U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 August 2004

CASE NO.: 2004-LCA-00033

In the Matter of:

MICHAEL J. SOROKINE,
Prosecuting Party,

vs.

SURGEWORKS, L.C.,
Respondent,

Appearances: Thomas R. Barton, Esquire
For the Prosecuting Party

Trystan Smith, Esquire
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

INITIAL DECISION AND ORDER

INTRODUCTION

This proceeding arises out of a determination issued by the Administrator, Wage and Hour Division, Employment Standards Administration of the U.S. Department of Labor ("Administrator") under the enforcement provisions of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1101 *et seq.* relating to labor condition applications for H-1B visas. It results from a request for a hearing filed by Michael J. Sorokine, the Prosecuting Party ("Complainant"). The hearing in this case was held on July 7, 2004, in Salt Lake City, Utah. The Complainant and counsel for both parties appeared and participated in the hearing.

For the reasons set forth below, the Administrator's Determination is AFFIRMED.

PROCEDURAL BACKGROUND

This proceeding began on June 19, 2003, when the Complainant filed a report with the Wage and Hour Division alleging that the Respondent, SurgeWorks, L.C., had violated the provisions of the H-1B non-immigrant worker program. (ALJ 2.)[1] On May 17, 2004, the Administrator issued a determination finding that the Respondent violated the H-1B provisions and was liable to the Complainant for back wages of $13,692.14. (ALJ 1.) The Administrator ordered the Respondent to pay the back wages owed in installments over a 3-year period. The Complainant disagreed with the Administrator's decision as to the back pay amount and objected to the payment schedule agreed to by the Administrator and Respondent and timely filed a request for a hearing before the U.S. Department of Labor's Office of Administrative Law Judges ("OALJ").

ANALYSIS AND FINDINGS

H-1B Worker Program

The Immigration and Nationality Act of 1952 ("INA"), as amended, defines various classes of aliens who are not considered "immigrants" under the U.S. immigration law and who may enter the United States for prescribed periods of time for prescribed purposes under various types of visas. 8 U.S.C. § 1101(a)(15). The Immigration and Nationality Act of 1990, Pub. L. 101-649, 104 Stat. 4978, amended the INA to create a program to allow a class of non-immigrant aliens, known as "H-1B workers," entry to the United States on a temporary basis to work in "specialty occupations," or as fashion models of distinguished merit and ability. 8 U.S.C. § 1101(a)(15(H); 20 C.F.R. § 655.700(c)(1).

The H-1B program has limitations. There are restrictions on the number of visas issued in any fiscal year and a maximum six-year period of admission for the authorized H-1B visa holder. 8 U.S.C. § 1184(g). The process for hiring an H-1B worker is laid out in detail in 20 C.F.R. Part 655, Subparts H and I. It requires an employer who wants to employ a non-immigrant worker to submit a Labor Condition Application ("LCA") to the U.S. Department of Labor ("DoL") for certification that certain criteria have been met. Once the employer obtains the DoL certification, the employer can submit a non-immigrant visa petition to the Immigration and Naturalization Service ("INS") so the H-1B visa can be issued for the worker. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. The non-immigrant worker is then admitted into the United States on a temporary basis under an H-1B visa.

The H-1B visa program was amended several times in subsequent legislation to add additional protections for U.S. workers. On October 21, 1998, the American Competitiveness and Workforce Improvement Act, Title IV of Pub. L. 105-277, 112 Stat. 2681, added a statutory requirement that the employer had to pay wages during an H-1B worker's non-productive time if the non-productive time was due to a decision by the employer. 20 C.F.R. § 655.731(c)(7)(i). The employer is relieved of this requirement only if the worker's non-productive time is due to conditions unrelated to employment, such as a lay-off. This includes conditions that take the

[1] At the hearing, two exhibits, ALJ 1 and ALJ 2, were marked and admitted into evidence as ALJ exhibits. The Complainant's exhibits are identified in this decision as "CX", and the Respondent's exhibits are identified as "RX."

worker away from his/her duties voluntarily or render the worker unable to work, such as temporary medical incapacities, unless the absence is subject to payment under the employer's own benefit plan or other statutes such as the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.* 20 C.F.R. § 655.731(c)(7)(ii). An employer who fails to pay an H-1B worker for work-related non-productive time is liable to that worker for the back wages.

