U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 04 September 2008

CASE NO.: 2008-LCA-00005

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party,

vs.

FOODPRO INTERNATIONAL, INC.,
Respondent,

DECISION AND ORDER

This is an action to require payment of prevailing wages to an employee working in the H-1B visa program. *See* 20 C.F.R. §§ 655.731, 655.805(a)(2). Prosecuting Party, the Administrator, Wage and Hour Division ("Administrator"), seeks an order requiring FoodPro, International, Inc., Respondent ("FoodPro," "the Company," or "Respondent"), to pay $52,309.55 in unpaid, required wages to Aggrieved Party, former employee Biljana Ivanova ("Ms. Ivanova" or "the employee").

After investigating, on November 7, 2007, the District Director issued a Determination on behalf of the Administrator. ALJ Exh. 3.[1] He determined that FoodPro had failed to pay required wages and owed back wages in the amount of $47,799.70.[2] He assessed no civil penalty. FoodPro timely requested a hearing on November 15, 2007. ALJ Exh. 5.[3]

I conducted a duly noticed hearing on May 20, 2008, in San Francisco, California. The Administrator was represented by counsel of record. FoodPro was represented by its President M. William Washburn ("Mr. Washburn"), who is not an attorney. I reminded Mr. Washburn that FoodPro had the right (at its own expense) to representation by counsel; he elected to proceed without counsel. Tr. 5. Ms. Ivanova and the Administrator's investigator testified on behalf of the Administrator, and Mr. Washburn testified on behalf of FoodPro. I admitted into evidence

[1] "Tr." refers to the transcript of the hearing. "R. Exh." refers to exhibits of Respondent. "Admin. Exh." refers to exhibits of the Administrator. "ALJ Exh." refers to exhibits of the administrative law judge. "R. Br." refers to Respondent's closing brief.

[2] The Administrator moved at trial to be allowed to recover $ 4,509.85 in excess of the amount in the Determination letter. This was based on evidence that the Administrator acquired after it issued the letter. As I discuss in the text below, I will deny the motion.

[3] The Administrator seeks the amount in the Letter of Determination ($47,799.70) unless its motion to enlarge that amount to $52,309.55 is allowed. *See* text below.

Respondent's Exhibit 1 and Administrator's Exhibits 1-45.[4] At the conclusion of the hearing, I closed the record for submission of evidence and allowed post-hearing briefing. Both parties submitted briefs. I now proceed to a decision.

Having reviewed all of the evidence, considered the arguments of the parties, and being fully informed, I will decide that FoodPro will be required to pay the amount stated in the Administrator's Letter of Determination, $47,799.70, but not more.

FINDINGS OF FACT

A. Stipulated facts.

The parties stipulated to the following:[5] FoodPro is a California corporation, engaged in the business of planning and designing food processing plants and distribution operations. Its President, Mr. Washburn, is ultimately responsible for hiring decisions, including approving Labor Condition Applications ("LCAs") on behalf of the Company under the H-1B visa program. FoodPro employed Ms. Ivanova as a Financial Analyst under that program in Stockton, California.

Mr. Washburn signed, and on October 5, 2001, FoodPro filed an LCA, which it used for Ms. Ivanova (ETA Case No. T-01285-00522).[6] *See* ALJ Exh. 1. FoodPro listed the position on the LCA as "Financial Analyst" and stated a prevailing wage in Stockton of $38,315.64.[7] Mr. Washburn understood that the statement of a prevailing wage was a requirement for the filing of an LCA. Specifically, section "E" of the LCA form states in pertinent part:

> E. Employer Labor Condition Statements.
> Please Note: In order for your application to be processed, you MUST read Section E of the Labor Condition Application cover pages under the heading "Employer Labor Condition Statements" and agree to all 4 labor condition statements summarized below:
> (1) Wages: Pay non-immigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time. Offer immigrants benefits on the same basis as U.S. workers.

Admin. Exh. 1 at DOL 2 (omitting the three other stated conditions). In the signature section ("Declaration of Employer"), the person signing attests that he has read section E of the cover pages and agreed to comply. *Id.*

---

[4] The Administrator withdrew exhibits identified as 46 and 47.

[5] In a pre-trial statement, the Administrator recited 66 enumerated, stipulated facts. ALJ Exh. 1. At the hearing, Mr. Washburn confirmed his stipulation to those facts. Tr. 21. Facts Nos. 41-66 stipulate to the identification and authenticity of several of the Administrator's exhibits.

[6] Mr. Washburn also signed a letter to the U.S. Immigration and Naturalization Service in support of the H-1B visa application for Ms. Ivanova. *See* Admin. Exh. 2.

[7] On the LCA, FoodPro also states that the wage rate will be $40,331.20. Admin. Exh. 1 at DOL 1; ALJ Exh. 1 at 5, ¶¶ 37, 38 (stipulating to document).

