U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 April 2008

CASE NO.: 2007-LCA-00006

In the Matter of

RAFAEL G. MORALES TOIA
Prosecuting Party,

v.

GARDNER FAMILY CARE CORP.,
Respondent

and

ADMINSTRATOR, WAGE AND HOUR DIVISION
Party-in-Interest.

Appearances

Rafael G. Morales Toia
Pro Se

Christine Brigagliano, Esq.
Van Der Hout, Brigaliano & Nightingale, LLP
For Respondent

Before: Gerald M. Etchingham
Administrative Law Judge

DECISION AND ORDER

This matter arises out of a determination 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, 8 U.S.C. § 1101 *et seq* (the "Act"). It results from a request for a hearing filed by Rafael G. Morales Toia, Prosecuting Party ("Complainant").

PROCEDURAL BACKGROUND

In August 2006, Complainant filed a complaint with the Wage and Hour Division alleging that Respondent Gardner Family Care Corp. ("Respondent") had violated provisions of the H-1B non-immigrant worker program. TR at 23. On January 30, 2007, the Administrator issued a determination finding that no violation had occurred. *Id.* Complainant disagreed with

the Administrator's conclusion, and by letter dated February 15, 2007, he timely requested a hearing before the U.S. Department of Labor's Office of Administrative Law Judges ("OALJ").

A hearing on this matter was held on May 16 and 17, 2007, in San Francisco, California. Complainant appeared at trial and proceeded in *pro se*. Respondent was represented by Christine Brigagliano, Esquire, of Van Der Hout, Brigaliano & Nightingale, LLP. At the hearing, Complainant's exhibits ("CX") 1-36 and 38-42, Respondent's exhibits ("RX") 1-10, 12-28, and 30-31, and Administrative Law Judge exhibits ("ALJX") 1-7 were admitted into evidence. TR at 26-28, 31, 104, 351, 355, 378. Complainant, Cecily Zazueta (Supervisor), Nadir DeLima (co-worker), Ana Lilia DeLeon-Gonzalez (Program Director), Judy DeLeon (Supervisor), and Jose Becerra (Human Resources Director) testified at trial. In addition, Complainant submitted the June 7, 2007, deposition testimony of Frederico "Rick" Ramirez, (co-worker, union steward), which is admitted as CX 43.

On June 6, 2007, Complainant filed a request for leave to file an additional exhibit. On June 7, 2007, Respondent objected. On June 8, 2007, I issued an order denying Complainant's request as untimely, irrelevant, and for failure to show good cause for admitting the proposed additional exhibit in violation of the terms of my pre-trial order.

Complainant filed a closing brief on August 9, 2007, which is hereby admitted into evidence as ALJX 8. Respondent filed a closing brief on August 6, 2007, which is hereby admitted into evidence as ALJX 9.

STIPULATIONS

At the hearing, the parties stipulated to the following:

1. On February 6, 2001, Complainant entered the U.S. in F-1 status to pursue a Master's degree in counseling.
2. In April 2001 Complainant enrolled in a Masters of Arts In Counseling Psychology Degree program at John F. Kennedy University ("JFK"), Orinda, CA.
3. On December 10, 2001, Complainant submitted an application for employment with Respondent. In his application Complainant stated the reason for leaving his most recent employment was "My M.A. degree in the U.S." He informed Respondent that he was a graduate student at JFK.
4. On January 7, 2002, the Santa Clara County Department of Mental Health Services sent a letter to Respondent stating that Complainant was eligible to fill a position as a Mental Health Rehabilitation Specialist ("MHRS").
5. On January 22, 2002, Respondent filed an H-1B petition with the U.S. Immigration and Naturalization Service ("INS") on behalf of Complainant using premium processing. *See* RX 5 at 1. It was approved on January 24, 2002, and was valid from January 31, 2002 through October 31, 2004. *See id*.
6. On January 28, 2002, Respondent offered Complainant a position as a Mental Health Rehabilitation Specialist ("MHRS") Level II with a starting annual salary of $39,284.00. The wage offered was the prevailing wage based on Respondent's union contract with Local SEIU 715.

7. From February 2002 through January 2005 Complainant was employed by Respondent as an MHRS.
8. On August 28, 2002, Complainant received a three percent increase per union contract to $40,463.00 annually. He remained an MHRS Level II.
9. On June 9, 2003, Complainant received a written warning and a Progressive Discipline Form is completed for his personnel file. Reasons given: "Verbal warning given for lack of proper documentation (progress notes), missing service team meeting and poor productivity, absent without notifying supervisor."
10. On September 1, 2003, Complainant receives a two percent pay increase per the union contract. His salary increased to $41,272.00 annually. "Changed from a Level II to a Step 1."
11. On February 4, 2004, Complainant received a performance review that states "Overall, Rafael's job performance is good." It was noted that in most categories he met and occasionally exceeded requirements. Under "recommendations for employee's job improvement and/or career development" the supervisor noted "Rafael will continue to learn the legal and ethical responsibilities of this profession. Will complete courses needed to apply for the MFT licensing."
12. On August 1, 2004, Complainant received a one percent pay increase per his union contract, to $41,685.00 annually. He remained an MHRS Step 1.
13. On September 10, 2004, Respondent filed a request to extend stay in H-1B status on behalf of Complainant. The extension was approved November 10, 2004, and valid through November 1, 2007.
14. In January 2005 Complainant applied to San Jose State University School of Counseling Psychology. He was asked to obtain an outside educational evaluation from Educational Credential Evaluators, Inc. ("ECE"). In the evaluation, dated January 12, 2005, ECE concluded that Complainant's Peruvian degree and experience were equivalent to a U.S. Bachelors degree *and* a U.S. Master's degree.
15. In March 2005 Complainant spoke with Respondent and SEIU Local 715 Union Steward Frederico "Rick" Ramirez regarding reclassification and promotion to the Mental Health Therapist ("MHT") position.
16. On March 9, 2005, Complainant provided educational information to the California Board of Behavioral Services (the "BBS") and obtained a license to work as an Intern-Marriage and Family Therapist, valid from March 9, 2005 through March 31, 2006.
17. On March 22, 2005, per Complainant's request, Respondent agreed to reclassify Complainant to an MHT-I, Step 4 and adjusted his salary from $41,685.00 to $48,774.00 annually. The new pay rate was made retroactive to January 12, 2005 (the date of the outside educational evaluation). Complainant argued that it should have been retroactive to his initial date of employment.
18. On June 16, 2005, Complainant received a verbal warning and a verification form was placed in his file. "Rafael did not come to work on 6/13/05 and did not call… the next day [he] left a leave request that was denied."
19. On June 20, 2005, Complainant responded by letter. He cited communication problems and a misunderstanding as the reason for his failure to come to work

that day. He stated that he thought "that the rules regarding permission to be absent from work… should be more flexible."

20. On August 1, 2005, Complainant received a three percent pay increase and "step alignment" per the union contract to $50,980.00 annually. He remained an MHT-I, Step 4.
21. On October 28, 2005, Complainant received a written warning notification "for insufficient or lack of documentation with [sic] equates to inadequate performance. He received his verbal warning for this same conduct… in June of 2003."
22. On February 4, 2006, Complainant did not receive an anniversary step increase as he did not have enough intern hours to meet Step Level Requirements for Level 5, which is eligibility to sit for the state licensing exam. He remained an MHT-I, Step 4.
23. In April 2006 Complainant was offered a position at Canyon Oaks Youth Center as an MFT-I.
24. On May 1, 2006, Complainant tendered his resignation to Respondent effective May 15, 2006.
25. On May 11, 2006, Canyon Oaks Youth Center withdrew the job offer.
26. On July 11, 2006, Respondent agreed to extend Complainant's temporary employment until August 13, 2006, three days a week, eight hours per day. This was noted as the final extension of Complainant's resignation date.

TR at 18-24. Because I find that substantial evidence in the record supports the foregoing stipulations, I accept them.

ISSUES

1. Is Respondent liable for back wages from February 2002 through January 12, 2005, because Complainant was qualified for a higher paid position?

2. Did Respondent violate the Act by requiring Complainant to pay some or all of his H-1B visa application and or renewal fees?

3. Did Respondent retaliate against Complainant for conduct protected by the Act by:

   a. reducing his hours from 40 to 20 per week in 2003,

   b. reneging on a promise to sponsor him for a green card,

   c. increasing pressure on him to perform and comply with his job duties,

   d. intimidating or threatening to fire him,

   e. blacklisting him, or

   f. terminating him?

4. What is Respondent's liability, if any, for Complainant's "nonproductive status" and/or transportation costs?

See ALJX 5 at 1-4, ALJX 8 at 10, TR at 41-44, 212-13, 248.

STATUTORY FRAMEWORK

The Immigration and Nationality Act's ("INA's") H-1B visa program permits American employers to temporarily employ non-immigrant aliens to perform specialized occupations in the United States.[1] 8 U.S.C. § 1101(a)(15)(H)(I)(b). The process for hiring an H-1B worker is set 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 file a Labor Condition Application ("LCA") with the U.S. Department of Labor ("DOL") for certification that certain criteria have been met. In the LCA, the employer must represent, *inter alia*, the number of employees to be hired, their occupational classification, the actual wage rate, the prevailing wage rate and the source of such wage data, the period of employment, and the date of need. 8 U.S.C. § 1182(n); 20 C.F.R. §§ 655.730-734. In addition, the employer must attest that it is offering and will offer during the period of employment the greater of: (1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the prevailing wage level for the occupational classification in the area of employment. 8 U.S.C. § 1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. § 655.730(d).

Once the LCA is certified by DOL, the employer submits a copy of the certified LCA along with the non-immigrant worker's visa petition to the Immigration and Naturalization Service ("INS") to request an H1-B visa for the worker. 8 U.S.C. § 1101(a)(15)(H)(I)(b); 20 C.F.R. § 655.700. Upon INS approval, the non-immigrant worker is admitted to the United States on a temporary basis under an H-1B visa.

Employers are required to pay H-1B workers the required wage beginning on the date on which the worker "enters into employment with the employer." 20 C.F.R. § 655.731(c)(6). The H-1B worker is considered to "enter into employment" when he first makes himself available to work or otherwise comes under the control of the employer. *Id.* § 655.731(c)(6)(i). Alternatively, even if the worker has not yet "entered into employment," where the worker is present in the U.S. on the date of the approval of the H-1B petition, the employer shall pay the worker the required wage beginning 60 days after the date the worker becomes eligible to work for the employer. *Id.* § 655.731(c)(6)(ii). The H-1B worker is eligible to work for employer upon the date of need set forth in the approved H-1B petition filed by the employer, or the date of adjustment of the non-immigrant's status by INS, whichever is later. *Id.* The employer's duty to pay the required wage ends when a bona fide termination occurs. *Id.* § 655.731(c)(7)(ii).

[1] "Specialized occupation" is defined by the INA 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).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I. Factual Findings

Respondent is a non-profit corporation that was started in the 1960s as a community clinic to provide medical and psychosocial services to migrant workers in the South San Francisco Bay area. TR at 330-32. The original organization subsequently, for funding purposes, split into two non-profit corporations, one for primary medical care and the other (Respondent) for mental health care. *Id.* Respondent provides services under a contract with the Santa Clara County Department of Mental Health. *See* TR at 254. Respondent employs approximately 200 employees, about half of which are therapists or rehabilitation specialists. TR at 332, 336. Approximately 75% of Respondent's staff and clients are Hispanic. *See* TR at 333. In the last five years, Respondent has employed about five H-1B workers. TR at 336. Complainant was one of Respondent's first H-1B visa employees. TR at 360.