Factual Background

The Respondent is a Salt Lake City consulting and staffing firm for the technology industry that helps technology employers fill vacant positions on their staff and provides consultants when the employers need temporary help for projects. If the Respondent successfully fills a vacant position for an employer, the employer pays the Respondent a commission equal to 20% of the new employee's annual salary. (HT,[2] p. 98.) The Respondent also employs technology trained consultants on its own staff and provides those consultants to employers who are seeking temporary staffing. A consultant's time is billed to the employer by the Respondent who then pays the consultant on an hourly or salary basis, depending on the individual consultant's contractual agreement with the Respondent.

The Complainant, who was born in 1971, is a Russian citizen who came to the United States in 1992 to pursue a one-year course of study at Brigham Young University in Salt Lake City, Utah. (HT, p. 14.) He changed to a degree program and earned a bachelor's degree in business administration from Brigham Young University in 1996 with a specialization in information systems. In April 2001, he was working at NextPage, but was circulating his resume to seek other employment. (HT, p. 97.) In April 2001, his resume came to the attention of Helen Bero, a recruiter for the Respondent, who was trying to fill a position for Howard Schultz & Associates ("HSA").[3] (HT, p. 97.) Ms. Bero contacted the Complainant about the position with HSA. Their contact ended unsuccessfully when HSA withdrew the requisition for the position. In late April or early May 2001, the Complainant started working under a H-1B visa for Digital Options as a web application developer. (HT, p. 17.) Ms. Bero contacted the Complainant again in July 2001, when HSA renewed the requisition. (HT, p. 98.) At that time, Ms. Bero sent the Complainant to HSA for the first of two interviews in a two-interview selection process. After the first interview, HSA decided that they wanted the Complainant to work for them and advised Ms. Bero that they wanted to hire the Complainant. At the time Ms. Bero sent the Complainant to HSA for his interview, neither HSA nor Ms. Bero knew that the Complainant was working in the United States under a H-1B visa. (HT, pp. 20, 99.) The Complainant did not inform Ms. Bero during their initial contact that he was not a U.S. citizen and could not work without a valid visa. (HT, pp. 99-100.)

HSA learned of the Complainant's visa status after it decided to hire him. After learning that the Complainant was not a U.S. citizen and could not work without a visa, Tina Moretz, the account manager at HSA, contacted Ms. Bero and demanded to know why they had not been informed of the Complainant's work status before they interviewed him. (HT, p. 99.) When

[2] References to "HT" are to the hearing transcript.

[3] In April 2001, the company that later became Howard Schultz & Associates was known as Lowery. Lowery was purchased by Howard Schultz & Associates some time after April 2001, but it later merged with PRG, a competitor, and became known as PRG Schultz. (HT, p. 110.) For the sake of continuity, this one employer will be referred to as "HSA."

asked why he had not revealed his work status to her, the Complainant pointed out to Ms. Bero that she had not asked about his status. (HT, p. 100.) HSA wanted the Complainant to work for it but refused to apply for the H-1B visa because it was against its policy to sponsor foreign workers. (HT, p. 100.) HSA was the Respondent's number one client, and the Respondent was anxious to please HSA. (HT, p. 99.) The Respondent already had several consultants working on assignment at HSA, so it decided that the solution was for it to complete the H-1B paperwork to have the Complainant become its employee so he could work for HSA as a consultant. (HT, p. 100.)