The documentation of record shows that FoodPro filed a Petition for Nonimmigrant Worker with the Immigration and Naturalization Service ("INS"), dated October 12, 2001. *See* ALJ Exh. 1 at 6, ¶ 41 (stipulating to document). The petition represents that FoodPro will pay Ms. Ivanova wages of $38,314.64 per year and will provide other compensation in the form of medical and dental insurance and profit sharing in the amount of $6,500 per year. *Id.;* Admin. Exh. 3 at DOL 19. The petition shows Mr. Washburn's signature under penalty of perjury. *Id.* The INS approved the visa in a notice dated January 28, 2002; the visa covered the period from January 28, 2002 to October 29, 2004. On November 22, 2004, the INS gave notice that it had extended the visa from October 30, 2004 to October 29, 2007.

The "Financial Analyst" position for which FoodPro hired Ms. Ivanova was one that FoodPro created for her. She worked in that position from February 1, 2002, through February 28, 2006. Mr. Washburn believed Ms. Ivanova to be working on an H-1B visa throughout the employment. He knew that the initial visa was to expire in 2004.[8]

FoodPro did not pay her the full amount of wages required under the H-1B visa program from her hire on February 1, 2002 through October 29, 2004. On February 12, 2002, Mr. Washburn informed his bookkeeper that Ms. Ivanova's starting salary was to be $24,000, and the bookkeeper confirmed this in writing. Admin. Exh. 22, 23. Ms. Ivanova's Wage and Tax Statements (Form W-2) from the Internal Revenue Service show her gross wages, tips, and other compensation for respective years as follows: $22,315.00 in 2002 (Exh. 30); $22,813.32 in 2003 (Exh. 31); $25,444.78 in 2004 (Exh. 32); $26,535.98 in 2005 (Exh. 33); and $5,996.37 in 2006 (Admin. Exh. 34). See ALJ Exh. 1 at 8, ¶¶ 61-65.

Although FoodPro has a profit sharing plan, its contributions to the plan were discretionary each year[9]. Throughout the employment, FoodPro paid Ms. Ivanova's landlord $625 per month for her rent but deducted the same amount from her paycheck (as $312.50 per semi-monthly check). FoodPro allowed all of its salaried employees certain paid holidays,[10] four hours per month sick leave, two weeks' vacation annually (except none in the first year); and one floating holiday annually (except none in the first year).

FoodPro provided health insurance to its salaried employees, including Ms. Ivanova, with the single exception of Truong Chanh, who received no health care benefits.[11] The Company provided dental insurance to all employees. As to Ms. Ivanova, the Company deducted her "share of the premiums from her gross pay for each pay period." ALJ Exh. 1 at 5 (¶ 36).

---

[8] The parties did not expressly stipulate that Mr. Washburn knew that Ms. Ivanova's visa was extended in 2004. The facts to which they did stipulate, however, imply that he knew of the extension. This follows from the stipulation that Mr. Washburn knew she was on an H-1B visa throughout her employment into 2006, and that the initial visa expired in 2004

[9] Plan participants may not withdraw funds while they remain employed at the Company. Thus, no contribution to the plan was paid over to Ms. Ivanova during her employment. Having left the Company's employ, Ms. Ivanova has requested the funds, and it appears that the plan administrator is processing the request. *See* text, *infra.*

[10] The holidays were New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving, and Christmas.

[11] FoodPro paid the full premium and one-third of additional premiums for spouse and dependent coverage. At the time of the initial submissions to the INS, FoodPro stated that it had 24 employees but did not specify how many were salaried. Admin. Exh. 3 at DOL 19.

B. Findings not based on stipulation.

1. Was the LCA to extend the visa fraudulently submitted?

FoodPro alleges that the LCA submitted in 2004 for the extension was not one approved by the Company. FoodPro asserts that the LCA submitted stated a prevailing wage in excess of Mr. Washburn's express limitations. Before reaching the facts specific to the extension, I turn for context to the submission of the initial LCA in 2001.

Mr. Washburn and Ms. Ivanova had pre-hire discussions about compensation before the initial LCA was filed. There was disputed testimony about these discussions. Mr. Washburn said that he discussed the salary before Ms. Ivanova came out to California. Tr. 166-67. He had sought legal assistance for the H-1B process and told the attorney that he could afford to pay Ms. Ivanova only $24,000 per year. Tr. 167-68. The attorney had told Mr. Washburn that the Department of Labor would not approve that amount. Tr. 169. When Mr. Washburn told Ms. Ivanova about this, her response was that she could take the Company in a new direction and develop new business, and that the Company could pay her commissions. *Id.* She also said that she had learned that the Company could count fringe benefits, profit sharing, and bonuses in addition to commissions, and that, together, these could amount to the prevailing wage, approximately $38,000. *Id.* Mr. Washburn testified that he trusted Ms. Ivanova's information and hired her. Tr. 170-71.