On February 6, 2001, Complainant entered the U.S. in F-1 status to pursue a Master's degree in counseling. Stip 1. In April 2001 he enrolled in a Masters of Arts In Counseling Psychology Degree program at John F. Kennedy University ("JFK"), Orinda, CA. Stip 2.

A. Claimant's Initial Job Classification

On December 10, 2001, Complainant submitted an application for employment with Respondent. Stip 3. Respondent had two possible positions for Complainant–the Mental Health Therapist ("MHT") position required a masters degree, but the Mental Health Rehabilitation Specialist ("MHRS") position only required a bachelor's degree. CX 24 at 6. Complainant's resume accurately listed a bachelor's degree earned in Peru and less than a year's progress towards a master's degree in the U.S. TR at 50; RX 2 at 3. He told Respondent that he did not have a Master's degree but that he was working on obtaining one. TR at 257. In his application, Complainant stated the reason for leaving his most recent employment was "My M.A. degree in the U.S." Stip 3. Complainant was told that he had to bring his "degree translated and what is the equivalent that you have, so you can be qualified for the MHRS." *Id.* Complainant submitted a copy of an English translation of his Bachelor's diploma to Respondent without any indication of master-equivalency. RX 3. He applied for and ultimately accepted a position with Respondent, as an MHRS. *See* Stip. 6, 7; TR at 49-50.

Three years later, Complainant discovered that his Peruvian bachelor's degree was the equivalent of a master's degree in the U.S. TR at 68. However, it is clear that, until then, both Complainant and Respondent sincerely believed that Complainant was not masters-equivalent and did not qualify for the MHT position.

Complainant admits that he did not believe that he was masters-equivalent until January 2005 and was "amazed" when he found out. TR at 68, 85-87; *see* Stip 14. Moreover, he does not believe that Respondent knew that he was masters-equivalent either. TR at 85. "Apparently, from the beginning, [Respondent] relied totally on their own judgment." TR at 93.

Respondent is required to get county certification of its MHTs and MHRS employees. *See* TR at 254. On January 7, 2002, Michael Ichinaga, Ph.D., Acting Manager of the Quality Improvement Division of the county's Mental Health Department wrote to Respondent:

> As a courtesy, we reviewed [Complainant's] credentials and found that he would be qualified for the category of Mental Health Rehabilitation Specialist (MHRS).
>
> Please keep in mind that our review does not mean that [Complainant] is certified as an MHRS. If he were hired by your agency, then he would need to formally submit his credential for approval.

RX 4. Over the next few years Respondent encouraged Complainant to complete courses necessary to become an MFT and Complainant testified that his supervisor was "trying to support me." RX 17 at 2; TR at 153.

Nevertheless, Complainant believes that it was Respondent's responsibility to accurately assess, or require an official evaluation of his foreign education. TR at 75. He testified that he applied for 50 jobs (in 2005-06) and "I can tell you, I know 50, and none of these potential employers disregarded the importance or didn't consider as a requirement an official evaluation of my credentials, because I got my degree not from the States, but from other country. All of them." TR at 75.

Jose Becerra, Respondent's Human Resources Director, admitted that he knew that there were services that performed credential evaluations, but he "thought that maybe [Complainant] already had it, because of JFK" and because he was a Master's student and "as I recall, we had [a] letter from [JFK] that he had a BA equivalent." TR at 338, 340. In that letter, dated October 11, 2002, Ellena Bloedorn, Director of Admissions at JFK wrote "To whom it may concern. . . [Claimant] has the equivalent of a US Bachelor's degree. He is enrolled in a Master of Arts degree program at [JFK]." At trial, Complainant pointed out that the initial JFK letter was dated over eight months after Complainant was hired so it could not have influenced his initial classification. TR at 381-82. Complainant claims that Respondent asked him to get that letter from JFK in order to obtain a classification from the county. TR at 93-94. In preparation for trial, Complainant solicited a May 11, 2007, email from a subsequent Director of Admissions at JFK which stated "I cannot determine the intent behind the [earlier letter]" and that JFK is "not an evaluator of international transcript documents. . . ." CX 36 at 5.

There is no evidence in the record that anyone working for Respondent was aware of the possibility that a credential evaluation might reveal a foreign degree to be the equivalent of a *higher* degree in the U.S. It also seems that Respondent had little or no motive to under-classify Complainant. Ana Lilia De Leon Gonzalez, who was program supervisor at Respondent until 2006, testified that Respondent encourages employees to move up to the MHT position and that "it is better for" Respondent because "we bill medical" for MHTs. TR at 264. Presumably, the extra salary that this non-profit employer pays to MHTs is offset by the higher rate billed to the county.

I find that Respondent classified Complainant as an MHRS Level II in good faith, based on the information presented by Complainant. The wage offered was the prevailing wage for that position, based on Respondent's union contract with Local SEIU 715. Stip. 6.

B. The Visa Fees

On January 22, 2002, Respondent filed an H-1B petition with the U.S. Immigration and Naturalization Service ("INS") on behalf of Complainant using premium processing. Stip. 5; *see* RX 5 at 1. Complainant testified that he paid some of the initial visa fees, but could not remember exactly how much. TR at 165-66. Premium processing costs an additional $1000.00 and speeds up the processing of the application. Complainant admitted that he wanted the application to be approved quickly so he could get to work, but testified "it wasn't my idea nor for my convenience. . . ." TR at 176. Nonetheless, he gave Respondent a check for $1000.00 dated January 16, 2002. *See id.*; PX 5 at 1. Ms. De Leon Gonzalez admitted warning Complainant that his prospective position could be eliminated via "budget cuts," but told him that the company would not pay for the premium processing. TR at 260. She admitted receiving the check from Complainant. TR at 283. Complainant testified that Respondent never reimbursed him the $1000.00. TR at 168.

The visa application was approved on January 24, 2002, and was valid from January 31, 2002, through October 31, 2004. Stip. 5; *see* RX 5 at 1.

On September 10, 2004, Respondent filed a request on behalf of Complainant to extend his stay in H-1B status. *See* Stip. 13. The extension was approved November 10, 2004, and valid through November 1, 2007. Stip. 13. Complainant indicated, and Respondent does not deny, that Complainant paid the $185.00 filing fee for the extension. *See* TR at 168; CX 5 at 3, 5; ALJX 9 at 13.

C. Complainant's Work Through January 2005, Including the Alleged Reduction In Hours and His Job Duties

From February 2002 through January 2005 Complainant was employed by Respondent as an MHRS. Stip. 7.

Complainant testified "I was told many times by Anna Lilia Gonzalez that [Respondent] would put in for my green card [permanent residency] application." TR at 56. Mr. Becerra testified that Respondent "doesn't sponsor people" and denied promising Complainant help in acquiring a green card. TR at 346.

On August 28, 2002, Complainant received a three percent increase per union contract to $40,463.00 annually. He remained an MHRS Level II. Stip 8.

In March 2003, Complainant left the U.S. to be married abroad. TR at 216. Ms. Gonzalez testified that he left without properly requesting time off or planning for the care of his clients during his absence. TR at 267.

Complainant testified that his hours were reduced from 40 to 20 per week for "a week, two weeks, no more than that," in June 2003. TR at 95; *see* TR at 55-67. Complainant testified that the reduction was punishment for insufficient productivity (TR at 54-61), but also testified that his supervisor was upset about a missing Child Protective Services Report (TR at 63-66). He further testified that he signed a form that changed him from full to part time but never received a copy. TR at 59. He also testified that he met with "Juan Sanchez" and "another journalist" who told him that he had "union rights." TR at 59-60.

Ms. Gonzalez testified that in June 2003 she told Complainant that his productivity was so low that he was meeting the productivity of a part-time employee and she asked him if he *wanted* to work part-time. TR at 275-76. She denied ever telling him that his hours *would* be reduced and she testified that his hours were not reduced. *Id.* She explained the paper work required to reduce an employee's hours and reiterated that Complainant's hours were not actually reduced.

On June 9, 2003, Complainant received a written warning and a Progressive Discipline Form was completed for his personnel file. Stip. 9. "Reasons given: 'Verbal warning given for lack of proper documentation (progress notes), missing service team meeting and poor productivity, absent without notifying supervisor.'" Stip. 9. The memo also cited "not meeting the productivity required" and stated that his 112.52 hours for May 2003 were below the 132 hour monthly minimum. RX 15 at 1-2. Notes from that meeting indicate that Complainant was also reprimanded for refusing to work with English speaking clients and he was encouraged to take an English class at Respondent's expense. RX 27. There is no mention of a change in Complainant's work schedule. *Id.*

Respondent submitted a Payroll History Report which shows that Complainant was paid for full-time work (2080 hours) throughout 2003. RX31. Complainant admitted that he was fully paid and "really not out of pocket any money," but testified "that doesn't mean it never happened." TR at 385. Respondent also submitted five Personnel Change Forms (dated 1/29/02, 8/19/02, 8/28/02, 9/18/03 and 7/22/04), all of which indicate full-time employment and none of which correspond to the alleged reduction in hours. *See* RX 8.

Complainant submitted Services Rendered Documents dated April 6 and 10, 2006, May 12, 2005, June 2-5, 9-12, 16-19, 23-26, and 30, 2003. *See* CX 41. The documents are used for billing and seem to have been offered to show that Complainant worked part-time on those dates. However, the entries are cryptic and Complainant did not explain them. Therefore, I cannot give them any weight.

Complainant's supervisor was sick during this period and Judy DeLeon–the unit's Lead MHT–was acting in a supervisory role and ultimately became the supervisor. TR at 295-96, 300. Ms. DeLeon explained that Respondent's progressive disciplinary procedure proceeds in stages: two verbal warnings, a memo, a write-up, probation, suspension, and termination. TR at 297-98. She testified that she did not recall any employee's hours being reduced punitively. *Id.*

Complainant testified that after his hours were allegedly reduced, Sandra, his supervisor, threatened to fire him if he didn't "comply with the productivity.' TR at 61.

Complainant testified that after the alleged reduction in hours he "always took care of productivity." TR at 67. Ms. Gonzalez did not recall any reports of problems with Complainant's productivity in 2004 and 2005. TR at 292.

On September 1, 2003, Complainant receives a two percent pay increase per the union contract. His salary increased to $41,272.00 annually. Stip. 10. "Changed from a Level II to a Step 1." Stip. 10.

On February 4, 2004, Complainant received a performance review that states "Overall, Rafael's job performance is good." Stip. 11. It was noted that in most categories he met and occasionally exceeded requirements. Stip. 11. Under "recommendations for employee's job improvement and/or career development" the supervisor noted "Rafael will continue to learn the legal and ethical responsibilities of this profession. Stip. 11. Will complete courses needed to apply for the MFT licensing." Stip. 11.

On August 1, 2004, Complainant received a one percent pay increase per his union contract, to $41,685.00 annually. Stip. 12. He remains an MHRS Step 1. Stip. 12.