In August 2001, before signing a contract to work for the Respondent, the Complainant and Ms. Bero had discussions about whether the Complainant would be an hourly or salaried employee. Ms. Bero offered him the option of being salaried at $70,000 per year or being paid an hourly rate of $37. (HT, p. 32.) The Complainant and Ms. Bero discussed the differences between the two pay options. Ms. Bero suggested that since the Complainant tended to work overtime and did not take vacations, it might be more financially advantageous for him to elect to be an hourly employee. The Complainant agreed with her and decided to become an hourly employee for the Respondent. (HT, p. 33.) At the time of these discussions in August 2001, Ms. Bero expected HSA to have at least 40 hours of work for the Complainant for a year and was not concerned about any possible down time. (HT, p. 109.)

After the Complainant agreed to work on an hourly basis, the Respondent offered the Complainant a 6-month employment contract. (HT, p. 66.) This was its standard contract term. (HT, pp. 107, 181.) The Complainant asked that his employment contract with the Respondent be for a period of at least 18 months, explaining that his request was based on suggestions by his immigration attorney.[4] (HT, p. 68.) The Respondent agreed to the 18-month contract, which it had never used before, to make it easier for the Complainant to get his Green Card. (HT, p. 181.) On August 21, 2001, the Complainant and Jill Johnson, the Respondent's representative, signed a contractual agreement which provided that the Complainant would work for the Respondent as a full-time hourly paid employee for a period of 18 months. The Contract stated that the Complainant would be paid based on hours billed to the client. (CX 1; HT, p. 69.) The contract also provided that the Respondent would help the Complainant get his Green Card. (CX 1.)

On the same day, the Respondent gave the Complainant a written conditional offer of employment which provided that the Complainant would work for the Respondent full-time as a Programmer Analyst/Web Developer at an hourly rate of $37, contingent upon the Complainant's acceptance of the offer and the issuance of a H-1B visa. (CX 2.) The offer of employment provided that as a SurgeWorks employee, the Complainant "will be scheduled to work at least a 40-hour week for the duration of eighteen (18) months" as specified in an attached Schedule A or "as asked by SurgeWorks." The Schedule A that was attached stated that the Complainant would be working for Howard Schultz & Associates as a Programmer Analyst/Web Developer at an hourly rate of $37. It indicated an approximate commencement date of August 23, 2001, and an approximate completion date of February 23, 2003. Both the Complainant and Ms. Johnson signed Schedule A indicating their respective acceptance of the terms outlined in Schedule A. (CX 2.)

[4] At the time of these events, the Complainant was working with an immigration attorney to get his Green Card.

On August 22, 2001, Dane Falkner, Respondent's owner[5] and president, signed an LCA application (CX 3) indicating that the Respondent wanted to employ a web developer in Salt Lake City at an hourly rate of $37 for the period from August 24, 2001, through April 10, 2003. The application also indicated that the prevailing wage at an additional work location in Salt Lake City was $27.85.

The Complainant started working as Respondent's consultant assigned to HSA on August 27, 2001, doing web application development, programming, and software design. (HT, pp. 28, 30.) Shortly after the Complainant started his assignment at HSA, Mr. Falkner was advised by Respondent's attorney that Mr. Falkner should notify the Complainant that as an hourly employee he would not be paid for any "down time." Mr. Falkner did so, and the Complainant became concerned and asked to be changed to salaried status. The Complainant and Respondent were unable to reach an agreement about converting the Complainant to salaried status, and the Complainant remained an hourly employee. In November 2001, the Complainant began looking for other employment because of concerns that he might not get full time work from the Respondent. (HT, p. 46.)

In December 2001, HSA notified Mr. Falkner by e-mail that it would not need the Complainant on a full-time basis beginning the end of January 2002. (HT, p. 187.) After learning that the Complainant's hours at HSA were going to be reduced, Ms. Bero, with the Complainant's cooperation, began looking for alternative employment for him. Ms. Bero referred the Complainant for interviews with some potential employers who wanted to hire directly, but those interviews were unsuccessful. She also explored leads as to possible employers that the Complainant gave her, but those efforts were similarly unsuccessful.