Countering this, Ms. Ivanova testified that she knew nothing about any prevailing wage requirement until she first saw the LCA, which was not until 2003. Tr. 33.[12] She said that Mr.

[12] Mr. Washburn stated that he confirmed the hire under the H-1B program in an offer letter, dated January 21, 2002. The letter offers her the Financial Analyst position –

> with an annual salary base of $26,400. Although the full range of company benefits will be available to you, you will need to reimburse the company for those benefits as discussed. Also many incentives will be available to you since, as we discussed, as a goal, we strive for a bonus potential of 25 percent.

R. Exh. 1. Ms. Ivanova denied ever seeing the letter. Tr. 72.

The Administrator objected to the offer letter's admission. He argued that there were indications that the document was created after the date on it. He pointed to the H-1B approval date of January 28, 2002 (Admin. Exh. 4), argued that there was no advance notice of approval, and noted that the offer letter, dated a week before the approval, referred to the visa in the past tense as having been approved. Tr. 73. Ms. Ivanova testified that the tone of the offer letter was inconsistent with the way Mr. Washburn spoke with her. Tr. 72.

Mr. Washburn testified that the government has an automated telephone line with the status of visa applications, and that Ms. Ivanova would call every day and report back. Tr. 167. Eventually, she learned this way that the visa had been approved and told Mr. Washburn. *Id.* According to Mr. Washburn, this occurred before the official notice was mailed. *Id.* FoodPro argues that this explains why the offer letter, dated before the notice date, refers to the approval as having happened in the past.

I overruled the objection, stating that these arguments went to weight and were insufficient to exclude the document. As I discuss in the text below, for the most part, the exhibit is irrelevant as is most of the evidence surrounding the hire.

Washburn told her pre-hire that her salary would be between $30,000 and $35,000. Tr. 33-34. She admitted that part of her job was business development but denied any discussions about bridging the gap between the salary FoodPro was going to pay her and the prevailing wage by earning commissions. Tr. 91-91.[13] She denied any pre-hire discussion about benefits. Tr. 34. She denied ever discussing reimbursing the Company for health benefits or even being asked to do so. Tr. 70. She stated that her salary at hire was $24,000, and that her first raise was not until February 2004. Tr. 34-35, 102.[14]

This disputed evidence provides a possible context for discussions around three years later, when FoodPro was filing for an extension of the visa in 2004. Although the parties disagree about the reason, they agree that Mr. Washburn was reluctant to extend the visa. Tr. 94-95, 171. According to his testimony, Mr. Washburn told Ms. Ivanova that he could not meet the prevailing wage, and stated to her that if she: "'can get that changed, and we can put down [on the LCA] your base rate – and we'll certainly still try to pay you all the bonuses and things . . . And so if you can get the Department of Labor, or the INS, or whoever it is you've got to get . . . But if you can work it out with them, that's fine.'" Tr. 171-72.

Following from this, Mr. Washburn testified further that he expected there would be no application for an LCA unless Ms. Ivanova could get her base salary (apparently about $26,400 per year) approved as a prevailing wage; that he signed the check for the LCA application fee

---

To the extent that the exhibit is relevant, I give it next to no weight. It is possible that Ms. Ivanova learned that her visa application would be approved by calling a "government" phone line. On the other hand, I doubt that the INS would announce a decision over the telephone as having been made and then date the documentation to show a decision on a later date. There is also Mr. Washburn's deposition testimony, in which, inconsistent with FoodPro's argument, he stated that he did not think FoodPro received any notice before the notice date that Ms. Ivanova's visa had been approved. Admin. Exh. 37 at DOL 258.

More to the point, the offer letter states a starting base salary of $26,400. Yet all of the considerable documentation consistently shows a starting base salary of $24,000. Ms. Ivanova testified that $24,000 was her starting salary and that she did not receive a raise until February 2004. It appears that the raise was to approximately $26,400, given her actual pay in years 2004, 2005, and 2006. In short, it appears that, although dated January 21, 2002, the "offer letter," refers to a salary that did not exist until 2004.

This suggests that the document is fraudulent – created after the fact to make it appear that Ms. Ivanova somehow might have been complicit in an agreement to receive less than the prevailing wage. Indeed, Mr. Washburn admitted elsewhere on the record (*see* text, *infra*) that he did create deceptive documents such as when he showed contributions to health benefits on Ms. Ivanova's pay stub while having her reimburse him in cash – all to create an impression for the government that he was paying her more than in fact he was. *See* Tr. 191-92; Admin. Exh. 37 at DOL 149: ("Q. Was the sole purpose of the alleged agreement for Ms. Ivanova to reimburse FoodPro to reflect more compensation for purposes of the H-1B program? A. Yes.") If the document is not fraudulent, its accuracy is too unreliable for me to give it any appreciable weight.