There was extensive testimony and evidence regarding Complainant's job duties during his first three years with Respondent and the differences between the qualifications and duties of an MHRS and an MHT. Respondent's current and former employees testified that even though the union contract only lists a master's degree, an MHT is also required to register with the state Board of Behavioral Sciences and obtain a waiver/intern license to deliver therapy to patients. *See* CX 24; TR at 205, 263, 265-66, 342-43; *see also* CX 43 at 36. In contrast, an MHRS only delivers counseling. *Id.* Additionally, an MHT is authorized to make diagnoses, sign treatment plans, and bills differently than an MHRS. *See* TR at 278-79, 323-24, 400-02. Ms. Gonzalez testified that new employees were given two trainings at the beginning of their employment to make sure that they knew the scope and legal limits of their practice. TR at 400-402.

Claimant testified that the MHTs and MHRSs worked side by side and the only difference was that, as an MHRS, he was instructed to change the terminology in his reports to reflect counseling instead of psychotherapy. *See* TR at 372-375, 379-80, 404. Complainant opined that many of his clients had problems serious enough that psychotherapy was required to help them. TR at 378-79. He testified that although he was not allowed to bill for psychotherapy, he was practicing it. *Id.* Complainant explained that was the reason he obtained a hypnotherapy certification in the summer of 2003 and that his supervisor knew and encouraged him. TR at 373, 377-78; *see* CX 42.

Nadir DeLima, Complainant's coworker, confirmed that MHTs and MHRSs work side by side and have similar duties, but also confirmed that MHRSs need more supervision, cannot sign treatment plans, and cannot supervise other MHRSs or MHTs. TR at 240-43.

D. The Degree Equivalency Revelation and Retroactive Promotion to MHT

In January 2005 Complainant decided to seek a master's program less expensive than J.F.K.'s and applied to San Jose State University School of Counseling Psychology. *See* Stip.14. He was asked to obtain an outside educational evaluation from Educational Credential Evaluators, Inc. ("ECE"). Stip.14. In the evaluation, dated January 12, 2005, ECE concluded that Complainant's Peruvian degree and experience were equivalent to a U.S. Bachelors degree *and* a U.S. Master's degree. Stip.14. The California Board of Behavioral Services Complainant confirmed the equivalency. TR at 69.

Complainant provided the equivalency information to Respondent and argued that he should be promoted to an MHT, retroactive to his initial date of employment. TR at 70; Stip.17. Respondent agreed to reclassify Complainant as an MHT retroactive to the date of the educational evaluation, but refused to make it retroactive the Complainant's start date. In March 2005 Complainant spoke with Respondent and SEIU Local 715 Union Steward Frederico "Rick" Ramirez regarding reclassification and promotion to the Mental Health Therapist ("MHT") position. Stip.15. Respondent H.R. Director Becerra testified that the union ultimately concluded that there was no legitimate grievance because Respondent classified Complainant in good faith. TR at 341-42.

Complainant testified that he had several meetings with management and the union and also contacted the U.S. Department of Labor, INS, State Department, Department of Justice, but could not get "support." TR at 72-73. He testified that he gave Mr. Becerra paperwork he got online regarding H-1B visa rules and regulations. TR at 72. Complainant also testified that he abandoned the retroactivity claim because Mr. Ramirez–the union steward–advised him that he needed to choose between that claim and getting green card sponsorship from Respondent. *Id.* Mr. Ramirez testified that he did not remember the entire discussion, but remembered that Complainant "didn't want to lose the good will of management" in his search for a green card. CX 43 at 7.

On March 9, 2005, Complainant provided educational information to the California Board of Behavioral Services (the "BBS") and obtained a license to work as an Intern-Marriage and Family Therapist, valid from March 9, 2005 through March 31, 2006. Stip.16.

On March 22, 2005, per Complainant's request, Respondent agreed to reclassify Complainant to an MHT-I, Step 4 and adjusted his salary from $41,685.00 to $48,774.00 annually. Stip.17. The new pay rate was made retroactive to January 12, 2005 (the date of the outside educational evaluation). Stip.17.

In response to these events, a clause was added to the August 1, 2005, union contract, stating that it is the worker's responsibility to obtain proper certification (county-recognized) of foreign education credentials. TR at 339, 345; *see* R24 at 17.

E. Complainant's Work From June 2005 Through April 2006

On June 16, 2005, Complainant received a verbal warning and a verification form was placed in his file. Stip.18. "Rafael did not come to work on 6/13/05 and did not call… the next day [he] left a leave request that was denied." Stip.18.

On June 20, 2005, Complainant responded by letter. Stip.19. He cited communication problems and a misunderstanding as the reason for his failure to come to work that day. Stip.19. He stated that he thought "that the rules regarding permission to be absent from work… should be more flexible." Stip.19.

On August 1, 2005, Complainant received a three percent pay increase and "step alignment" per the union contract to $50,980.00 annually. Stip. 20. He remained an MHT-I, Step 4. Stip. 20.

Complainant testified that in August or September of 2005 he concluded that Respondent was not going to sponsor him for a green card and began looking for another job. TR at 74, 110. He testified that he "got 50, 60 or more interviews" and many job offers. TR at 110. He testified that the offers were all withdrawn once the prospective employers found out he was in H-1B status that would terminate in November 2007. TR at 113.

On October 28, 2005, Complainant received a written warning notification "for insufficient or lack of documentation with [sic] equates to inadequate performance. Stip. 21. He received his verbal warning for this same conduct… in June of 2003." Stip. 21. Ms. Zazueta testified that she remembered that Complainant told her that he had medical complications from his own out-patient surgery around that same time. TR at 184-85.

Complainant testified that around the end of 2005 or beginning of 2006 he had a conversation with his former supervisor Ms. Zazueta and told her he felt pressured. TR at 112. She asked him if he felt "harassed." TR at 112-113. He testified that he "realized 'Well, if 'harassment' means to be pressured constantly, and perhaps more than other people regarding similar compliance and things like that,' I told myself 'Well, I think so.'" TR at 112.

Nadir DeLima, Complainant's coworker, testified that she did not perceive that Complainant was "particularly singled out in terms of productivity expectations," rather "it was a problem within the agency." TR at 239.

On February 4, 2006, Complainant did not receive an anniversary step increase as he did not have enough intern hours to meet Step Level Requirements for Level 5, which is eligibility to sit for the state licensing exam. Stip. 22. He remained an MHT-I, Step 4. Stip. 22.

F. Complainant's Resignation and Last Few Months of Employment

In April 2006 Complainant was offered a position at Canyon Oaks Youth Center as an MFT-I. Stip. 23. On May 1, 2006, Complainant tendered his resignation to Respondent

effective May 15, 2006. Stip. 24; CX3. On May 11, 2006, Canyon Oaks Youth Center withdrew the job offer. Stip. 25.

Complainant testified that he informed Ms. Zazueta (his former supervisor), that his new job fell through and she told him there was no policy preventing employees that resigned from returning and she suggested "Why don't you stay?" TR at 114. He testified that Ms. DeLeon also told him "Yes, you can stay." TR at 116. But, after a week, Ms. DeLeon told him that he could only work part-time, without benefits, because they had already started interviewing other candidates for his position. TR at 116-17. Complainant testified that she asked him how long he wanted to stay because Respondent did not want to hire someone "who's going to leave at any time" and he said:

> I do understand that, and I do respect that. So I want to, I think, commit myself to stay for a whole year here. My visa, anyway, is going to expire in a year and a half, and after that time, I will be able to – if I can get another job, to change jobs. but I could commit that, myself – commit to that.

TR at 117-18. He testified that about a week later he asked for written confirmation and Ms. DeLeon referred him to the H.R. Director Becerra. TR at 118.

Ms. DeLeon testified that, after Complainant explained his dilemma, she contacted Mr. Valencia who referred her to Complainant's supervisor, Miriam Maldavsky. TR at 306. Ms. Maldavsky told Ms. DeLeon that clients were complaining about Complainant – "that he wasn't seeing them on a regular basis. One client said that he was sleeping during his therapy session, that he would doze off. . . ." TR at 306-07. Ms. DeLeon testified that there were complaints "from the Director, from the supervisor, and from clients." TR at 307. She further testified that Complainant said "As soon as I find a job, I'm out of here." *Id.* She did not think it was in the best interests of the clients to reinstate him. TR at 308.

Complainant testified that after several meetings with Mr. Becerra, Mr. Ramirez (the union steward), Ms. Zazueta, and Miguel Valencia (Clinical Director), they refused to rehire him. TR at 118. Complainant testified that he then told them that they were retaliating against him for his (2005) efforts to be reclassified. TR at 118-19.

Complainant further testified that Ms. DeLeon told him that she could not "support" him "anymore." TR at 131-32. He also alleged that she told him, two to three months before leaving work at Respondent, that she could no longer support him because she had become part of Respondent's management team and that he should concentrate on his own job and not "get into other people's business." *Id.* Complainant then described a conversation with Maryann Salcedo, a union representative, in which Ms. Salcedo told him that "management" attributed to him the dissemination of information concerning education credentials. *See* TR at 131-34. Ms. Salcedo did not testify.

Complainant's testimony on this subject was unclear, but it seems that he was testifying that Ms. DeLeon hinted to him that Respondent was refusing to rehire him in retaliation for

speaking to a union steward about evaluating credentials "a few days before" his conversation with Ms. DeLeon, and then Ms. Salcedo purportedly confirmed that story. *Id.*

Ms. DeLeon credibly denied the substance of Complaint's testimony about their conversation. She testified that she told him (in Spanish):

> You're not dumb. You're very smart. You know there's lots of complaints going on from all levels, the Medical Director, the supervisor, and clients. That's why it's difficult to – you know, for us to – for me to advocate to reinstate you. There's just too many complaints about your work performance.

TR at 308-09. Ms. DeLeon admitted that there was no documentation of Complainant's allegedly poor work performance after May 1, 2006, but she explained that Complainant was leaving and his supervisor was "green." TR at 327-28. As discussed below, I find Ms. DeLeon's version of this conversation more credible.

Mr. Becerra testified that he met with Complainant's supervisor, Ms. Maldavsky, shortly after Complainant's new job fell through. TR at 346-48. He testified that he explained to her that there was no rule requiring or preventing her from rehiring Complainant. TR at 348-49. Ms. Maldavsky told him that she was already interviewing for Complainant's position and had "some pretty good candidates." TR at 349. Mr. Becerra testified that there was "a lot of discussion" about whether to rehire Complainant. TR at 349-50. He then became aware that Complainant's "status in the U.S. was in jeopardy" and the union became involved. *Id.* Apparently as part of processing his resignation, Complainant had been paid out his remaining vacation time. *See* TR at 350-53; RX 30. So, to help Complainant preserve his visa status and at his request, Respondent rescinded the vacation payout and allowed Complainant to push back his resignation date and take the vacation hours. *Id.* Mr. Becerra recalled that Complainant's resignation date was pushed back twice. TR at 353; *see* Stip. 26.

Mr. Becerra testified that he was not involved in the decision not to rehire Complainant. TR at 353-54. Mr. Becerra testified that he had no reason to believe that anyone would want to retaliate against Complainant for requesting back-pay. TR at 361. "No, no. . . . our employees aren't that petty." *Id.*

Mr. Ramirez, the union steward, confirmed that he was informed that the only reason for not rehiring Complainant was that Respondent was dissatisfied with Complainant's work performance. CX 43 at 15.

Complainant submitted a Leave Request Form which indicates that he took vacation from June 16 through July 11, 2006. *See* CX 29.

On July 11, 2006, Respondent agreed to extend Complainant's temporary employment until August 13, 2006, three days a week, eight hours per day. Stip. 26. This was noted as the final extension of Complainant's resignation date. Stip. 26.