The Complainant worked a minimum of 40 hours per week at HSA through the end of January 2002. (HT, p. 38.) Beginning February 2002, HSA started reducing his hours due to lack of work as a result of the downturn in the economy. When the Complainant's work hours were reduced below 40 hours per week, the Respondent paid him only for the hours he actually worked and did not offer him additional hours of work to provide him with 40 hours of work per week. (HT, pp. 38, 44.)

As an hourly employee, the Complainant was required to pay for half of the cost of his group health insurance. When his hours were reduced to 20 hours per week, the Respondent picked up the Complainant's share of the health insurance premiums to ensure that he would have health insurance coverage. (HT, p. 53.) Respondent continued to pay the Claimant's entire health insurance premium until March 1, 2003. (HT, p. 54.)

In March 2002, Mr. Falkner presented the Complainant with a revised Schedule A which memorialized the reduction in hours the Complainant would be working at HSA. The revised Schedule A stated that effective March 4, 2002, the Complainant's assignment with PRG Schultz, the successor to HSA, was being reduced to approximately 20 hours per week. (HT, p.

[5] Though there are other owners, Mr. Falkner owns 80% of the company. (HT, p. 204.)

191; CX 6; RX 3.[6]) The Complainant refused to sign the revised Schedule A. (HT, pp. 90, 192, 225.)

Ms. Bero's job searches were unsuccessful, as were the Complainant's. On July 3, 2002, Mr. Falkner wrote the Complainant and informed him that while the Respondent continued to search for work for him, it had work available for him to do on its own system and offered to pay him $27.85 per hour to do the work. (RX 1.) The Complainant took the assignment and worked directly for the Respondent for approximately 10 hours at the $27.85 hourly rate. After this work ended, the Complainant stopped returning Ms. Bero's phone calls to his cell phone about possible job leads and assignments. (HT, p. 47.)

In July 2002, the Complainant was offered employment with Affiliated Computer Services, Inc. ("ACS") located in Sandy, Utah. ACS submitted a new H-1B application for him, and he started working for them on August 3, 2002, as a full-time salaried employee. (HT, p. 47.) ACS paid him a salary of $60,000 and provided him with health insurance benefits. (HT, p. 62.)

Mr. Falkner, who owned an 80% interest in SurgeWorks, had the authority to hire and fire employees. (HT, p. 146.) When SurgeWorks lost contact with the Complainant, he assumed the Complainant had quit and did not instruct Ms. Bero or Ms. Johnson to formally terminate the Complainant's employment. (HT, p. 197.) He did not instruct anyone to prepare paperwork for the Complainant's personnel file documenting that the Complainant had quit. Mr. Falkner failed to notify the INS that the Complainant had quit his employment with Respondent, and he did not stop payments on the Complainant's group health insurance premiums. (HT, p. 197.)

The Administrator's Findings

The Complainant filed his report on June 19, 2003, alleging that the LCA requirements had been violated because he was not paid for his non-productive time. On May 17, 2004, after an investigation was completed, the Administrator issued a determination finding that Respondent had failed to pay the Complainant wages for his non-productive time for the period from February 9, 2002, to August 3, 2002. The Administrator did not assess any civil money penalties but awarded $13,692.14 in back wages to the Complainant. The Administrator also ordered the Respondent to pay the back wages to the Administrator pursuant to the terms of an installment agreement signed by Mr. Falkner on May 4, 2004. The installment agreement provided for an initial payment of $4,000 in May 2004, to be followed by monthly payments of $323.07 or $323.08 through April 2007. (ALJ 1.)

Complainant's Objections

The Complainant objects to the Administrator's determination that he is not owed any back wages after August 2, 2002. He argues that he remained an employee until the end of his contract and is entitled to the difference in wages between what he actually earned with ACS and the wages he would have earned while working for the Respondent. He also objects to the

[6] The parties offered different versions of the revised Schedule A. Neither party was able to offer an explanation as to why there were different versions of this document. The Complainant's version, however, was on original letterhead. The essential provision in it, the reduction to 20 hours per week, was the same in both.

installment payment of the back wages owed to him, arguing that the regulations require that the entire amount be paid at one time.