[13] Ms. Ivanova also testified that she and Mr. Washburn agreed that her business development work would focus on government projects. She said that they agreed that it was extremely difficult to get this work, and that if she were to succeed, it "will be like once-in-a-lifetime." Tr. 97. The implication is that she and Mr. Washburn never expected any substantial commissions and that most likely there would be none, and in fact, according to Ms. Ivanova, she never did bring in any work. Tr. 98.

[14] Initially, Ms. Ivanova testified that her first raise was not until 2005. She corrected the testimony when Mr. Washburn showed her documentation on cross-examination.

($185) without realizing what it was, Tr. 172; and that the LCA submitted did not contain the information that he had approved, Tr. 201; Admin. Exh. 37 at DOL 271, 273. He testified that he generally does not read documents, including government forms, before signing them (but relies on his staff) Tr. 189-90; that he does not recall signing the LCA for the extension; and that he never received a copy of it. He asserts that he was either tricked into signing the LCA by its being placed in a stack of other documents for his signature, or that it was signed electronically without his knowledge or consent. Tr. 172-73; Admin. Exh. 37 at DOL 261.

For her part, Ms. Ivanova denies any discussion with Mr. Washburn at the time of the extension concerning FoodPro's inability to pay her the prevailing wage. Tr. 96.

The Administrator produced an unsigned LCA for the extension and later an identical LCA that did show Mr. Washburn's signature. Mr. Washburn recognized the signature but doubted its authenticity because he could not remember signing it. Admin. 37 at DOL 259-60. He also questioned why the Administrator would have both a signed copy and an unsigned copy.

Although I accept that Mr. Washburn might have signed the LCA without reading it, I reject his allegation that the LCA extension was fraudulently filed.

At the outset, I acknowledge that Ms. Ivanova might have felt certain pressure about getting the extension approved. Although she minimizes now her urgency about leaving Macedonia in 2001, her contemporaneous email to Mr. Washburn prior to the first LCA is more persuasive. It suggests desperation, citing threats from Albanian criminals to harm Ms. Ivanova and her children. There is no evidence that Ms. Ivanova had found any alternate employment by 2004 when her visa was about to expire. Without an extension, Ms. Ivanova likely would have to return to a possibly uncertain future in Macedonia. Mr. Washburn was reluctant to request the extension. Ms. Ivanova could have become desperate again.

Nonetheless, even were I to give the benefit of the doubt to Respondent (and there is no reason to do so), the evidence still does not support FoodPro's fraud allegation. First, I conclude that Mr. Washburn did sign the LCA for the extension. He acknowledges that the signature appears to be his. Given his testimony that he signed government documents without reading them, his inability to recall reading the LCA demonstrates nothing about whether he signed it.

Second, the Administrator's producing both a signed and an unsigned LCA implies nothing nefarious. A signed copy and an unsigned copy are what routinely follow from the regulatory regime. Employers are required to file H-1B LCAs electronically with the Department of Labor and then to sign and keep an original. 20 C.F.R. § 655.720 (must file electronic LCA at http://www.lca.doleta.gov); 655.730. The electronically filed LCA would have no "wet" signature. FoodPro routinely did this on LCAs.[15] On the other hand, the application to the INS (now U.S. Citizenship and Immigrations Services) for H-1B visas must be a copy of the signed original. 20 C.F.R. § 655.730(c)(3). The Administrator stated that he obtained the signed copy from the INS. This is entirely unremarkable; the INS would have such a document. I therefore

[15] Mr. Washburn testified that FoodPro had brought in no more than five employees under the H-1B visa, and the Administrator was able to show other electronically filed LCAs bearing no "wet" signature on three other FoodPro LCAs. Tr. 143-44, citing Admin. Exh. 18-20.

conclude that Mr. Washburn signed and approved the LCA for the extension, whether knowingly or not.

Third, Mr. Washburn did not testify that Ms. Ivanova actively misled him; he did not say that she told him she had noted her current salary as the prevailing wage on the LCA. The worst that could be inferred, even accepting Mr. Washburn's version of the facts, is that Ms. Ivanova patterned the extension after the original LCA, did not reduce the prevailing wage to her current base salary, and did not tell Mr. Washburn. Yet the draft LCA came to Mr. Washburn for review and signature, Ms. Ivanova made no representation about what it contained, and its contents were immediately available for Mr. Washburn to read if he chose to do so. That is not fraud in the factum or fraud in any sense; at the least, Mr. Washburn should have checked the LCA to be sure the prevailing wage was no more than what he willing to pay – according to his testimony, that was his primary concern.