Complainant briefly volunteered at Respondent in an effort to preserve his visa status, but stopped after he concluded it would not. Complainant testified that he volunteered in June or July 2006 for "like a week" at Respondent's request. TR at 125-27. Ms. DeLeon testified that Mr. Ramirez, Complainant's union steward, left her a voicemail message suggesting the idea. TR at 395-96. She testified that Complainant volunteered "a couple of days" but stopped after he concluded "it was not going to work." TR at 396-97. Mr. Ramirez testified "My understanding was they kept [Complainant] on the books officially as an employee, although [Complainant was] just working unpaid as a volunteer for a few weeks. . . ." CX 43 at 17. Mr. Ramirez denied suggesting that Complainant volunteer. *Id.* at 37.

Respondent claims that Complainant was paid for 24 hours per week July 12-28, 2006. ALJX 9 at 6. However, Respondent only submitted Payroll Reports covering the period May 14, 2006, through June 25, 2006. *See* RX 30.

Complainant submitted pay stubs and pay reports covering the period May 1, 2006 through July 28, 2006. *See* CX 10. Complainant's pay stubs indicate that his gross pay was $1,960.77 per pay period (2 weeks), which is $24.51 per hour.[2] *See* CX 10. The pay records show that Complainant was paid full-time wages through July 11, 2006. *Id.* In the 13 business days between July 11, and July 29, 2006, Complainant was paid for 56 hours of work– $1,372.56.[3]

Complainant requested and was granted voluntary leave for what were to have been the last two weeks of his employment [July 29 through August 13] in order to look for a job and/or prepare to move. *See* TR at 130; CX 8 at 2.

There was testimony that, some time before Complainant's last day with Respondent, his position was filled. *See* TR at 121-22 191-92.

On approximately August 7, 2006, Complainant began working for a new employer, earning $22.12 per hour. *See* CX 10. Complainant testified "many problems happened with the following employer regarding the visa. . . ." TR at 130.

II. Credibility

I find that the majority of the testimony in this case was credible. There was little conflicting testimony regarding the sequence of events, and the conflicts were generally over attributions of motive or minor facts. The significant conflicts in testimony concerned whether Complaint's hours were reduced to part-time in June 2003, whether he was promised sponsorship for a green card, his job duties as an MHRS, and the substance of two conversations with Ms. DeLeon after he resigned. As discussed below, neither of the first two questions of fact are legally material in this case. I note, however, that Complainant's testimony many times

[2] $1,960.77 divided by 80 hours equals $24.51 per hour.
[3] $980.40 (40 hours) + $392.16 (16 hours) = $1,372.56. Also, 56 hours x $24.51= $1,372.56.

veered from the issues at hand and frequently appeared vague and/or inaccurate as discussed below.

A. Complainant's Job Duties as an MHRS

Claimant testified that during his first three years of employment as an MHRS, he was performing all the duties of an MHT except that he changed the terminology in his reports to reflect counseling instead of psychotherapy. He also testified that he obtained a hypnotherapy certification in the summer of 2003 so he could deliver that therapy and that his supervisor knew and encouraged him. TR at 373, 377-78; *see* CX 42.

In contrast, Ms. Zazueta, Ms. Gonzalez, and Mr. Becerra testified that, although the union contract only lists a master's degree, an MHT is also required to register with the California Board of Behavioral Sciences (the "BBS") and obtain a waiver/intern license to deliver therapy to patients. *See* CX 24; TR at 205, 263, 265-66, 342-43; *see also* CX 43 at 36. In contrast, an MHRS only delivers counseling. *Id.* Additionally, an MHT is authorized to make diagnoses, sign treatment plans, and bills differently than an MHRS. *See* TR at 278-79, 323-24, 400-02. Ms. Gonzalez testified that new employees were given two trainings at the beginning of their employment to make sure that they knew the scope and legal limits of their practice. TR at 400-402.

Nadir DeLima, Complainant's coworker, confirmed that MHTs and MHRSs work side by side and have similar duties, but also confirmed that MHRSs need more supervision, cannot sign treatment plans, and cannot supervise other MHRSs or MHTs. TR at 240-43.

I find Complainant's testimony that there is considerable overlap in the duties of MHRS and MHTs credible and supported by Ms. Zazueta and Ms. DeLima's testimony. However, I also credit Respondent's witnesses' testimony that a BBS license is required for MHTs and that there are different legal boundaries to the practices of MHRS and MHTs. Moreover, when Complainant applied for the MHRS position, he told Respondent that he did not have a master's degree and I find it more likely that he performed the MHRS duties he applied for and believed fit his qualifications. *See* Stip. 6, 7; TR at 257.

B. Complainant's Conversations With Ms. DeLeon

Both of the disputed conversations between Complainant and Ms. DeLeon were relevant to Respondent's motives for refusing to rehire Complainant. In the first conversation, Ms. DeLeon told Complainant that Respondent did not want to fill his former position with someone who would leave shortly thereafter. TR at 117. Complainant testified that he told Ms. DeLeon, "So I want to, I think, commit myself to stay for a whole year here." TR at 117. However, Ms. DeLeon testified that Complainant said "As soon as I find a job, I'm out of here." TR at 307; *see* TR at 312.

Considering the demeanor of the witnesses and the entire record, including the uncertainty in Complainant's own description of what he said ("I think"), his obvious bitterness towards Respondent, and his testimony that emphasized how important it was to him to find

another job, I find Ms. DeLeon's version more credible. Thus, I find that Complainant made statements that caused Respondent's management to reasonably believe that Complainant would, if rehired, leave at his earliest opportunity.

The second disputed conversation began with Ms. DeLeon telling Complainant "You are not dumb" or "You are not stupid." TR at 131-32, 308-09. Complainant testified that Ms. DeLeon hinted that Respondent's refusal to rehire him was in retaliation for speaking to a union steward about evaluating credentials. *See* TR at 131-34. Ms. DeLeon testified that she was merely chiding him that it was obvious that his recent work performance was the reason she could not advocate for his "reinstatement." TR at 308-09.

Either version, if true, could have been supported by other evidence, but neither was. Complainant could have solicited the testimony of Ms. Salcedo to confirm the second half of his version. Respondent could have documented Complainant's alleged poor work performance in the prior month(s).

I find Complainant's version less credible. First and foremost, he attributes Respondent's alleged retaliatory motive to the fact that he spoke to a union steward about evaluating credentials "a few days before." TR at 132. The timeline is not totally clear, but he testified that the conversation with Ms. DeLeon took place in his last few months at Respondent. It would have to have taken place after his new job fell through (mid May 2006) because it involved a discussion of why he was not being rehired. However, in response to his education equivalency mix-up, the August 1, 2005, union contract was amended to clarify that it was the worker's responsibility to obtain proper certification of foreign education credentials. *See* TR at 339, 345; R24 at 17. So, Complainant is alleging that Respondent retaliated because he spoke to a union steward about an issue publically decided in Respondent's favor more than nine months earlier. I find this unlikely and Complainant not credible.

Second, Complainant testified that he "immediately" spoke with Ms. Salcedo and she told him that Mr. Becerra had referred her to talk with Complainant about "the evaluation of credentials." TR at 133. This further indicates that Respondent's management did not consider Complainant's classification issue to be confidential.

Considering the totality of the circumstances, I find Ms. DeLeon's version of the conversation more credible.

III. Discussion

A. Is Respondent Liable For Back Wages From February 2002 Through January 12, 2005, Because Complainant Was Qualified For a Higher Paid Position?

Complainant argues that Respondent violated the Act because it "under-classified and underpaid" him "during the first three years of employment. ALJX 8 at 1. In support, Complainant cites the Act's requirement that employer's pay H-1B visa holders the greater of:

the actual wage paid to other employees or the local prevailing wage for the occupation, "based on the best information available as of the time of filing the [LCA]." ALJX 8 at 1-2; *see* 8 U.S.C. § 1182(n)(1)(A). Complainant also cites 20 C.F.R. § 655.731(a)(2)(ii)(B) and argues that Respondent should not have used its own judgment to evaluate his foreign education because Respondent is not an "independent authoritative source." ALJX 8 at 3. Complainant further argues that Respondent violated 20 C.F.R. § 655.805(a)(1) and (c) by willfully misstating a material fact by "asserting on the LCA that Plaintiff's US degree equivalency was a BA in Psychology, without first getting a bona fide evaluation report." ALJX 8 at 4. Finally, Complainant argues that Respondent's job classifications are "solely based on professional education and experience." ALJX 8 at 5.

Title 20 of the Code of Federal Regulations, subsection 655.731(c)(8) states:

> If the employee works in an occupation other than that identified on the employer's LCA, *the employer's required wage obligation is based on the occupation identified on the LCA*, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.

(emphasis added); *see Amtel v. Yongmahapakorn*, ARB Case No. 04-087, ALJ Case No. 2004-LCA-006, at 6-7 (2006). In *Amtel*, the administrative law judge ("ALJ") determined that the complainant "performed duties of a vice-president for Amtel [the employer] and, therefore, Amtel owed [the complainant] the higher prevailing wage rate for a vice-president rather than the prevailing wage it paid her as an internal auditor." *See Amtel*, at 6. The employer in *Amtel* even listed the complainant as a vice-president on "company forms and in a company telephone directory." *Amtel*, at 6. Nevertheless, the complainant's LCAs described her as an internal auditor, so the Administrative Review Board (the "ARB") reversed the ALJ's determination and held "Amtel's required wage obligation to complainant was based on the job description of internal auditor as identified on the LCA." *Id.* at 7. However, the ARB noted that she never "complained that Amtel had failed to specify the job that she performed accurately or had failed to pay her the appropriate wage rate." *Amtel*, at 6-7.

Here, as in *Amtel*, Complainant's LCA listed him in the lower-paid position (MHRS). RX 5 at 6. However, unlike the complainant in *Amtel*, Complainant here did protest the classification while still employed by Respondent. However, Respondent promptly promoted him the MHT position, retroactive to the date of the credential evaluation. Therefore, as in *Amtel*, this contested time period, February 2002 through January 12, 2005, predates any protest by the H-1B visa holder.

Moreover, contrary to Complainant's assertion, Respondent did not willfully misclassify him. I have found that Respondent classified Complainant as an MHRS Level II in good faith, based on the information presented by Complainant and the fact that he was attending graduate school to earn a masters degree. *See* Stip. 3; TR at 257. I do not find that Respondent was negligent, much less reckless. Therefore, following the holding in *Amtel*, Respondent's wage obligation, at least until Complainant notified Respondent of the equivalency mix-up, was based on the MHRS occupation listed in Complainant's LCA, not on the MHT occupation.

So, the only question that remains is whether Respondent met that wage obligation–that is whether Respondent paid Complainant the greater of: the local prevailing wage for an MHRS or the actual wage for an MHRS. *See* 8 U.S.C. § 1182(n)(1)(A).

The parties stipulated that the wage paid to Complainant was the prevailing wage for the MHRS position, based on Respondent's union contract with Local SEIU 715. *See* Stip. 6.

"The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications *for the specific employment in question*." 20 C.F.R. § 655.731(a)(1) (emphasis added). Under *Amtel*, only the actual wage of the MHRS position is relevant. *See Amtel*, at 6-7. Subsection (a)(1) also mandates that the actual wage is not frozen at the date of the LCA, but rather:

> Where the employer's pay system or scale provides for adjustments during the period of the LCA--e.g., cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation--such adjustments shall be provided to similarly employed H-1B nonimmigrants (unless the prevailing wage is higher than the actual wage).
>
> 20 C.F.R. § 655.731(a)(1).