Respondent Was Required to Pay the Complainant for Non-Productive Time

As mentioned earlier, the INA was amended in 1998 to specifically require employers to pay their H-1B workers for any non-productive time caused by a decision of the employer or lack of work. The implementing regulations in 20 C.F.R. § 655 require an employer to pay a full-time H-1B worker during the worker's non-productive time unless the H-1B worker was non-productive due to conditions unrelated to employment which make the worker unable to work. 20 C.F.R. § 655.731(c)(7). Respondent does not deny that the Complainant was only paid for the hours that he actually worked and that he was not paid for his non-productive time before August 3, 2002.

The dispute is over whether the Complainant is entitled to any back wages after August 2, 2002, when he started working for ACS. Respondent argues that the Complainant's employment stopped when he halted contacts with them and started working at ACS. The Administrator apparently agreed with the Respondent and ended the back pay liability on August 3, 2002. The Complainant, however, argues that he did not quit and was not terminated, so he remained an employee of the Respondent's until the end of his 18-month contract period.

Resolution of this dispute turns on whether the Complainant remained an employee of the Respondent's, and if so, whether he is entitled to any back pay after he started working at ACS.

The Complainant Was A SurgeWorks Employee Until His Contract Ended

A H-1B employer is not required to pay wages to a H-1B worker if there has been a *bona fide* termination of the employment relationship. 20 C.F.R. § 655.731(c)(7). The Respondent never terminated the Complainant's employment and never told him he had been terminated. (HT, p. 197.) It is undisputed that no paperwork was ever prepared showing that the Complainant had been terminated or had resigned from his job with the Respondent. (HT, pp. 165, 197.) Furthermore, the INS was never informed that the Complainant's employment with the Respondent ended before the scheduled end date identified in the LCA, though Respondent was required to do so by 8 C.F.R. § 214.2(h)(11). Moreover, SurgeWorks continued to pay the Complainant's share of the group health insurance premiums, which were only available to SurgeWorks employees. Finally, the Respondent did not send him a COBRA notice telling him that his employee health benefits had ended until February 3, 2003. (HT, pp. 167, 168.)

I find, therefore, that the Complainant remained an employee of SurgeWorks until his contract ended. The Respondent treated him as an employee by continuing to pay for his health benefits, and it never notified the INS that the Complainant's employment ended before the term specified in the LCA. 20 C.F.R. § 655.731(c)(7)(ii).

Respondent Is Not Liable for Back Wages After August 2, 2002

As discussed earlier, an employer is not required to pay wages to a H-1B worker for non-productive time unless the non-productive time is due to a decision by the employer for work-related reasons, such as lack of work. There is no dispute that the Complainant never worked for

the Respondent in any capacity after his July 2002 direct assignment with the Respondent. The Respondent asserts that it is not liable for any back wages to the Complainant after August 2, 2002, because the Complainant made himself unavailable for work by failing to remain in contact with the Respondent.

The Complainant asserts that he told Ms. Bero in mid-July 2002 that he found a full-time job with ACS but that he remained interested in working full time for the Respondent if a position was found for him. (HT, p. 49.) He testified that he told Ms. Bero he would quit his new job if she found a full-time assignment for him. Ms. Bero, in contrast, testified that the Complainant never told her that he had found a full-time job and that she contacted him in early August 2002 about a one-week assignment with the Utah Valley Community College, but the Complainant told her he was not interested because he had some job interviews scheduled. (HT, pp. 135-6.) The Complainant denies that he ever turned down any work offered to him. (HT, p. 45.)

Ms. Bero also testified that except for one phone conversation in January 2003, she had no contact with the Complainant after July 2002 because the Complainant never returned any of her numerous calls to his cell phone where she left voice mail messages asking him to call her back. Ms. Johnson similarly testified that she had problems contacting the Complainant in July and August. She testified that between mid-July and mid-August 2002, she called the Complainant once a week at least four times and left voicemail messages asking about his time cards but the Complainant never returned her calls. (HT, p. 161.)

