states, "we wish to employ Mr. Rahman as an Attorney-at-Law," and the letter continues to list the specific duties that an attorney-at law in Respondent's firm would perform. *Ax. 1*. The January 11, 2000 letter also describes Rahman as "undoubtedly a Specialist of distinguished merit and ability belonging to this specialty occupation." *Ax. 1*. Also, the letter concludes that "[t]he approval of the petition and the change of his status from F-1 to H-1B are necessary so that we may continue to use the knowledge and expertise of Mr. Rahman in providing quality service to our clients." *Ax. 1*. This letter shows that Respondent intended to employ Rahman solely in an attorney capacity.

The January 10, 2000 Employment Agreement states that the Respondent is undertaking the H1-B application process for Rahman because it "will allow him to stay and work in the United States and to prepare and train him to handle complex legal immigration work for his assignment." *Ax. 3*. The Employment Agreement makes no mention of clerical non-attorney work. The Rider to the Employment Agreement that the Employer added to alter the salary in the Employment Agreement did not alter Rahman's job assignments. *Ax. 4*. Respondent had the opportunity to clarify the employment relationship or Rahman's expected employment duties. Respondent's failure to do so implies that the Employment Agreement correctly memorializes Rahman's duties, that is, the understanding that Rahman would be performing 'complex legal immigration work.'

Additionally, Rahman was working on a full-time basis at the time Respondent filed for the LCA on his behalf. *Tr. 34*. During the week before the approval of the LCA, May 15, 2000 through May 21, 2000, the timesheets show Rahman worked 49.27 hours. *Ax. 7*. Once the LCA was approved, Rahman's hours did not decrease. For example, the timesheets show that during the work week of May 21, 2000 through May 27, 2000, Rahman worked 48 hours. *Ax. 7*. Respondent was paying Rahman based on his recorded time spent working, which was a full-time work week. *Ax. 5; Ax. 7; Ax.8*. There is no evidence in the record that Respondent intended for Rahman to work less than full-time once the LCA was approved. Therefore, I find that Respondent made a misrepresentation on the LCA by stating that the intended employment was only part-time.

Moreover, the employment by Respondent of Rahman to perform the work of a part time paralegal or secretary would be contrary to Respondent's LCA. The LCA did not authorize employment of a part-time paralegal or clerical worker and thus such employment would have been a circumvention of Respondent's obligation to hire U.S. workers for such work.

II. Willful Misrepresentation of a Material Fact

The filing of an LCA by an Employer which misrepresents a material fact is a violation of the Act. 20 C.F.R. § 655.805(a)(1) (noting that Federal criminal statutes provide penalties of up to $10,000 and/or imprisonment of up to five years for knowing and willful submission of false statements to the Federal Government). "Upon determination that an Employer has made a willful misrepresentation of a material fact on the LCA, a civil money penalty may be imposed that is not to exceed $5,000 per violation. 20 C.F.R. § 655.810(b)(2)(ii). Willful failure is

defined by 20 C.F.R. § 655.805(c) as "a knowing failure or a reckless disregard with respect to whether the conduct was contrary to the Act."

The Respondent made a willful misrepresentation on his LCA by asserting on the LCA that the hours worked by Rahman would be part time. This misrepresentation enabled Respondent to pay Rahman significantly lower gross wages and still meet the required prevailing yearly wage. The misrepresentation is determined to be willful for the following reasons.

First, Respondent was fully aware of the number of hours that the Rahman was working. Rahman recorded his hours every day and turned in his time cards to Respondent every week. *Tr. 39-41*. Shah signed Rahman's paycheck every week and kept a copy of his pay records. *Ax. 5; Ax. 8; Tr. 39-41*.

Second, Respondent produced false payroll records to the Administrator during the investigation. *Ax. 9*. Those records show Rahman working less than forty hours a week and receiving an hourly wage rate of $24.22. *Ax. 9.* In contrast, Rahman's pay stub details reveal that Rahman consistently worked forty hours or more per week and received $16.82 per hour until December 2000 when his hourly rate was reduced to $10.30 in accord with the November 13, 2000 Rider. *Ax. 8*. Mary Dodds, the Department of Labor investigator, never received any response to her request that he explain the difference between the two sets of payroll records. *Tr. 138*.

Respondent attempts to explain the two sets of payroll records in its post-hearing brief. Respondent's brief argues that the second set of payroll records were necessary to show non-attorney hours. *Respondent's Brief*, at 7, n.2. This explanation is not only inconsistent with his LCA but it is not supported by any contemporaneous records such as billing records that would show Rahman's time being separated between attorney and non-attorney duties.