Here, I find that the MHT position had a BBS licensing requirement that the MHRS position did not, therefore I find that for the purposes of H-1B wage obligations, the two positions constitute distinct occupations. Complainant did not present or point to any evidence that the actual wage for the MHRS occupation was greater than the wage paid to him by Respondent. Furthermore, Complainant was paid pursuant to a union contract and thus was almost certainly paid the "actual wage" of an MHRS. Therefore, he cannot prevail on this issue.

Instead, Complainant argues that he was performing the duties of an MHT. *See* ALJX 8 at 2. However, Complainant's testimony that he was delivering psychotherapy without a license does not entitle him to the wages of a licensed therapist. Even if the duties of an MHT were relevant, I find that MHTs have different legal responsibilities than MHRSs, including a BBS licensing requirement. Thus, Complainant's "duties and responsibilities" were not similar enough to those of an MHT to qualify him for the actual wage of an MHT, even if *Amtel* hadn't foreclosed the issue. Furthermore, a licensing requirement would certainly constitute a "legitimate business factor" to distinguish MHRSs and MHTs. *See* 20 C.F.R. § 655.731(a)(1).

Therefore, I find that Respondent paid Complainant at or above the required rate during this disputed time period, February 2002 through January 12, 2005, and is not liable for back wages based on misclassification.[4]

[4] Complainant's argument that Respondent should not have used its own judgment to evaluate his foreign education because Respondent is not an "independent authoritative source" is based upon the regulations governing how "prevailing wage" is determined *in the absence of a collective bargaining agreement*. *See* 20 C.F.R. § 655.731(a)(2)(ii)(B). Since Respondent's wage obligation was based on the MHRS occupation, the "independent authoritative source" argument is foreclosed by the stipulation that the wages paid to Complainant were the prevailing wage for the MHRS position, *and* based on a collective bargaining agreement.

B. H-1B Visa Application and Renewal Fees

Complainant argues that Respondent illegally required him to pay visa application and renewal fees. ALJX 8 at 9. Respondent acknowledges that it is required to "pay all *required* filing fees for an H-1B petition," but argues that it should not have to pay the $1000.00 Premium Processing fee since that fee was incurred "at the request of and for the benefit of" Complainant, not Respondent. ALJX 9 at 13 (emphasis added).

The regulations state:

> The 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*.

20 C.F.R. § 655.731(c)(10)(ii) (emphasis added). Respondent is liable for all H-1B application and renewal fees incurred on Complainant's behalf.

Complaint testified that he paid some of the initial visa fees, but could not remember exactly how much. TR at 165-66. To cover Premium Processing, Complainant gave Respondent a check for $1000.00 dated January 16, 2002. TR at 176; PX 5 at 1. Complainant testified that he was not reimbursed. TR at 168. Respondent did not rebut this testimony. Complainant further indicated and Respondent concedes that Complainant also paid the $185.00 filing fee for the 2004 H-1B visa extension. *See* TR at 168; CX 5 at 3, 5; ALJX 9 at 13. Complainant did not provide any evidence of the cost of the initial filing fee, so I reject that claim for lack of specificity. However, I do find that he paid a total of $1,185.00 in Premium Processing and renewal fees. Respondent is liable to Complainant for that sum. *See* 20 C.F.R. §§ 655.810(b)(1)(v) & (e)(1).

C. Retaliation

Complainant argues that Respondent reduced his hours in 2003 and 2006, failed to sponsor him for a green card, increased pressure on him to perform and comply with his job duties, intimidated or threatened to fire him, blacklisted him, and terminated him in retaliation for a variety of protected activities, including "requesting fair treatment regarding: when full time employment was changed to part time-20 hours," supporting coworkers "regarding excessive productivity expectations," requesting to be excused from weekly staff meetings, contesting his classification and pay after the first three years, supporting coworkers regarding dismissals and ethics, and objecting to a request by management to "artificially create higher levels of productivity." ALJX 8 at 12-17.

Respondent argues that there is no evidence to sustain a finding that it "intimidated, threatened, coerced, blacklisted, or discharged [Complainant] in retaliation for protected activity, Complainant had "performance issues" from the beginning of his employment, Respondent

could not legally sponsor Complainant for a green card, and that Complainant was required to and failed to use the grievance process per the CBA. ALJX 9 at 13-17.

Title 20 of the Code of Federal Regulations, subsection 655.801(a) prohibits retaliation against employees who report suspected H-1B violations or participate in related investigations. It states:

> (a) No employer subject to this subpart I or subpart H of this part shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee
> has--
> (1) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t), including this subpart I and subpart H of this part and any pertinent regulations of DHS or the Department of Justice; or
> (2) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t).

20 C.F.R. § 655.801(a); *see* 8 U.S.C.A. § 1182 (n)(2)(C)(iv).

Complainant argues for an application of the *McDonnell Douglas* prima facie framework to his retaliation claim. ALJX 8 at 12-13; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). However, H-1B retaliation claims are analyzed in the same manner as other whistleblower statutes administered by the Department of Labor. *See* 65 Fed. Reg. 80,178 (Dec. 20, 2000) ("The Department is of the view that Congress intended that the Department, in interpreting and applying this provision, should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department."); *Yongmahapakorn v. Amtel Group of Florida, Inc.*, 2004-LCA-6 (2004) (ALJ) p.24; *Vojtisek-Lom* v. *Clean Air Technologies Intl, Inc.* 2006-LCA-00009 (2007) (ALJ) at 24-26; *Kersten* vs. *La Gard, Inc.*, 2005-LCA-00017 (2006) (ALJ) at 5.

In *Brune v. Horizon Air Indus., Inc.*, the ARB restated the procedures and burdens of proof applicable to an AIR 21 whistleblower complaint. ARB No. 04-037, ALJ No. 2002-AIR-8, at 13 (2006). Under the whistleblower statutes, a complainant must prove unlawful discrimination by a preponderance of evidence. *Id.* at 13-14.

> This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR 21 cases. The Title VII burden shifting pretext framework is warranted where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence. The ALJ (and ARB) may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a

> complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action.
>
> Thereafter, and only if the complainant has proven discrimination by a preponderance of evidence and not merely established a prima facie case, does the employer face a burden of proof. That is, the employer may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event.

Brune, ARB No. 04-037 at 13-14 (footnotes omitted). Thus, a complainant does not shift a burden to the employer by merely showing protected activity, an adverse employment activity, and some inference of discrimination. *See id.* An ALJ must find that a preponderance of all the evidence, including the employer's proffered explanation, shows that the complainant's "protected activity contributed to" the employer's "adverse action." *Id.* Then, and only then, does the employer bear the burden to show it would have made the same decision absent the protected activity. *Id.*

1. Protected Activities

Complainant lumped the alleged protected activities into one group and all the alleged adverse actions into another, and has not clarified the alleged causal links between them. I will address each alleged adverse action, but as a threshold matter, must address the alleged protected activities. Of the activities Complainant identified in his brief, only "[R]equesting fair treatment regarding" his alleged reduction in hours would, if true, qualify as a legitimate protected activity. *See* ALJX 8 at 12-17.

Complainant has not shown that "[R]equesting fair treatment regarding:" excusal from weekly staff meetings, objecting to a request by management to "artificially create higher levels of productivity," and supporting coworkers regarding "excessive productivity expectations," and dismissals and ethics are activities that in any way involve a disclosure of a violation of the relevant immigration laws or participation in an investigation or proceeding regarding such. *See* 20 C.F.R. § 655.801(a).

However, Complainant did testify about speaking to a union steward about evaluating credentials in approximately May 2006, which might have been a disclosure related to the relevant immigration laws. Also, he testified that he provided H-1B visa regulations to Mr. Becerra as part of his campaign to secure a retroactive promotion to MHT in March 2005. *See* TR at 72.

I find Complainant's conversation with a union steward in May 2006 and communications with Respondent regarding a retroactive promotion in March 2005 to be legitimate protected activities, supported by evidence in the record. Additionally, his alleged request for fair treatment regarding the alleged reduction in his hours in June 2003, if true, would qualify as a protected activity.

2. Reducing Complainant's Hours From 40 to 20 Per Week in 2003

Complainant testified that his hours were reduced from 40 to 20 per week for "a week, two weeks, no more than that," in June 2003. TR at 95; *see* TR at 55-67. Ms. Gonzalez and Ms. DeLeon testified that Complainant's hours were not reduced and Respondent produced a Payroll History Report which shows that Complainant was paid for full-time work throughout 2003. TR at 275-76, 297-98; RX31. Complainant admitted that he was fully paid, but testified "that doesn't mean it never happened." TR at 385.

Complainant testified that the alleged reduction was punishment for insufficient productivity (TR at 54-61), but also testified that his supervisor was upset about a missing Child Protective Services Report (TR at 63-66). In his brief he argues that his hours would not have been restored "if not achieving Respondent's productivity demands." ALJX 8 at 13. On June 9, 2003, Complainant received a written warning for "lack of proper documentation, missing service team meeting and poor productivity, absent without notifying supervisor," very similar to the reasons he identifies as the motive for his reduction in hours. Stip. 9; RX 15 at 1-2.

Complainant has identified no legitimate protected activity that preceded the alleged 2003 reduction in hours. The alleged request for fair treatment regarding his reduced hours inherently followed the alleged reduction, the efforts to secure a retroactive promotion took place in 2005, and the discussion of education credentials with the union steward occurred in 2006. Even assuming that Complainant's hours were reduced in June 2003, he has not shown by a preponderance of the evidence that he engaged in a protected activity beforehand. Therefore, he has not shown illegal discrimination under the Act.

Moreover, even if his hours were reduced in June 2003, because Respondent has proven that Complainant was paid for full-time work throughout 2003, Complainant cannot claim back wages for "nonproductive status." *See* 20 C.F.R. § 655.731(c)(7)(i) (and discussion below).

3. Reneging On a Promise to Sponsor Him For a Green Card

Complainant testified "I was told many times by Anna Lilia Gonzalez that [Respondent] would put in for my green card [permanent residency] application." TR at 56. Mr. Becerra testified that Respondent "doesn't sponsor people" and denied promising Complainant help in acquiring a green card. TR at 346. Complainant testified that in August or September of 2005 he concluded that Respondent was not going to sponsor him for a green card and began looking for another job. TR at 74, 110.

Sponsoring an employee for a green card requires the employer to certify that "there are insufficient U.S. workers who are able, willing, and qualified for the position." *See* 20 C.F.R. § 656.2(c)(1)(i). Respondent explains that it had no problem replacing Complainant, and after his replacement quit, again finding a replacement worker. ALJX 9 at 14; *see* TR at 121-22 191-92. Therefore, Respondent could not have legally sponsored Complainant for a green card.

Complainant cites Mr. Ramirez's testimony that Complainant abandoned his retroactive pay claim primarily because so he wouldn't "jeopardize" the sponsorship "process." ALJX 8 at

15. However, that only goes to Complainant's motivations and Complainant's speculation about Respondent's motivations.

It is disputed whether Respondent ever promised to sponsor Complainant for a green card. Even if it did and then reneged on that promise, Complainant has not shown by a preponderance of the evidence that the refusal was motivated by retaliation for a protected activity. In fact, Respondent bent over backwards to help Complainant preserve his immigration status after he resigned in May 2006.