After carefully weighing the testimony of these witnesses, I have concluded that the Complainant's testimony is less than credible. Specifically, I do not find credible the Complainant's claim that he told Ms. Bero in July 2002 that he found full-time employment with ACS. The Respondent's actions were inconsistent with those of an employer who knows that a full-time employee has found full-time employment with another employer. The Respondent continued to treat the Complainant as an employee by continuing to pay for his group health insurance premiums and by failing to notify the INS that the Complainant was no longer employed. The Complainant admitted that ACS was providing him with health benefits. I find it implausible that the Respondent would continue to pay for the Complainant's share of his group health insurance premiums if he was getting those benefits from another employer. If the Complainant had told Ms. Bero that he had found full-time employment with ACS, it would have been logical for her to ask him whether he still needed his health insurance benefits from the Respondent and for the Respondent to discontinue those benefits when told he didn't. Mr. Falkner stated that he would have stopped paying for the Complainant's health benefits in August 2002 if he had known that the Complainant had other health insurance. (HT, p. 200.)

I also find it improbable that the Complainant would have told Ms. Bero that he wanted to continue working for the Respondent if the Respondent could find him a full-time assignment. He testified that he started looking for another job in November 2001. (HT, p. 46.) Though there was conflicting testimony as to when the Respondent and Complainant learned that HSA was not going to need the Complainant on a full-time basis, none of the dates were as early as

November 2001.[7] The Complainant started looking for another full-time job on his own before he even learned that the full-time status of his assignment to HSA was in jeopardy. He did so after being told by Mr. Falkner that he was only going to be paid for the hours he actually worked. He testified that he became concerned about whether or not he would have full-time work with the Respondent. (HT, p. 46.) By the time the Complainant found the job with ACS, both he and Ms. Bero had been searching unsuccessfully for months to find him a full-time assignment or job.

The Complainant's commencement of his job search in November 2001, while he was working full time at HSA and before learning that his hours were going to be reduced, showed his lack of confidence in the Respondent's ability to provide him with full-time work on a long term basis. By July 2002, there were only 6 months left on his contract with the Respondent, so the Respondent was only obligated to find him work for another 6 months. He had just accepted a full-time job with an employer, presumably, for an indefinite term. These facts make it highly unlikely that he would have told Ms. Bero that he would quit a permanent full-time salaried job with health benefits for a full-time assignment with the Respondent that would be temporary in nature. This, combined with the fact that the Respondent continued to pay for the Complainant's group health insurance premiums, leaves me hard pressed to believe the Complainant when he says that he told Ms. Bero he had found a full-time job but still wanted to work for the Respondent.

On the issue of credibility, Ms. Bero testified that in early August, she offered the Complainant a one-week job assignment that the Complainant turned down because he said he had interviews he needed to prepare for. (HT, p. 135.) The Complainant denied ever turning down an assignment. Again, I find Ms. Bero's testimony more credible. Ms. Bero provided very specific details about this contact. She explained that it stood out in her mind because of the unusual circumstances surrounding the job opening. She testified that she specifically remembered that contact because she and her husband were on a retreat when she learned about the possible assignment. She had to take time out from the retreat to make phone calls to track down information about the assignment before offering it to the Complainant because she learned about it on a Friday, and the employer wanted the consultant to start on Monday. (HT, p. 136.) Since the Complainant started his full-time permanent job with ACS on August 3, 2002, there was no reason for him to jeopardize his new job by delaying his first day of work to accept a one-week temporary assignment with the Respondent. Ms. Bero's detailed recollection of the incident, coupled with the Complainant's obvious motivation for rejecting the assignment, make her testimony more credible. I find that she made the one-week assignment offer to the Complainant at the beginning of August 2002 and that the Complainant rejected it.