Respondent is a law firm that holds itself out as one that specializes in immigration. *See Ax. 1* (Respondent's January 11, 2000 letter describing his firm as one with a heavy emphasis on immigration matters including H1-B visa petitions). A law firm specializing in this type of immigration law must, or should, have an acute knowledge of the Regulations at issue here, in order to advise its clients. Hence, I find Respondent's misrepresentation on the LCA as knowing, willful, and designed solely for the purpose of fraudulently circumventing required wage requirements, as discussed *infra*.

III. Failure to Pay Required Wage

The Act requires that an LCA filed by an employer must include a statement that the employer will offer to aliens during the period of authorized employment as an H-1B non-immigrant, wages that are at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specified employment or the prevailing wage level for the occupational classification, whichever is greater. 8 U.S.C. § 1182(n)(1)(A). The definition of actual wage is the wage rate paid by the employer to all individuals with experience and qualifications for the specific employment in question at the

place of employment. *See* 20 C.F.R. § 655.715. Section 655.731(a)(1) provides that where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B non-immigrant by the employer. The higher of the prevailing wage rate or the actual wage is referred to by 20 CFR § 655.731(a) as the required wage rate.

The prevailing wage rate indicated on the LCA signed by Respondent is $52,707.20.[3] *Ax. 11*. The actual wage rate indicated on the payroll records was $35,000 and $21,424.[4] *Ax.8*. The salary based on the actual wage rate is far lower than the prevailing wage, hence the prevailing wage of $52,707.20 is the required wage. *See* 20 C.F.R. § 655.731(a). Therefore, Respondent is deemed to have underpaid the H-1B employee, and back wages are in order.

Because the wage on the LCA was based on a yearly salary rather than an hourly wage, and the payroll records are sporadic, back wages have been calculated based on the average weekly wage, rather than an hourly basis.

A. Duration of Employment under the LCA

Rahman is due the required wage amount for his employment during the period of May 20, 2000 to April 26, 2001. The period of May 20, 2000 through April 26, 2001 equates to forty-eight (48) weeks and four (4) days of employment.[5] Rahman took an unpaid vacation from December 23, 2000, until January 23, 2001, and returned to work on January 25, 2001. *Tr. 116*. That equates to four (4) weeks and three (3) days of unpaid leave. Also, the record shows that Rahman was absent from work for three (3) days during the week of June 4, 2000. *Ax. 7; Tr. 148-49*. Taking into consideration the unpaid days off, Rahman is entitled to his required wages for forty-three (43) weeks and three (3) days.

B. Required Wage

The prevailing wage rate indicated on the LCA signed by Respondent is $52,707.20, and as discussed above, it is the required wage. Thus, the weekly prevailing wage rate is $1,013.60.[6] This is computed by dividing the prevailing rate of $52,707.20 by 52 weeks (the amount of weeks in one year). Working for forty-three (43) weeks and three (3) days, at a rate of $1,013.60 per week, would correlate to required wages in the amount of $44,192.96.[7]

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[3] The yearly wage listed on the H1-B petition is $26,450.00, which is approximately half of the prevailing wage. *Ax. 1*. Presumably, Respondent listed half of the amount because he indicated that the position was "part-time." However, the representation that the employment was "part-time" was incorrect, as discussed *supra*.

[4] Rahman's paystub details indicate that he was paid $16.82 per hour (based on $35,000 per year) until December 3, 2000 when his hourly rate fell to $10.30 per hour (based on $21,424 per year). *Ax. 4, Ax. 5, and Ax. 8*.

[5] Because the amount in the LCA was based on a yearly salary rather than an hourly wage, the work week is considered to have five business days for the purpose of these computations.

[6] The weekly rate of $1,013.60, based on annual salary, was also computed by the Administrator. *Tr. 148; Ax 12*.

[7] 43.6 weeks multiplied by the rate of $1,013.60, equates to $44,192.96. Also, this amount can be arrived at by multiplying 43 weeks by the weekly rate of $1,013.60 ($43,584.80), and adding it to three days' wages ($608.16) --

C. Actual Wages

Rahman testified that he earned $35,976.23 in the year 2000, and $8,097.70 during 2001. *Tr. 25*, *Tr. 111, Ax. 6.*

Because Rahman's employment was not authorized under the LCA in the year 2000 until May 20, 2000, Rahman's actual income for time worked has been apportioned between the time Rahman worked in the year 2000 before, and after, the LCA came into effect, i.e., January 1, 2000 through May 19, 2000 and May 20, 2000 through December 23, 2000 (his last day of employment in 2000).[8]