Furthermore, it is uncontroverted that Respondent was easily able to fill Complainant's position and thus would have had to lie to sponsor Complainant for a green card. *See* 20 C.F.R. § 656.2(c)(1)(i). Therefore, even if one of the protected activities was found to contribute to Respondent's refusal to sponsor Complainant for a green card, I find that there is clear and convincing evidence that Respondent would have made the same decision anyway. Therefore, Claimant has not shown illegal discrimination under the Act.

4. Increasing Pressure on Him to Perform and Comply with His Job Duties

Claimant does not identify a time frame for this alleged adverse action and the record contains evidence of reprimands for poor performance from many time periods. However, he testified that around the end of 2005 or beginning of 2006 he had a conversation with his former supervisor Ms. Zazueta and told her he felt pressured. TR at 112. She asked him if he felt "harassed." TR at 112-113. He testified that he "realized 'Well, if 'harassment' means to be pressured constantly, and perhaps more than other people regarding similar compliance and things like that,' I told myself 'Well, I think so.'" TR at 112.

Considering the record as a whole, Complainant has not shown that any of Respondent's disciplinary actions or exhortations were motivated by anything other than a desire to meet productivity goals. In fact, there was significant testimony that Respondent's employees were overworked. *See e.g.* CX 43 at 28-30. Complainant's own testimony that he only thought that he was "perhaps" pressured more than others is good evidence that he was not being singled out for protected activity. Complainant has not shown illegal discrimination under the Act.

5. Intimidating or Threatening to Fire Him

Complainant alleges that he received an ultimatum from Respondent "about updating notes when Plaintiff [Complainant] was medically ill, after surgical procedure and on medical absence is another example of concrete harassment underwent." ALJX 8 at 15. He cites testimony in the record[5] in which he asks Ms. Zazueta about the above. *See* TR at 184-85. His question was interrupted by an objection and when he re-asked it, he omitted the reference to a threat to fire him. In any event, he was referencing an October 2005 conversation and there was no evidence presented that would indicate that the threat, if it occurred, was made in retaliation for protected activity. In fact, it would have been over six months from the closest previous protected activity.

[5] It's not totally clear because Complainant apparently worked from a digital copy of the trial transcipt in which the page numbers are different.

In the only other relevant reference to being "fired" in the record, Complainant testified that after his hours were reduced (in 2003), Sandra, his supervisor, threatened to fire him if he didn't "comply with the productivity.' TR at 61. Here, there is possibly temporal proximity to a protected activity–requesting fair treatment regarding his alleged reduction in hours. However, it is unclear which occurred first–the alleged threat or the request for fair treatment–and the alleged threat is expressly based upon productivity, not protected activity.

Complainant has not shown illegal discrimination under the Act.

6. Blacklisting

Complainant devotes a whole section of brief to blacklisting and alleges four adverse acts. ALJX 8 at 17-18.

a. Not being reimbursed for mileage expenses during the first two years of employment 2002-03, and from 2004-05.

Complainant points to no evidence in the record to support this claim. Also, the fact that the adverse action is alleged to have begun before Complainant's earliest protected activity supports the inference that even the later alleged adverse action, was not in retaliation for protected activity.

b. Respondent did not allow Complainant to do "On-Calls" for the first two years of employment and the last year of employment.

Again, Complainant points to no evidence in the record to support that the alleged adverse action occurred. He only cites (incorrectly) the CBA section that discusses "On Call" assignments. *See* RX 24 at 16.

c. Received warnings regarding work performance while several coworkers with equal or worse problems did not.

Complainant merely cites the deposition testimony of Mr. Ramirez, in which he testifies that heavy caseloads are a continual problem at Respondent, but mainly in the Medi-Cal programs. *See* CX 43 at 28-30. Complainant points to no evidence that he was treated differently than similarly situated coworkers.

d. "Respondent showed favoritism being more open, supportive and respectful with some employees and more aggressive and restrictive with others like Plaintiff."

Again, Complainant makes a bald accusation. He points to no evidence in the record to support that the alleged adverse action occurred, much less evidence of a retaliatory motive.

Complainant has not shown illegal discrimination under the Act.

7. Termination or Decision Not to Rehire

Complaint alleges that his "dismissal" was a "direct consequence" of his various alleged protected activities. ALJX 8 at 14. Respondent argues that Complainant was not terminated, he resigned, and Respondent was under no obligation to rehire him. ALJX 9 at 18-19.

Complainant resigned effective May 15, 2006. Stip. 24; CX3. Complainant continued working for Respondent until July 28, 2006. *See* CX 10. So, the issue here is whether Respondent merely allowed Complainant to postpone his resignation, or rehired him and then fired him.

I agree with Respondent that Complainant was not terminated. Complainant does not dispute Respondent's assertion that he was only allowed to continue working in an effort to help preserve his visa status. Moreover, Complainant's original LCA was not cancelled, nor a new LCA filed, which would be consistent with a true rehiring. Considering the totality of the evidence in the record, I find that Respondent merely extended Complainant's resignation as opposed to rehiring him.

However, the relevant regulation states that an employer shall not "intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee" has engaged in protected activity. 20 C.F.R. § 655.801(a). Thus, the plain language of the regulation does not limit the prohibited actions to traditional "adverse actions" (firing, demotion, etc.). The refusal to rehire can constitute illegal retaliation. *Cf. Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007) at 17 ("tangible employment action" includes "failure to hire" under the whistleblower provisions of the Surface Transportation Assistance Act of 1982). However, in this case it is of no consequence because Complainant did not prove by a preponderance of the evidence that his protected activity contributed to Respondent's decision. *See Brune*, ARB No. 04-037 at 13-14.

The only direct evidence of a retaliatory motive for Respondent's decision not to rehire Complainant was his testimony that Ms. DeLeon hinted that Respondent's refusal to rehire him was in retaliation for speaking to a union steward about evaluating credentials. *See* TR at 131-34. However, as discussed above, I did not find that testimony credible.

Complainant also alleges that Respondent failed to "apply a system of progressive discipline, as specified in its Employee Handbook, consistently and without discrimination. Such discharge was arbitrary since Respondent never stated concrete reason [SIC] or could justify retaliatory discrimination." ALJX 8 at 16. First, the record contains an abundance of evidence of disciplinary communication, just not any in the last few months. More importantly, Complainant's written resignation mooted any progressive discipline system. Respondent was free to refuse to rehire Complainant for any reason, so long as that reason was not retaliatory. Therefore, lack of documentation of progressive discipline in the last few months does not constitute direct evidence of a retaliatory motive, nor does it raise much of an inference, because Complainant had resigned.

Temporal proximity is the evidence that most often supports retaliation claims lacking direct or "smoking gun" evidence. An adverse action that occurs soon after a protected activity supports an inference of a retaliatory motive. However, the strength of that inference is inversely proportional to the evidence of a non-retaliatory motive.

Here, the record is not clear, but Respondent's decision not to rehire Complainant was made sometime between May 11 and July 11 of 2006.[6] Complainant's three possible protected activities were 1) his conversation with a union steward about evaluating foreign education credentials that occurred in May or June 2006, 2), his communications with Respondent regarding a retroactive promotion in March 2005 and 3) his alleged request for fair treatment regarding the alleged reduction in his hours in June 2003.

a. Complainant's May or June 2006 conversation with a union steward about evaluating foreign education credentials

The record is also not clear as to when Complainant spoke to a union steward about evaluating foreign education credentials.[7] *See* TR at 131-34, 308-09. However, even assuming temporal proximity, I cannot find, by a preponderance of the evidence, that protected activity contributed to Respondent's decision not to rehire Complainant.

First, as discussed above, the foreign education evaluation issue had been publicly settled in Respondent's favor over nine months beforehand. *See* TR at 339, 345; R24 at 17.

Second, Complainant testified that Ms. Salcedo told him that Mr. Becerra had referred her to talk with Complainant about "the evaluation of credentials." TR at 133. If Respondent's HR director referred the union representative to Complainant, it seems very unlikely that Respondent would be motivated to retaliate against Complainant for speaking to her.

Third, as discussed above, I found credible Ms. DeLeon's testimony that Complainant told her that he would leave for another job at his first opportunity. That was a compelling reason not to rehire him that significantly reduces the strength of any inference of a retaliatory motive.

Fourth, I found credible Ms. DeLeon's explanation that Respondent decision not to rehire Complainant was based primarily upon complaints about his performance. *See* TR at 308.

Fifth, Complainant himself testified that he told Respondent's management in May or June 2006 that they were retaliating against him *for his efforts to be reclassified*. *See* TR at 118-19.

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[6] On May 11, 2006, Canyon Oaks Youth Center withdrew the job offer. Stip. 25. On July 11, 2006, Respondent agreed to extend Complainant's temporary employment and noted it as the final extension of Complainant's resignation date. Stip. 26.

[7] Complainant testified that he spoke to a union steward about evaluating credentials "a few days before" the conversation in which Ms. DeLeon explained why he was not being rehired, but the date of that conversation was not identified. *See* TR at 132. My overall sense is that both conversations occurred in late May or early June of 2006.

Finally, the evidence indicates that, although Respondent was not totally pleased with Complainant's work, he was fairly well-liked and that Respondent's management wanted to help him, even to the point of exposing Respondent to liability by offering him part-time employment after he resigned.

Therefore, I find that Complainant has not established by a preponderance of the evidence that his May or June 2003 protected activity contributed to Respondent's decision not to rehire him.

b. Complainant's communications with Respondent regarding a retroactive promotion in March 2005

Complainant testified that he told Respondent's management in May or June 2006 that they were retaliating against him for his (March 2005) efforts to be reclassified but provides no other evidence. *See* TR at 118-19. The March 2005 protected activities occurred more than a year before the May or June 2006 decision not to rehire him. Therefore, they were not temporally proximate enough to raise a significant inference of causation. Moreover, any inference of retaliatory motive is further weakened when considered in the context of Respondent's compelling reasons not to rehire Complainant.[8] Therefore, I find that Complainant has not established by a preponderance of the evidence that either the June 2003 or March 2005 protected activities contributed to Respondent's decision not to rehire him.

c. Complainant's alleged request for fair treatment regarding the alleged reduction in his hours in June 2003

Complainant's alleged request for fair treatment regarding the alleged reduction in his hours in June 2003 came almost three years before Respondent's decision not to rehire him. Complainant provided no other evidence to support a causal link between this alleged event and Respondent's decision not to rehire him. Therefore, I find that Complainant has not established by a preponderance of the evidence that the alleged June 2003 protected activities contributed to Respondent's decision not to rehire him.

Considering the entire record and all reasonable inferences thereof, Complainant has not shown by a preponderance of the evidence that any of his protected activities contributed to any adverse action against him. Therefore, Complainant has not shown illegal discrimination under the Act.

[8] Ms. DeLeon's credible testimony that Complainant told her that he would leave for another job at his first opportunity and that Respondent's decision not to rehire Complainant was based primarily upon complaints about his performance.

D. **Respondent's Liability For Complainant's "Nonproductive Status" and/or Transportation Costs.**

Title 20 of the Code of Federal Regulations, subsection 655.731(c)(7) sets out an employer's wage obligation to a H-1B employee in "nonproductive status," i.e. "not performing work." 20 C.F.R. § 655.731(c)(7)(i). Subsection (c)(7)(i) requires the employer to pay "the required wage for the occupation listed on the LCA" even if the H-1B employee is not working "due to" 1) "a decision by the employer," 2) "lack of a permit or license," or 3) "any other reason except as specified in paragraph (c)(7)(ii)."[9] *Id.* Thus, subsection (c)(7)(i) requires employers to pay the LCA wage to a H-1B worker in nonproductive status unless that worker is not working due to a reason specified in subsection (c)(7)(ii).