The Complainant attempted to show that Ms. Bero's testimony was biased because she is the second cousin of Mr. Falkner's wife. (HT, p. 141.) I am not persuaded that this familial relationship was sufficient to influence Ms. Bero's testimony. Ms. Bero's testimony about the Complainant's failure to return her calls to his cell phone is consistent with that offered by Ms.

[7] Mr. Falkner testified that he received an e-mail in December 2001 about the reduction in hours (HT, p. 187), but Ms. Bero testified that she learned of it in January 2002 (HT, p. 116.) The Complainant testified that he learned of it in December 2001 (HT, p. 41.)

Johnson, who has no ownership interest in SurgeWorks and no familial relationship to anyone connected to SurgeWorks.

In view of the Complainant's overall lack of credibility, I find more credible Ms. Bero's and Ms. Johnson's testimonies that the Complainant stopped returning their phone calls in August 2002. By failing to return Ms. Bero's phone calls, the Complainant effectively made himself unavailable for work with the Respondent. Thus, his non-productive time after August 2, 2002, was not due to a decision by the employer. Accordingly, the Respondent is not liable to the Complainant for any wages he might have earned with the Respondent after August 2, 2002.

The Administrator Had Authority to Allow Installment Payments

After finding that the Respondent owed the Complainant $13,692.14 in back wages for the non-productive hours before August 3, 2002, the Administrator ordered the Respondent to pay the back wages in installment payments over a three year period pursuant to an agreement signed by Mr. Falkner as President of SurgeWorks. (ALJ 1.)

The Complainant objects to the installment payments, arguing that the regulations do not permit installment payments. Mr. Falkner testified that payment of the Complainant's back wages in one lump sum would pose a financial hardship and that he provided financial records to demonstrate such financial hardship to the Administrator. (HT, p. 226.) On cross-examination, he testified that Respondent cannot make a lump sum $9,000 payment to the Complainant. (HT, pp. 226-7.) He further stated that the Respondent cannot draw on its line of credit because its credit line is at its maximum and has been locked by the bank. He added that his efforts to get an additional credit line, and even a credit card, have been unsuccessful. (HT, p. 227.)

20 C.F.R. § 655.810(f) provides, in pertinent part, that:

> The civil money penalties, back wages, … determined by the Administrator to be appropriate are immediately due for payment or performance upon assessment by the Administrator, or upon the decision by an administrative law judge where a hearing is timely requested. ... The remittance shall be delivered or mailed to the Wage and Hour Division office in the manner directed in the Administrator's notice of determination. ... The payment or performance of any other remedy prescribed by the Administrator shall follow procedures established by the Administrator. Distribution of back wages shall be administered in accordance with existing procedures established by the Administrator. (emphasis added)

The Complainant argues that the language in the first sentence of 20 C.F.R. § 655.801(f) mandates that the entire amount of back wages owed him is immediately due and that the Administrator has no discretion to deviate from that language by allowing Respondent to make installment payments. He acknowledges that the last sentence of the section provides that the Administrator is to administer the distribution of the back wages, but argues that that sentence refers to distribution of the back wages, not payment of the back wages by the employer.

I am not persuaded by the Complainant's argument. The Complainant has not identified any statutory provision that mandates that the back wages be paid immediately in one lump sum. The Administrator is entrusted with the responsibility for determining the back wages owed,

collecting the back wages, and distributing them to the affected employees. This section of the LCA regulations also specifically states that the employer must make the payments to the Administrator "in the manner directed in the Administrator's notice of determination." 20 C.F.R. § 655.801(f)

While the first sentence of this section requires the employer to pay the back wages upon their assessment, the later requirement that the wages be paid "in the manner directed in the Administrator's determination" gives the Administrator the discretion and authority to dictate the specific details as to exactly when and how the back wages are to be paid. With the results of the investigation and any financial information an employer may submit, the Administrator is certainly in the best position to assess when and how the back wages should be paid. In this instance, after considering all factors, the Administrator determined installment payments to be the best methodology.