The amount earned in 2000 after the LCA took effect has been computed by prorating Rahman's earned income that year. The first computation required is the actual earned weekly rate. This weekly rate was attained by dividing the amount earned, $35,976.23, by the number of weeks worked from January 1, 2000 through December 23, 2000, which was 50 weeks and 2 days. This equals an average actual weekly income of $713.81.[9] Then, one must multiply the weekly rate by the number of weeks worked after May 20, 2000 (which is 30 weeks and 2 days). This results in a computation that Rahman earned approximately $21,699.82[10] from May 20, 2000 through December 23, 2000.[11]

The total amount of wages actually earned under the LCA must be computed by adding the wages actually earned under the LCA in 2000 ($21,699.82) to the wages actually earned in 2001 ($8,097.70). Thus, for the period of May 20, 2000 through April 26, 2001, Rahman actually earned **$29,797.52**.

D. Salary Offset

The required wage must be offset by the wages actually paid to Rahman. *See* 20 C.F.R. § 655.810(a). The difference between the required wage during the period of employment under the LCA (May 20, 2000 through April 26, 2001 = $44,192.96) and the wages actually earned during the course of that time ($29,797.52) is **$14,395.44**.

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the amount of three days' wages ($608.16) was arrived at by dividing the weekly rate of $1,013.60 by five (number of business days in a week) to get the daily rate of $202.72, and multiplying it by 3.

[8] The Administrator's calculations for the year of 2000 computed the amount actually earned starting on February 20, 2000. *See Administrator's Brief*, at 14; *Rx. F*. However, there is no evidence in the record that Rahman was not working between January 1, 2000 and February 20, 2000. Rahman testified that he worked for Respondent full time since August 1999 until his vacation to Bangladesh in December 2000. *Tr. 34, 116*. Therefore, my computations take into consideration that Rahman worked prior to February 20, 2000, in the year 2000.

[9] $713.81 = $35,976.23 divided by 50 weeks and 2 business days (50.4).

[10] $21,699.82 = $713.81 (weekly rate) x 30.4 (weeks worked).

[11] This conversely means that Rahman earned approximately $14,276.20 from January 1, 2000 through May 19, 2000.

E. Back Wages Due

Therefore, the amount of $14,395.44 represents the amount of back wages due to Rahman based on full-time employment.

Respondent argues that back wages are not owed to Rahman because the LCA only authorized employment for part-time work. Therefore, if Rahman was working full-time, this would be outside the scope of the LCA, and unenforceable. *Respondent's Brief*, at 2.[12] Respondent is correct that the Administrator can only enforce the terms stated on the LCA. *See* 20 C.F.R. § 655.700 (a)(4). However, the declaration of "part-time" employment on the LCA has been determined to be a willful misrepresentation, as discussed *supra*. It has been determined that in reality, Respondent intended for Rahman to be a full-time employee. I find that Respondent's representation that the employment was part-time was motivated by an intention to pay less than the required wage. Respondent can not escape its financial responsibility by benefiting from its fraudulent statement on the LCA. Therefore, the LCA must be enforced in its corrected form, and Respondent's argument is rejected.

IV. Civil Money Penalty

A maximum civil penalty of $5,000 may be assessed by the Administrator for willful failure to pay required wages and for willful misrepresentation of a material fact. *See* 20 C.F.R. Sec 655.810(b)(2)(i) and (ii). 20 C.F.R. Sec 655.810(c) requires that the Administrator consider the type of violation committed and other relevant factors in assessing civil money penalties. The factors which may be considered include: 1) Previous history of violations; 2) the number of workers affected by the violation or violations; 3) the gravity of the violation or violations; 4) efforts made by the employer in good faith to comply with the Act; 5) the employer's explanation of the violation; 6) the employer's commitment to future compliance; and 7) the extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

The aforesaid factors have been considered. Anil Shah, who owns and operates Respondent, is an officer of the court. Thus his willful misrepresentation of his LCA in order to deprive the alien of promised and legally mandated wages is particularly grave. This is Respondent's first offense, however its attempted justification, submission of false payroll records, was pretextual and unlawful.

[12] Respondent relies on *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137 (2002), to support its argument that Rahman's work above the LCA mandated part-time employment is prohibited. *Respondent's Brief*, at 2. However, Respondent's reliance is misplaced. *Hoffman* holds that the National Labor Relations Board, as an adjudicative forum, does not have the authority to award or enforce back pay to illegal aliens. *Hoffman*, at 149.

The Administrator assessed Respondent's civil penalty at $2,500 for willful failure to pay required wages and $2,500 for willful misrepresentation of a material fact. The assessment was set at 50% of the maximum in light of the size of Respondent's firm. *Tr. 168-69*.

