DATE: November 3, 1997

CASE NO: **96-LCA-2**

In the Matter of:

**ADMINISTRATOR, WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR**,

Complainant

v.

NATIVE TECHNOLOGIES, INC.

Respondent.

Before: JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Immigration and Nationality Act, 8 U.S.C. §§1101(a)(15)(H)(I)(b), 1182(n), and 1184 (hereinafter "Act") and the regulations promulgated thereunder which are found at 29 C.F.R. §507.[1]

This matter is presently before me on cross-Motions for Summary Judgment, together with simultaneous briefs, filed by the parties. The regulations governing these proceedings provide, in relevant part:

> The administrative law judge may enter summary judgement for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact and that a party is entitled to summary decision.

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[1]I find that Native Technologies, Inc. (Respondent) timely filed a request for a hearing in this matter. The regulation at 29 C.F.R. § 815(a) contemplates service by alternative means where the respondent does not accept service by certified mail. The Administrator in this case did serve the notice by regular mail, the notice was received by Respondent on February 16, 1996, and a request for a hearing was filed seven days later. Under these circumstance, the request for hearing was timely.

29 C.F.R. § 18.40(d).[2] In deciding a motion for summary decision, the court must consider all the materials submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). A court shall render summary judgement when there is no genuine issue as to any material fact, the moving party is entitled to judgement as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. See LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir. 1993); United States v. TRW, Inc., 4 F.3d 417, 423 (6th Cir. 1993), cert. denied 114 S.Ct. 1370 (1994).

Statement of the Case

This case arises out of an investigation conducted by the Wage and Hour Division of the Department of Labor, and concerns the compensation of Iouri Mordovskoi, a Russian citizen in the United States pursuant to an H-1B non-immigrant visa obtained by Thomas Ryan, President of Native Technologies, Inc., (hereinafter "Respondent"). Mr. Mordovskoi was employed by Respondent in Flagstaff, Arizona. On January 24, 1996, the Administrator determined the following: (a) Respondent filed a LCA with the Department's Employment and Training Administration which misrepresented a material fact; and (b) Respondent willfully failed to pay wages as required. The material facts of this case are undisputed, leaving only legal issues concerning liability for backwages and the propriety of civil money penalties and other remedies sought by the government.

Native Technologies, Inc. is a small space systems and software engineering organization headquartered in Flagstaff, Arizona. Since October of 1992, the company has been involved in the research and development of technology and software to provide total system solutions for international communications, especially in the field of automated translation. In October, 1993, NASA announced its intention to contract specifically to Native Technologies and its joint U.S.-Russian engineering team in order to provide an initial automated translation and communications solution to the U.S.-Russian Space Station program. Although NASA had announced its intention, no formal contract had been awarded or entered into with Respondent at that time.

In anticipation of obtaining the NASA contract, Respondent hired Mr. Mordovskoi to serve as both a Technical Software Coordinator and liaison between the U.S. and Russian components of the company's efforts. Mr. Ryan had met Mr. Mordovskoi in 1992 and believed that he was qualified to fill

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[2]Although the regulations at 29 C.F.R. § 507.835 and § 507.840 do not provide for the resolution of Labor Condition Applications actions through motions for summary judgment, 29 C.F.R. § 507.825 provides that the Rules of Practice and Procedure for the Office of Administrative Law Judges, 29 C.F.R. Part 18, shall be applicable to these proceedings in the absence of conflict. Twenty-nine C.F.R. § 18.40 allows the submission of motions for summary decision, which may be granted by an administrative law judge if there is no genuine issue of material fact.

the role of the company's Senior Engineer.[3] In order to bring Mr. Mordovskoi to the United States, in January of 1994 Mr. Ryan applied for an H-1B visa by filing a Labor Condition Application (LCA) with the Employment Training Administration (ETA) of the Department of Labor. The LCA stated that Mr. Mordovskoi was to be paid at an hourly rate of $25.00. (See EX-2 (AJ)).

Mr. Mordovskoi entered the United States on August 27, 1994, prior to the actual grant of the NASA contract. However, commencing on or about August 29, 1994, Mr. Mordovskoi was provided with miscellaneous projects by Respondent. Both parties concede the fact that Mr. Mordovskoi performed work on behalf of Respondent prior to January 1, 1995 for which he received no compensation. (See EX-C (SL), February 28, 1997, letter to Complainant from counsel for Respondent). During this time, Respondent did pay for Mr. Mordovskoi's living expenses, including rent, food and utilities totaling $1483.08. Respondent later subtracted this amount from Mr. Mordovskoi's wages, as reimbursement. (See EX-F(IM)).

In late December, Respondent secured a contract with the computer science department at the New Mexico State University. At that time, Respondent and Mr. Mordovskoi entered into an employment agreement in which Mr. Mordovskoi was to receive $20.00 per hour in connection with the New Mexico State University contract. Mr. Mordovskoi kept track of his own time on time sheets and the time sheets were then submitted to the company's accountant who prepared pay roll. The total amount of compensation paid was $9,800.00, for a total of at least 490 hours worked from January 9, 1995 through at least April 16, 1995.