Subsection (c)(7)(ii) sets out two exceptions to the obligation to pay the LCA wage to an H-1B employee in nonproductive status.[10] 20 C.F.R. § 655.731(c)(7)(ii). The first exception encompasses situations when the H-1B employee is temporarily in nonproductive status. *Id.* Furthermore, it is limited to "a period of nonproductive status due to conditions *unrelated to employment*" in which the employee is either voluntarily not working or "unable to work." *Id.* (emphasis added). The examples given for a voluntary period of nonproductive status are "touring the U.S." and "caring for [an] ill relative." *Id.* The examples given for a period of nonproductive status in which the employee is unable to work are "maternity leave" and "automobile accident which temporarily incapacitates the nonimmigrant." *Id.*

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[9] (i) Circumstances where wages must be paid. 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, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA. If the employer's LCA carries a designation of "part-time employment," the employer is required to pay the nonproductive employee for at least the number of hours indicated on the I-129 petition filed by the employer with the DHS and incorporated by reference on the LCA. If the I-129 indicates a range of hours for part-time employment, the employer is required to pay the nonproductive employee for at least the average number of hours normally worked by the H-1B nonimmigrant, provided that such average is within the range indicated; in no event shall the employee be paid for fewer than the minimum number of hours indicated for the range of part-time employment. In all cases the H-1B nonimmigrant must be paid the required wage for all hours performing work within the meaning of the Fair Labor Standards Act, 29 U.S.C. 201 et seq.
20 C.F.R. § 655.731(c)(7)(i)

[10] (ii) Circumstances where wages need not be paid. If an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), 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. *DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled* (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).
20 C.F.R. § 655.731(c)(7)(ii) (emphasis added).

The second exception applies when "there has been a bona fide termination of the employment relationship." *Id.* In *Amtel*, the ARB explained that a "*bona fide* termination" has three requirements: 1) notice of the termination of employment relationship to the H-1B employee, 2) notice of the termination of employment relationship to the DHS,[11] and 3) the employer must provide the employee with payment for transportation home (if required under 8 C.F.R. 214.2(h)(4)(iii)(E)). *See* ARB Case No. 04-087 at 9-11; 20 C.F.R. § 655.731(c)(7)(ii).

Under subsection 214.2(h)(4)(iii)(E), the employer is liable for the reasonable cost of the H-1B employee's transportation home if the employee is "dismissed" before the LCA expires.[12] 8 C.F.R. 214.2(h)(4)(iii)(E). However, if the H-1B employee "voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed" and thus the employer is not liable for transportation costs. *Id.*

Subsection 214.2(h)(4)(iii)(E) also demonstrates that, when formulating the regulations, the Secretary intended "bona fide termination" to encompass voluntary terminations–resignations or "quits"–as well as dismissals. Thus, although it may appear punitive, an employer is liable for "the required wage for the occupation listed on the LCA" even if the H-1B employee has resigned, unless one of the two subsection (c)(7)(ii) exceptions applies. Keeping tabs on the whereabouts of temporary H-1B workers is a legitimate policy goal of the regulations and an active notice requirement helps achieve that goal.

Respondent cites subsection 655.731(c)(7)(i) and argues that notice to the DHS "if required, should only apply where the nonproductive status is '*due to a decision by the employer,*' and it should not apply where the employee resigns." ALJX 9 at 11 (emphasis in the original). This argument ignores the fact that the wage obligation, in the same sentence, is expressly extended to nonproductive status "due to" "any other reason except as specified in paragraph (c)(7)(ii)." 20 C.F.R. § 655.731(c)(7)(i) (emphasis added). As discussed above, subsection (c)(7)(ii) only excuses an employer's wage obligation for nonproductive periods that are 1) both temporary and due to conditions unrelated to employment" or 2) subsequent to a bona fide termination, which requires notice to the DHS.

[11] The term INS under 20 C.F.R. § 655.731(c)(7)(ii) (2004), was effective at the time that the underlying facts in *Amtel* occurred, but has since been changed to DHS. *See Amtel*, ARB Case No. 04-087 at n. 8; 20 C.F.R. § 655.731(c)(7)(ii) (2006).

[12] (E) Liability for transportation costs. The employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. If the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed. If the beneficiary believes that the employer has not complied with this provision, the beneficiary shall advise the Service Center which adjudicated the petition in writing. The complaint will be retained in the file relating to the petition. Within the context of this paragraph, the term "abroad" refers to the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H-1B status.

8 CFR 214.2(h)(4)(iii)(E)

Respondent also argues that:

> Requiring notice as an element of a bona fide termination where a worker resigns contravenes an H-1B worker's statutory portability. That is, H-1B workers are permitted to begin work with a new employer even before a new petition by the new employer is approved and whether or not the prior employer has notified CIS [DHS].

ALJX 9 at 11 (emphasis in the original). First, this is a policy argument that does not trump the unambiguous intent of the regulation. Second, Respondent does not explain how requiring an employer to notify DHS in order to cut off its H-1B liability prevents the employee from changing jobs. Finally, an H-1B employee working with a new employer is not in nonproductive status, at least if making an equal or greater wage (more on this below).

Complainant cites Black's Law Dictionary's definition of "bona fide" and argues that no bona fide termination occurred because Respondent did not follow "the procedures found in its own Memorandum of Agreement." ALJX 8 at 7. However, in *Amtel*, the ARB rejected a nearly identical argument. ARB Case No. 04-087 at 9-11. The ARB recognized:

> that an aggrieved H-1B nonimmigrant employee might also have other rights or remedies that arise under, for instance, a separate employment agreement or contract, a union contract, common law, or other state or federal statutes apart from the H-1B provisions of the INA. The scope of the Board's jurisdiction to review cases involving an employment relationship arising under the INA, however, extends only insofar as that relationship arises under, or is terminated pursuant to, the INA's H-1B provisions.

Id. at 9-10. The ARB concluded "Contrary to the ALJ's determination, an employer need not establish a valid basis or good cause for an employee's termination to effect a "bona fide termination" under the INA's H-1B provisions." *Id.* at 10. It is clear from *Amtel* that a bona fide termination under the Act requires only the satisfaction of the three elements the ARB distilled from the Act and its accompanying regulations and comments. *See id.* at 9-11.

In summary, an employer is liable for the LCA wage for an H-1B employee's nonproductive time unless it can show that one of two exceptions apply. 20 C.F.R. § 655.731(c)(7)(i). The first exception is limited to temporary nonproductive periods, unrelated to employment, where the employee either chooses not to, or is unable to, work. *Id.* at (ii). The second exception applies when there has been a bona fide termination of the employment relationship, which occurs when three (and only three) elements are satisfied–notice to the employee, notice to DHS, and payment of transportation costs if required under 8 C.F.R. 214.2(h)(4)(iii)(E). *Id.*; *Amtel,* ARB Case No. 04-087 at 9-11.

1. June 2003

As discussed above, even if Complainant's hours were reduced in June 2003, Respondent has proven that Complainant was paid for full-time work throughout 2003, thus Respondent has fulfilled its wage obligation for that period. *See* RX31; 20 C.F.R. § 655.731(c)(7)(i).

2. July 12 through July 28, 2006

From July 12 through July 28, 2006, Complainant worked part-time for Respondent. *See* CX 8 at 2; CX 10; TR at 121-22, 130, 191-92. Complainant claims Respondent owes him wages for that period under subsection 655.731(c)(7)(i) because there was no bona fide termination of the employment relationship.

Claimant argues that no bona fide termination occurred because Respondent did not pay for his "return transportation." ALJX 8 at 8. However, as discussed above, the employer is only liable for the reasonable cost of returning the H-1B employee home if the employee is "dismissed" before the LCA expires. 8 C.F.R. 214.2(h)(4)(iii)(E). Because I find that Complainant resigned, he was not "dismissed" and thus no transportation costs were owed. Consequently, Respondent's failure to pay transportation costs does not eliminate the possibility that a bona fide termination occurred. Furthermore, in *Amtel*, the ARB explained that if there is no bona fide termination, the employer is not liable for transportation costs. ARB Case No. 04-087 at fn. 12.

However, Complainant further argues that no bona fide termination occurred because Respondent failed to notify DHS that its employment relationship with Complainant was terminated. ALJX 8 at 7. Complainant admits that he does not know if or when Respondent notified DHS. *Id.* Respondent does not admit, but does not deny, that it failed to notify DHS.

It is a well-established rule that adverse inferences can be drawn from a party's failure to submit evidence within that party's control. *See e.g. Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Bowles v. U.S.*, 319 U.S. 33, 37 (U.S. 1943). Here, Respondent would control, and did not submit, evidence that it notified DHS of the termination of its employment relationship with Complainant, so I find that it did not notify DHS. Consequently, under subsection 655.731(c)(7) and *Amtel*, there was not a bona fide termination of the employment relationship between Respondent and Complainant.

Furthermore, Respondent does not argue that the other subsection (c)(7)(ii) exception applies. See 20 C.F.R. § 655.731(c)(7)(ii). There is no evidence that Complainant was unable to work and, although he did resign, his part-time status was not "unrelated to employment." *Id.* I find that, from July 12 through July 28, 2006, Complainant was in partial nonproductive status and he was not "due to conditions unrelated to employment," either choosing to, or unable to, work. *Id.* (emphasis added). Therefore, I find no exception applies and Respondent is liable for Complainant's full-time LCA wage rate from July 12 through July 28, 2006.

In *Amtel*, the ARB only held the employer liable for the LCA wage rate, despite the fact that the complainant was working in a higher paid position (in title and duties). ARB Case No.

04-087 at 6-7. However, the ARB twice stated that the complainant did not protest the wage rate until after she was terminated. Nevertheless, it did not explicitly make its holding contingent on the employee's silence and the regulation is not ambiguous. Again, subsection 655.731(c)(8) states:

> If the employee works in an occupation other than that identified on the employer's LCA, *the employer's required wage obligation is based on the occupation identified on the LCA*, and not on whatever wage standards may be applicable in the occupation in which the employee may be working.

20 C.F.R. § 655.731(c)(8) (emphasis added). Therefore, I hold that Respondent's wage obligation to Complainant for the period after July 12, 2006, is based upon his LCA wage. Again, as discussed above, subsection 655.731(a)(1) mandates that the actual wage reflect periodic adjustments or promotions within the same occupation. 20 C.F.R. § 655.731(a)(1). However, as above, I find that the BBS licensing requirement distinguishes the MHT and MHRS position into two distinct occupations. Therefore, the relevant LCA wage rate for the period after July 12, 2006, is the MHRS rate at that time at the highest level Complainant achieved in that position.

The parties did not provide 2006 wage information for the MHRS position, but I can approximate the actual wage for that year. On March 22, 2005, Respondent reclassified Complainant to an MHT-I, Step 4 and adjusted his salary from $41,685.00 to $48,774.00 annually. Stip. 17. On August 1, 2005, Complainant received a three percent pay increase and "step alignment" per the union contract to $50,980.00 annually. Stip 20. If Complainant's highest salary as an MHRS ($41,685.00) is multiplied by 1.03 (to reflect the August 1, 2005, 3% increase), the result is $42,935.55. I find that sum to be Respondent's annual wage obligation for the period after July 12, 2006. $42,935.55 divided by 52 weeks and 40 hours per week equals $20.64 per hour–Respondent's hourly wage obligation.