Finally, I do not in any event accept Mr. Washburn's version of the exchanges between him and Ms. Ivanova at the time FoodPro filed for the extension. Rather, I credit Ms. Ivanova's testimony denying any discussion about FoodPro's inability to pay the prevailing wage. As I discuss below, Mr. Washburn is generally less than entirely credible. But on this particular dispute, FoodPro's attorney had previously advised Mr. Washburn that the Department of Labor would not approve a visa with a lower prevailing wage. It would have been senseless to send Ms. Ivanova on a fool's errand, trying to get an application approved that he knew the DOL would reject. I believe that Mr. Washburn was reluctant to request the extension, but I find that he did not require Ms. Ivanova to find a way to get her base salary ($26,400) approved as the prevailing wage and that there was no fraud in connection with the submission of the LCA for the extension.

2. FoodPro's health insurance benefits.

Mr. Washburn testified that FoodPro has two separate classes of salaried employees and that these classes get different fringe benefits: there is a class of finance workers who do not get health insurance benefits, and there is a class of all other salaried employees who get such benefits. FoodPro offered no documents from a health and welfare plan that refers to any classes of employees; it offered no documents relevant to this issue whatever.

Mr. Washburn also admitted on direct that this division of the salaried employees into classes was merely an after-the-fact excuse that he made up as a defense in this action. Tr. 173-76. As he stated, after the Administrator began his investigation, Mr. Washburn did some research and found that if the employer had a class of employees who are treated the same and have similar duties, there can be exceptions to a requirement of providing benefits to the H-1B worker; that he was looking for a defense; and that to establish a defense, he wrote up a letter – parts of which were unintentionally false – that eliminated health benefits for financial workers.[16]

Contrary to FoodPro's assertions, Ms. Ivanova testified that when she started she was given an employee handbook. Tr. 49, 51, 70; Admin. Exh. 21. The handbook states that FoodPro pays

[16] Mr. Washburn's testimony reflects that he would have extended this after-the-fact manufactured excuse to more fringe benefits, but the only other financial worker was receiving all of the fringe benefits other than health care.

100 percent of the employee's health care premiums at Kaiser as well as one-third of the premium for spouse and family members. Admin. Exh. 21 at DOL 60. The employee pays only a "minimal 'co-payment' required at the time of each doctor visit." *Id.*

On cross-examination, FoodPro tried to bring Ms. Ivanova's testimony into doubt. FoodPro also offered Mr. Washburn's testimony that he was unfamiliar with the employee handbook; that fringe benefits usually were stated in the offer letter; and that hourly employees got different benefits from salaried employees and part-time employees got different benefits from employees who were full-time. Tr. 180-81.

I find Ms. Ivanova's testimony has not been refuted, and that she did receive the employee handbook at the time of hire. Her answers on cross-examination were unremarkable; Mr. Washburn, who does not read submissions to the federal government might not be familiar with all materials passed out to new employees; and I have found that the would-be "offer letter" is entitled to next to no weight. When FoodPro gave Ms. Ivanova this handbook, it undertook to provide her health care benefits at the costs indicated in the handbook; it was not treating her as part of a class of workers who get all benefits except health care. FoodPro did not break its salaried employees into classes for purposes of any fringe benefits, including health insurance benefits.[17]

3. Mr. Washburn's credibility.

I find Mr. Washburn's credibility to be wanting. As discussed above, Mr. Washburn admits making up the different benefit classes of salaried employees as a *post hoc* rationale. He admits that he showed health benefits on Ms. Ivanova's pay statements and then asked her to reimburse him only because he wanted to mislead the government into thinking that he was giving her greater compensation. I have described the considerable evidence suggesting that the "offer letter" was fraudulent.

I also credit Ms. Ivanova's testimony that Mr. Washburn proposed to her that the case be concluded with FoodPro's giving her a check, which would establish that he had paid her in full, and then she would later return the check to the Company. Tr. 79. This is consistent with his seeking a similar exchange of checks for fringe benefits. Tr. 80. It is consistent with his arranging to show health benefits on Ms. Ivanova's pay statements only to have her reimburse the Company for the benefits *sub rosa.* Every one of these reimbursement schemes is an effort to mislead government officials.[18] *See also,* fn. 21, *infra* (Mr. Washburn not credible when contending that he hired Ms. Ivanova intending to pay her more than all of the profits of the Company for the preceding year).

[17] I do not doubt that the other finance-related employee (who essentially is the bookkeeper), never asked for medical benefits and did not get them. The record offers no explanation for this. Perhaps she was covered on her spouse's employer-related health care plan. There is no evidence that FoodPro told her that she was ineligible for health care benefits because her work related to the Company's finances.

[18] Mr. Washburn suggested that this plan to "exchange" checks to create an appearance that FoodPro had paid the back wages was the idea of the investigator, Mr. Avila. Tr. 176-77. I reject this suggestion. The check "exchange" is Mr. Washburn's *modus operandi;* there is nothing of which I am aware that would induce a long-term DOL investigator to suggest such a fraudulent scheme.