The Complainant's interpretation of the section would preclude not just installment payments after a determination by the Administrator, but also installment payments in a case resolved before an ALJ. In practice, ALJs have often approved settlements of H-1B appeals which involve installment payments of back wages. *See e.g. Administrator, Wage and Hour Division v. Software Technology Greenhouse, USA*, 2000-LCA-7 (ALJ decision, April 4, 2001); *Administrator, Wage and Hour Division v. Micronesian Sales Co.*, 1995-LCA-6 (ALJ decision, July 5, 1995).

In assessing the merits of the Complainant's argument that the Respondent must pay his back wages immediately, I looked to how back wages and penalties are handled under the Fair Labor Standards Act ("FLSA"). The penalty language in the implementing regulations for the FLSA, which is found at 29 C.F.R. § 580.18, is virtually identical to that found at 20 C.F.R. § 655.810(f). The FLSA regulation at 20 C.F.R. § 580.18 states, in pertinent part that:

> "[w]hen the determination of the amount of any civil money penalty provided for in [29 C.F.R. Part 580] becomes final in accordance with the administrative assessment thereof, or pursuant to the decision and order of an Administrative Law Judge in an administrative proceeding as provided in § 580.12, … the amount of the penalty thus determined is immediately due and payable…." (emphasis added)

Both of these regulations contemplate immediate payment of the penalties and back wages. Also, collection and distribution of the funds owed under both regulations are administered by the Administrator. Under the FLSA, the Administrator has often agreed to installment payments for back wages and penalties despite the regulatory language requiring immediate payment. The existence of such installment payment agreements is reflected in decisions in civil contempt actions sought by the Administrator where an employer has failed to make the installment payments under a FLSA settlement agreement. *See e.g. Brock v. Scheuner Corp.*, 841 F.2d 151 (6th Cir. 1988); *Marshall v. Casto*, 1978 WL 1686 (S.D. Ohio 1978).

Where an employer is in financial difficulties and the Administrator has determined that immediate payment of the back wages could jeopardize the employer's ability to stay solvent, it is reasonable for the Administrator to establish a payment schedule. Installment payments of

FLSA back wages were specifically approved by the Second Circuit in *Donovan v. Soveriegn Security, Ltd.*, 726 F.2d 55 (2nd Cir. 1984). *Donovan* involved an employer who claimed that payment of pre- and post-judgment interest on back wages owed to its employees would create a financial hardship for it and asked that it not be required to pay interest on its back wage liability. The trial judge agreed and eliminated pre- and post-judgment interest from an earlier FLSA back wage award and ordered installment payments. The Secretary of Labor appealed. The Second Circuit found the judge had erred when he eliminated the interest owed to the employees, but it endorsed the installment payment that was ordered, stating:

> "… the judge was correct in thinking that it would be a Pyrrhic victory to force the company out of business, so that it could not **pay** even the **back wages** and current employees would lose their jobs. But the proper way to avoid this calamity is to formulate a management payment schedule, not to extinguish part of the debt." (emphasis in original)

Donovan v. Sovereign Security, Ltd., 726 F.2d at 58.

In this instance, the Administrator, after reviewing the Respondent's financial records, has made a determination that installment payments are appropriate. I find that the Administrator has the authority under the regulations to order the payment of the back wages in installments if the Administrator deems it to be appropriate.

CONCLUSION

In summary, the Respondent was required to pay the Complainant wages for his non-productive time during the term of the Complainant's contract, which ended February 23, 2003. However, the Complainant's non-productive time after August 2, 2002, was not due to an employer condition related to employment. Thus, the Respondent is not required to pay the Complainant any back wages for the period beginning August 3, 2002. Furthermore, the Administrator had the authority to order the Respondent to make his back wage payments in installments.

ORDER

Accordingly, the Administrator's decision is AFFIRMED, and the Complainant's appeal is DENIED.

A

JENNIFER GEE
Administrative Law Judge

NOTICE OF REVIEW:

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 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 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.