Complainant submitted pay stubs and pay reports covering the period May 1, 2006 through July 28, 2006. *See* CX 10. The pay records show that Complainant was paid full-time wages through July 11, 2006. *See* CX 10. In the 13 business days from July 12 through July 28, 2006, Complainant was paid for 56 hours of work–$1,372.56.[13] *Id.* Working full-time he would have worked 8 hours multiplied by 13 days, which equals 104 hours. 104 hours multiplied by $20.64 equals $2,146.56. Therefore, Respondent is liable for that sum minus the $1,372.56 that Complainant was paid, which equals $774.00. *See* 20 C.F.R. § 655.810(a).

3. July 29 through August 6, 2006

Complainant did not work and was not paid by Respondent from July 29 through August 6, 2006. *See* CX 10. However, Complainant requested and was granted voluntary leave for what were to have been the last two weeks of his employment, July 29 through August 13, 2006, in order to look for a job and/or prepare to move. *See* TR at 130; CX 8 at 2. Therefore, although he was in nonproductive status, I find that this time "away from his/her duties" was "at his/her voluntary request and convenience." 20 C.F.R. § 655.731(c)(7)(ii). However, because the

[13] $980.40 plus $392.16 equals $1,372.56.

purpose of that time off was "to look for a job and/or prepare to move" and the need to move was related to new employment from the loss of his visa because of lack of employment, I do not find that it was "due to conditions unrelated to employment." *Id.* Therefore, the subsection 655.731(c)(7)(ii) exception does not apply and Respondent is liable for the LCA wage for that period.

July 29 through August 6, 2006, contained five business days. Five days multiplied by eight hours multiplied by $20.64 equals $825.60. Therefore, Respondent is liable for $825.60 in wages for the period July 29 through August 6, 2006. *See* 20 C.F.R. § 655.810(a).

4. August 7, 2006 through November 1, 2007

Complainant requested front pay in the form of "the prorated difference between past and new income [Complainant] has been receiving because of abusive employment termination." ALJX 5 at 3; *see also* ALJX 8 at 18. Respondent does not address this issue except to argue that Complainant "is not entitled to any additional pay for any period of his employment." ALJX 9 at 12.

On approximately August 7, 2006, Complainant began working for a new employer, earning $22.12 per hour. *See* CX 10. Complainant testified "many problems happened with the following employer regarding the visa. . . ." TR at 130.

There is no definitive evidence in the record, but I find it likely that Complainant worked under one or more subsequent H-1B petitions from August 7, 2006, through November 1, 2007, and he never returned to work for Respondent. As such, a bona fide termination of his employment would be effected, although there is no clear precedent.

Here, it does not matter because, even if Respondent is still liable for the LCA wage through this period, the only evidence in the record of Complainant's subsequent wages is the exhibit cited above, which indicates that Complainant was working full-time at an hourly rate of $22.12. Since Respondent's wage obligation under the LCA was for full-time employment at an hourly rate of $20.64 (see above), Respondent is not liable for any wages from this period.

The last extension of the LCA expired November 1, 2007, so Respondent has no liability for any subsequent time period. *See* Stip. 13; RX 9.

5. Transportation Costs

Claimant argues that Respondent was liable for, but did not pay for, his "return transportation." ALJX 8 at 8. As discussed above, Complainant was not "dismissed" and thus no transportation costs were owed. *See* 8 C.F.R. 214.2(h)(4)(iii)(E). Furthermore, in *Amtel*, the ARB explained that if there is no bona fide termination, the employer is not liable for transportation costs. ARB Case No. 04-087 at fn. 12. Respondent is not liable for Complainant's transportation costs.

E. Various Other Claims

In his closing brief, Complainant argues that Respondent failed to provide proper notice of his LCA filings and cutoff his health benefits during his last weeks of employment, but deducted payment nonetheless. ALJX 8 at 10-11, 16-17. In his brief Claimant also alleged the tort of intentional infliction of emotional distress, as well as misrepresentation of a material fact under 20 C.F.R. § 655.805(a)(1).

Complainant did not raise these issues before trial or seek leave to amend his complaint to address these issues. Therefore, I find that Respondent did not have an adequate chance to defend these charges and would be unfairly prejudiced by their inclusion in this decision. These claims are stricken as untimely filed and as in violation of my prehearing order. *See* ALJX 1 at 1. Furthermore, I do not find sufficient evidence in the record to support these claims. Finally, I have no jurisdiction to hear a tort action for intentional infliction of emotional distress, and a complaint of misrepresentation on an LCA must be filed within 12 months of the alleged violation. *See* 8 U.S.C. § 1182(n)(2)(A). For all the above reasons, these claims are denied.

F. Damages

1. Prejudgment Interest

Complainant argues for prejudgment interest on the back wages owed. ALJX 8 at 19-20.

In *Amtel*, the ARB explained:

> The ERA does not specifically authorize an award of interest on back pay. Nevertheless, the Board held that a "back pay award is owed to an individual who, if he had received the pay over the years, could have invested in instruments on which he would have earned compound interest."

ARB Case No. 04-087 at 12 (quoting *Doyle v. Hydro Nuclear Serv.*, ARB Nos. 99-041, 99-042, 00-012; ALJ No. 89-ERA-22, slip op. at 18-21 (May 17, 2000)). The ARB went on to order the employer to pay prejudgment and post-judgment interest on the owed back pay. *Id.* at 12-13. The interest rate used is the Federal Short Term rate plus 3%, as specified in 26 U.S.C. § 6621. *See id.*

2. Punitive Damages

In addition to the back wages, visa fees, and transportation costs discussed above, Complainant requests punitive damages. ALJX 8 at 18-19. He argues that "Respondent did not comply with previous commitment when finally terminated [Complainant's] employment while being completely aware of how such a decision would jeopardize Plaintiff's [Complainant's] and [his] dependents' legal stay in the States, finances, and almost every aspect of [Complainant's] and [his] dependents' lives." ALJX 8 at 19.

> Nothing in the Immigration Act or the Secretary's implementing regulations authorize punitive damages. Punitive or exemplary damages are recoverable under Title 29 C.F.R. Part 24 only when a whistleblower protection statute specifically includes them. The Safe Drinking Water Act and the Toxic Substances Control Act do. 42 U.S.C.A. § 300j-9 (i)(2)(B)(ii)(IV) (West Supp. 2005) and 15 U.S.C.A. § 2622(B)(2)(B)(iv) (West 1999). The Immigration Act does not.

Kersten v. La Gard, Inc, 2005-LCA-00017 at 7 (2006) (ALJ). Even if punitive damages were available, I find that Respondent did not perceive a "risk that its actions [would] violate federal law to be liable in punitive damages." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999).

3. Front Pay

Complainant argues for front pay because reinstatement would not be possible. ALJX 8 at 18. However, at this date, the extension of the LCA has expired, and with it Respondent's obligations to Complainant. *See* Stip. 13; RX 9. Therefore, Respondent has no liability to Complainant beyond that discussed above.

G. Is Respondent Liable For a Civil Monetary Penalty?

The Administrator "may" assess civil monetary penalties up to $1,000 for non-willful violations and up to $5000 for willful violations of the INA. 8 U.S.C. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii). "Willful" is defined as "a knowing failure or a reckless disregard with respect to whether the conduct was contrary to" the INA. 20 C.F.R. § 655.805(c). Seven factors may be considered in determining the amount of a monetary penalty: previous history of violations by the employer; the number of workers affected; the gravity of the violations; the employer's good faith efforts to comply; the employer's explanation; the employer's commitment to future compliance; the employer's financial gain due to the violations; or potential financial loss, injury or adverse effect to others. 20 C.F.R. § 655.810(c).

In this case, the Administrator concluded that Respondent did not violate the Act. Since no violation was found, no penalty was assessed. Under 20 C.F.R. § 655.840(b), an Administrative Law Judge ("ALJ") has the authority to "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." The ALJ's authority to review the Administrator's assessment specifically includes a determination of the appropriateness of a civil penalty. *See Administrator, Wage and Hour Division v. Law Offices of Anil Shaw*, 2003-LCA-20 (ALJ May 19, 2004) (citing *Administrator v. Chrislin, Inc.*, 2002 WL 31751948 (DOLAdm.Rev.Bd)).

Complainant alleges that Respondent's conduct constituted a "willful" violation. Although I have concluded that Respondent violated the Act by shifting some of the visa fees to Complainant and failing to effectuate a timely bona fide termination, I do not find Respondent's actions to have been willful–neither intentional nor reckless. In addition, there is no evidence in the record of previous violations by Respondent or that any worker other than Complainant was affected by Respondent's violations. Respondent's financial gain due the violation and the

corresponding potential financial loss of Complainant were limited to $1,185.00 in visa fees and $1,599.60 in back wages.[14] *Compare U.S. Dept. of Labor v. Quikcat.com, Inc.*, 2003-LCA-19 (ALJ June 9, 2005) (upholding civil monetary penalty for willful failure to pay $357,777.26 in required wages to fourteen H-1B workers); *Administrator, Wage and Hour Division v. Home Mortgage Company of America, Inc.*, 2004-LCA-40 (ALJ March 6, 2006) (upholding civil monetary penalty for willful failure to pay $513,036.56 in required wages to fourteen H-1B workers). In addition, I find that Respondent made good faith efforts to comply with the INA by paying Complainant the required wage for all hours he worked.

Having considered the relevant factors, I find that the record does not support the assessment of a civil monetary penalty in this case.

ORDER

IT IS HEREBY ORDERED that:

1. Respondent Gardner Family Care Corp shall pay to Complainant Rafael G. Morales Toia in accordance with the foregoing findings $1,185.00 to reimburse visa fees paid by Complainant.

2. Respondent Gardner Family Care Corp shall pay back wages to Complainant Rafael G. Morales Toia in accordance with the foregoing findings for the period July 12 through July 28, 2006, in the total net amount of $774.00.

3. Respondent Gardner Family Care Corp shall pay back wages to Complainant Rafael G. Morales Toia in accordance with the foregoing findings for the period July 29 through August 6, 2006, in the total net amount of $825.60.

4. Complainant is entitled to prejudgment compound interest on the award of accrued back wages at the applicable rate of interest which shall be calculated in accordance with 26 U.S.C. § 6621 and this Decision and Order.

5. Respondent shall be assessed post judgment interest under 26 U.S.C. § 6621 until satisfaction.

6. Complainant's claims for retaliation, intentional infliction of emotional distress, reimbursement for health benefits, misrepresentation of a material fact on the LCA, failure to properly post notice of the LCA, transportation costs, back wages for June 2003, back wages after August 6, 2006, front pay, and punitive damages are **DENIED**.

7. The Administrator of the Wage and Hour Division, Employment Standards Division, DOL, shall forthwith make such calculations as may be necessary and appropriate with respect to back pay, and all calculations of interest necessary to

[14] $774.00 + $825.60.

carry out this Decision and Order, which calculations, however, shall not delay Respondent's obligation to make immediate payment to the Prosecuting Party.

8. This Decision and Order shall supersede the Administrator's finding of no violation, which shall be deemed void and without further effect.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: **Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210**. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a). If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).