4. FoodPro's profit sharing or 401(k) plan.

FoodPro has a profit-sharing or 401(k) plan.[19] Mr. Washburn testified at his deposition that the Company normally contributes about 20 percent of an employee's gross earnings to her profit sharing trust annually. Admin. Exh. 37 at DOL 324. Employees are eligible to participate after they have worked for the Company "about a year." *Id.* FoodPro's contributions vest at the rate of 15 percent per year, until the employee becomes fully vested after seven years. *Id.* Mr. Washburn stated that the Company's contributions were in its discretion (from zero to 25 percent) and that the Company had missed making contributions in only one year. *Id.* at DOL 324, 328. He stated in his brief that Ms. Ivanova has now asked for a payout, and the Company is calculating it. His testimony was that Ms. Ivanova's vested contribution at the time she left was about $7,000 or $8,000. Mr. Washburn testified that this benefit was given to all employees and becomes available when they leave the Company. Admin. Exh. 37 at DOL 326. A third-party administrator (Charles Scwab) manages it. *Id.* at DOL 327.

5. Willful misconduct.

Respondent offers evidence to show that any violation was not willful. It seeks to show, for example, that Mr. Washburn was unfamiliar with the LCA and other relevant forms, that the forms are not sufficiently clear to tell employers what counts as wages, that there is no advice on what to do if the employer cannot afford to pay the wages, that he signed some of the documents without reading them, that the Company relies on the foreign national to take care of the visa application (especially on extensions), that the only reason FoodPro did not pay Ms. Ivanova more is that it could not afford to, that the prevailing wage was annual and the Company hoped to make up later in the year for deficiencies early in the year, and that in no event did FoodPro or Mr. Washburn intend to violate the rules of the program.[20] I will not make findings about these allegations because they are irrelevant: the truth of the matters asserted will not affect the outcome.[21]

This is because "The Secretary may order payment of back wages (including benefits) due for [failure to pay wages as required under § 655.731] whether or not the violation was willful." 20 C.F.R. §655.805(b). If the violation was willful, the Administrator may also assess penalties. *Id.* The civil money penalties include: "* * * (2) An amount not to exceed $5,000 per violation for

[19] FoodPro states that the references in the record to the FoodPro Profit Sharing Trust are actually to a 401(k) plan, not profit-sharing.

[20] Other examples along these lines include evidence to show that Ms. Ivanova was desperate to relocate to the United States because certain Albanian criminals were threatening her and her children in Macedonia (where they had been living); she managed to get one daughter into a U.S. school and wanted to be closer to her; she needed an H-1B employer to sponsor her; she approached FoodPro through a mutual contact; and FoodPro created the job for her. Tr. 68.

[21] Every indication is that Mr. Washburn's conduct, at its core, was intentional. He knew that he was not paying the prevailing wage as required. His statement to the INS was that he would pay the prevailing wage plus $6,500 in fringe benefits. He knew or should have known that the fringe benefits were separate and above the wage obligation. He also stated to the INS that FoodPro's net annual income *before hiring Ms. Ivanova* was $39,022, Admin. Exh. 3 at DOL 19, and yet he contends that he expected to be able to add her to the payroll and pay her wages of $38,314.64 and fringe benefits of $6,500. I find it less than credible that Mr. Washburn believed that he would make good on these obligations. In any event, it is beyond question that Mr. Washburn knew that in 2002, 2003, and 2004 respectively he failed to meet his obligations, and he continued Ms. Ivanova in his employ anyway.

(i) A willful failure pertaining to wages/working conditions (§§ 655.731, 655.732 . . .); (ii) A willful misrepresentation of a material fact on the labor conditions application; or (iii) Discrimination against an employee (§ 655.801(a) . . .)." A "willful failure" "means a knowing failure or a reckless disregard with respect to whether the conduct was contrary to [the requirement to pay prevailing wages]." 20 C.F.R. § 655.805(c).

Here, the Administrator does not seek to impose a civil penalty. Accordingly, issues such as whether the employer's violation was a knowing failure or reckless disregard do not arise; the Secretary is acting solely under her regulatory authority to order payment of back wages "whether or not the violation was willful."

6. Calculation of amount of underpayment.

To describe his investigation and the supporting evidence found, the Administrator offered the evidence of then-Wage and Hour Investigator Cesar Avila.[22] Mr. Avila spoke with Mr. Washburn, interviewed employees, and reviewed two years' ledgers. Tr. 116.

Mr. Avila found that the Company failed to pay the prevailing wage. Tr. 117. He explained his methodology for calculating the amount of unpaid wages.[23] Usually his calculations were based on a comparison for each pay period of the actual amount the Company paid the Aggrieved Party against the required wage for that period. This time, however, he did not have the statements for the various pay periods. He asked Ms. Ivanova for them, but she was moving and could not access them. Tr. 147. Curiously, he did not ask Mr. Washburn or FoodPro for copies. *Id.* Without the pay statements, he had to rely on Ms. Ivanova's Forms IRS W-2 for the respective years involved and pro-rate for the dates worked. He concluded that the amount of back wages was $47,799.70. The Determination Letter went out indicating that as the amount due.