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." 20 C.F.R. § 655.840(b) provides for a review of assessed civil penalties by the ALJ, whose regulatory authority is broadly drawn. An ALJ's scope of authority to change the Administrator's assessment is "untrammeled" under the regulations and specifically includes a determination of the appropriateness of the assessed civil money penalty. *Adminitrator v. Chrislin, Inc*., 2002 WL 31751948 (DOLAdm.Rev.Bd.). Thus an ALJ has the discretion to determine whether the civil money penalties assessed by the Administrator are appropriate in light of the controlling statutory and regulatory factors.

Although I believe that Respondent's status as a law firm and the deliberate nature of the misrepresentation deserves the maximum penalty permitted by law, I acquiesce to the Administrator's opinion on the size of Respondent's penalty. Therefore, I assess a civil money penalty in the amount of $5,000, that is, $2,500 for willful failure to pay required wages and $2,500 for willful misrepresentation of a material fact.

V. Debarment

The Administrator requests that Respondent be disqualified from approval of any petitions filed by, or on behalf of, the employer for two years, as authorized by 20 C.F.R. § 655.810(d)(2). *Administrator's Brief*, at 11-12. This penalty is clearly warranted in light of the willful nature of Respondent's misrepresentation of its LCA. Respondent shall be disqualified from filing new H-1B petitions for a period of two years pursuant to Section 655.810(d)(2).

VI. Impermissible Acceptance of the Filing Fee

The employer may not receive, and the H-1B non-immigrant may not pay, any part of the $500 additional filing fee or $1000 additional filing fee, whether directly or indirectly, voluntarily or involuntary. 20 C.F.R. § 655.731(c)(10)(ii). The Administrator may asses a civil money penalty not to exceed $1,000 for the payment by the employee of the additional $500/$1,000 filing fee.

Rahman testified that Respondent required him to pay the additional filing fee for his H-1B petition. *Tr. 127-29*. Rahman stated that he paid the Respondent $610 in cash for the visa fee. *Tr. 127-28*. Dodds testified that amount paid by Rahman was $500 for the filing fee, and the extra $110 represented a business expense that Respondent incurred with the filing of the petition. *Tr. 158*. The Administrator sought recovery of only the $500 fee contemplated by the Regulations, because Rahman did not have any further documentation. *Tr. 158.*

Respondent produced a copy of the check for $610 it sent to INS as proof that Respondent actually paid the fee to INS. *Rx. E.* However, as testified by Rahman, the INS would not have accepted the fee from him. *Tr. 128*. Respondent's check does not discredit the

testimony of Rahman that he actually reimbursed Respondent for the $610 filing fee. Therefore, based on Rahman's credible testimony, he is entitled to be reimbursed $610 from Respondent.

Based on Respondent's status as a law firm specializing in immigration law, as discussed *supra*, it should be assessed the maximum civil penalty possible. However, in consideration if the size of Respondent's firm, the civil penalty is reduced by half, and Respondent is assessed a civil money penalty in the mount of $500.

VII. Failure to Maintain a Copy of the Documentation Used to Establish Prevailing Wage

The Regulations require that the employer develop and maintain documentation sufficient to meet its burden of proving the validity of the "prevailing wage" for the occupation for which the H-1B worker is sought. 20 C.F.R. § 655.760(a); *see also* 20 C.F.R. § 655.731 (b)(1). This documentation must be made available to DOL upon request. *Id.*

Investigator Dodds testified that respondent was unable to produce the documentation that established Rahman's prevailing rate. *Tr. 133, 162-63, 165.* Dodds was able to confirm that Respondent requested a prevailing wage rate from the New York State DOL, and it was faxed back to Respondent on December 10, 1999. *Tr. 164-65; Ax. 14*.

Respondent's inability to produce documentation establishes a violation of 20 C.F.R. § 655.760(a). However, the inability to produce this documentation does not warrant the imposition of a civil money penalty. Accordingly,

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondents shall pay back wages to Meer Rahman in the amount of **$14,395.44**;

2. Respondent shall reimburse Meer Rahman the expenses associated with the petition filed on his behalf, in the amount of **$610**;

3. Respondent shall pay to the Department of Labor, in accordance with 20 C.F.R. § 655.810 (f), civil penalties for willful misrepresentation of a material fact on the LCA, willful failure to pay required wages, and willful acceptance of the additional $500/1,000 filing fee, in the amount of **$5,500**; and

4. Respondent is disqualified from filing for H-1B petitions for the duration of two years, as set for by 20 C.F.R. § 655.810(d)(2).

A

Thomas M. Burke
Associate Chief 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, D.C. 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within thirty calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.