After the Letter went out, Ms. Ivanova provided the pay statements. Mr. Avila recalculated, this time comparing the amount paid with the amount required for each pay period. He adjusted the amount due to $52,309.55. Tr. 147. He allowed Mr. Washburn an opportunity to review his work. Tr. 133; *see* Admin. Exh. 21 at DOL 66-68. Mr. Washburn objected that FoodPro had paid Ms. Ivanova's rent, but Mr. Avila declined any adjustment because the pay statement showed that, having paid the landlord directly, FoodPro deducted the rent out of Ms. Ivanova's paychecks. Tr. 135. Mr. Avila denied an adjustment for health and dental insurance because he found that these benefits were available to all employees. Tr. 136.

[22] I find that Mr. Avila was an expert in the area of investigating wage and hour claims, including claims in the H-1B visa program. By the time of the investigation, he had eight years' experience as a DOL Wage and Hour Investigator. Tr. 111-12. He had received extensive training, including two training events centered on the H-1B program, the first in 2002 and the second in 2006. Tr. 112-13. He had previously done five H-1B investigations. Tr. 113.

[23] Mr. Avila testified that he began with the prevailing wage: $38, 314.64. He divided this by the number of pay periods annually at FoodPro, bringing the prevailing wage per pay period to $1, 596.44. Although not initially, after comments from Mr. Washburn, he changed the prevailing wage per pay period to zero for periods during which Ivanova was on an unpaid leave at her own request. At this point, however, he was stymied because he did not have pay statement for the respective pay periods. It appears that he therefore calculated from the annual IRS W-2's. Tr. Tr. 120, 126-31, including authenticating documents at 122-25.

APPLICABLE LAW

The H-1B visa program is a voluntary program that permits employers to secure and employ temporarily non-immigrants to fill specialized jobs in the United States. *See* 8 U.S.C. § 1101(a)(15). An employer applying to participate in the program must state on an LCA that it will pay the required wage. 20 C.F.R. § 655.731. Specifically, the employer must attest that it will pay the required wage throughout the period of employment and that this wage will be the greater of the actual wage rate or the prevailing wage rate. *Id.* § 655.731(a). The enforceable wage obligation is the actual wage or the prevailing wage, whichever is more. *Chelladurai v. Infinite Solutions,* ARB Case No. 03-072 (2006).[24]

Here, the Administrator does not contend that the actual wage was higher than the prevailing wage and accepts as accurate the prevailing wage that FoodPro represented on both the initial LCA and the extension: $38,314.64. FoodPro does not dispute that this correctly states the prevailing wage, and I find that it does.

"Upon determining that an employer has failed to pay wages or provide fringe benefits as required by § 655.731 and § 655.732, the Administrator shall assess and oversee the payment of back wages or fringe benefits to any H-1B nonimmigrant who has not been paid or provided fringe benefits as required. The back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid . . .." 20 C.F.R. § 655.810.

As to the defenses, the assertion that an employee got a signature on an LCA through the employer's "habit of signing documents without reading them" is an affirmative defense, with the burden on the employer. *Administrator v. Jackson,* ARB Case No. 00-0668 (April 31, 2001) at 4. The employer "cannot rely on his own negligence as a basis for relieving himself of his obligation to pay the prevailing wage." *Id.*

An employer must provide benefits to workers under the H-1B program "on the same basis, and in accordance with the same criteria" as the employer offers to U.S. workers. 20 C.F.R. § 655.731(c)(i). Included among these benefits, without limitation, are cash bonuses and contributions to retirement and savings plans. 20 C.F.R. § 655.73(c)(3). The possibility of a future bonus or similar compensation may only be "credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits)." 20 C.F.R. § 655.731(c)(2)(v).

For purposes of meeting the requirement of paying the prevailing wage, "cash wages paid" consist only of "payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due [except routine payroll deductions such as for income tax, FICA, union dues, the employee's portion of insurance premiums, savings and retirement contributions]." 20 C.F.R. § 655.731(c)(2)(i). Deductions

[24] "Actual wage" is the rate that the employer pays to all individuals with experience and qualifications for the specific job similar to the H-1B visa employee. It is not an average that reflects the wage paid *all* workers in the occupation. 20 C.F.R. § 655.715. The parties do not dispute that in this case, Ms. Ivanova was the only employee with this job.

from pay cannot be for the employer to "recoup a business expense . . . (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition)." 20 C.F.R. § 655.731(c)(9). "Cash wages paid" must be reported to the Internal Revenue Service as employee's earnings. 20 C.F.R. § 655.731(c)(2)(ii-iv). This means that the wages paid for these purposes can be no greater than those reported on the IRS Forms W-2.

DISCUSSION

The Administrator has established FoodPro's failure to pay Ms. Ivanova $47,799.70 in required wages. Mr. Washburn was not defrauded into signing the LCA; at best he was negligent in failing to review the prevailing wage commitment stated on it. FoodPro was required to provide health care benefits to Ms. Ivanova on an equal footing with the other salaried employees and was not entitled to reimbursement. Ms. Ivanova was not part of a class of employees denied these benefits. FoodPro's contributions to the pension or profit-sharing plan were not countable against required wages. They were discretionary with no assurance that any would be paid, and in fact, in one year none was paid. Moreover, they were not "cash in hand, free and clear, when due"; they vested over time and were not payable unless and until the employee left the employment. To the extent that the Company made such payments, Ms. Ivanova again was entitled to them on the same footing as the other employees over and above the required wages. Accordingly, the Company must pay these back wages without any setoff.[25]

On the other hand, I deny the Administrator's motion to enlarge the amount of unpaid wages based on evidence discovered after the Letter of Determination. An employer is required to cooperate in investigations by, among other things, making available to the Administrator such records that the Administrator deems appropriate to copy or inspect. 20 C.F.R. § 655.800(c). FoodPro satisfied that requirement by making its records available. There is no evidence to the contrary.

Rather, it was the investigator who chose to ask only Ms. Ivanova for her pay statements, even when she said that she could not access them for some time. The investigator demanded access to others of the Company's books and ledgers; he could have asked for this as well. He also could have made copies of the documents that he did request; it was his choice to take notes instead.

---

[25] The regulatory regime is comprehensive and not subject to construction for policy reasons. Nonetheless, I address Mr. Washburn's contention that it is inconsistent with public policy to award anything to Ms. Ivanova because FoodPro paid her everything that it promised her, and that Ms. Ivanova "should not be given money which she never earned, was never promised and did not expect." R. Br. at 4.

Mr. Washburn's argument misses the mark. He neglects that a central purpose of the H-1B program is to benefit employers such as him by allowing them to bring in foreign workers with specialized skills when there are no U.S. residents able and available to do the work. The program has wage requirements to protect against employers who would bring foreign workers in when American workers were available and pay the foreign workers below-market wages; this would deprive the American workers of employment opportunities and negate the parallel statutory aim of protecting American workers and not only benefitting American employers. Although Mr. Washburn's obligation was to pay the wages to Ms. Ivanova, he was required to do so for the principal purpose of protecting an American worker, not out of consideration for Ms. Ivanova.

There is no indication that the Administrator put FoodPro on notice that it was seeking enlarged back wages before its pre-trial submissions received May 9, 2008, just eleven days before trial. At trial, FoodPro objected that it had insufficient time to review the new calculations and rebut them. Mr. Washburn explored the calculations when Mr. Avila was on the stand, but his argument that he was given insufficient opportunity to prepare has merit.[26]

The Administrator's request to enlarge the amount of back wages was untimely and prejudicial to Respondent, and thus is denied.

CONCLUSION

FoodPro failed to pay required wages under the H-1B visa program to Ms. Ivanova in the amount of $47,799.70. FoodPro is not entitled to recover from Ms. Ivanova the health care premiums it paid on her behalf. The Administrator may not increase the amount of back wages stated in its Determination letter. Accordingly,

IT IS ORDERED that FoodPro International, Inc. pay $47,799.70 in back wages to the Wage and Hour Division, U.S. Department of Labor, 2800 Cottage Way, Room W-1836, Sacramento, California 95825-1886 within 15 days after this Decision becomes final (*see* below). This debt is subject to the assessment of interest, administrative cost charges and penalties in accordance with the Debt Collection Improvement Act of 1996 and Department of Labor policies. Interest is assessed at the Treasury Tax and Loan Account rate on any principle that becomes delinquent. The rate is currently 3.0 percent. The Department of Labor may assess a penalty on any portion of the amount owed remaining delinquent more than 90 days.

A

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220,

[26] Mr. Washburn's questions to Mr. Avila pointed to the fact that there were a number of pay periods in which Ms. Ivanova did not work a full 80 hours, and yet FoodPro was being asked to pay the full required wage. It was not disputed that when Ms. Ivanova requested time off without pay, Mr. Avila did not add to the calculations any back wages. As to the remaining pay periods, there is no basis to relieve FoodPro of any of its obligations. First, to the extent that Ms. Ivanova worker fewer than 80 hours because she did not have enough work, the regulations require the employer to pay even for time during which the employee was inactive. Second, it appears that FoodPro paid Ms. Ivanova as an exempt employee; it paid her nothing extra for the many pay periods during which she worked over 80 hours. This means that Ms. Ivanova was meeting the requirements of full time work even when her hours slipped below 80, just as she was paid nothing when her hours exceeded 80. In any event, the amount of back wages that I am ordering FoodPro to pay were not calculated on a pay period basis, given the absence of Ms. Ivanova's pay statements at the time Mr. Avila calculated the back wages.

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).