The complaint which led to the investigation by the Administrator alleges that Mr. Mordovskoi has not been paid wages as required by the implementing regulations of the Act. Specifically, Mr. Mordovskoi maintains that Respondent is liable for wages for work performed between August 29, 1994 and December 26, 1994. Likewise, he further alleges that he was underpaid from January 1, 1995 through May of 1995. Complainant prays that this Court affirms the investigative findings underlying this action, thereby requiring the payment of backwages, civil money penalties, and debarment of the respondent for such terms as specified by the Immigration and Nationality Act, 8 U.S.C. §§ 1101, et seq., as amended by the Immigration Act of 1990 (P.L. 101-649) and the Miscellaneous Technical Immigration and Naturalization Amendments of 1991.

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[3]Although the Employment Agreement (See EX-E (IM)), which was in effect commencing January 30, 1995, describes Mr. Mordovskoi's position as that of "Senior Programmer and US-Russian Software Development Coordinator," I find that he was in fact entitled to wages equal to that of a Senior Engineer. The LCA submitted by Respondent on or about January 19, 1994 clearly states Mr. Mordovskoi's position to be that of "Sr. Engineer." Accordingly, I find that it is in this capacity in which Mr. Mordovskoi was employed by Respondent. As I will discuss below, the regulations do not provide for contingent funding of a position, nor do they permit a probationary period where the alien's job skills will be assessed for assignment to an appropriate position paid at a different rate than for the stated occupation on the LCA. See 29 C.F.R. § 507.730(e)(1)(iii). Likewise, public policy clearly discourages this type of action.

Findings of Fact and Conclusions of Law

As stated above, Mr. Thomas Ryan applied for an H-1B visa for Mr. Mordovskoi in January of 1994 by filing a LCA with the Employment Training Administration (hereinafter "ETA") of the Department of Labor. At this time, the applicable implementing regulations (29 C.F.R. § 507 et seq.) were collectively identified as the Interim Final Rule concerning H-1B regulations. The Interim Final Rule was superseded effective January 19, 1995, by the Final Rule, 29 C.F.R. § 507 et seq.

Appropriate Wage Rate

Pursuant to Subpart I of the Regulations, 29 C.F.R. § 507.800 et seq., upon receipt of a complaint, the Administrator of the Wage and Hour Division shall investigate the complaint and make a determination as to (1) whether the employer has misrepresented a material fact on the LCA, or (2) has failed to meet any of the stated conditions in the LCA, including payment of wages, whether negligently or willfully. 29 C.F.R. § 507.805(a)(1) and (2)(I). Moreover, employers are constrained by the regulations to cooperate in enforcement proceedings. 29 C.F.R. § 507.800(d). If the Administrator determines that violations of any of the aforementioned provisions have occurred, statutory remedies, including backpay, civil money penalties and debarment may be imposed.

In the case at bar, the Administrator found Respondent in violation of the H-1B provisions of the Immigration and Nationality Act, 8 U.S.C. § 1182(n), as amended, and pursuant to 29 C.F.R. § 507.805(a)(1) and (2)(I) held Respondent liable for the payment of backwages, civil money penalties, and the debarment from any existing and future LCA's for a period of at least one year.

The LCA at issue herein was filed pursuant to the Interim Final Rules, which are consequently determinative for this case.[4] In applying for an H-1B visa, Respondent's application was required, inter alia, to assert (1) the occupation in which the non-immigrant alien is to be employed, by Dictionary of Occupational Titles, and (2) the gross wage rate to be paid to each H-!B alien, "expressed on an hourly, weekly, bimonthly, or annual basis." 29 C.F.R. § 507.760(a)(1).

Additionally, the regulations at 29 C.F.R. § 507.731 provide that an employer seeking to employ an H-1B non-immigrant in a specialty occupation or as a fashion model of distinguished merit and ability shall state on the ETA form that it will pay the H-1B non-immigrant the required wage rate. The employer is required to pay the greater of the actual wage rate – that is, the wage paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question – or the prevailing wage rate based on the best information available as of the time of filing the application. 29 C.F.R. § 507.731(a). Thus, where an employer has no similarly qualified employees at the employing

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[4]While the Interim Final Rule and the Final Rule are significantly identical, where changes in section numbering occurred, or where the operative language is substantially different, these differences, if relevant, will be noted. All citations in this Decision, unless specifically identified as referring to the Final Rule, are to the Interim Final Rule.

facility, the actual wage rate is not available for comparison. The employer is relegated to basing the wage determination on the "best information available." 29 C.F.R. § 507.731(a)(1) and (2). In this case, Mr. Mordovskoi's education and linguistic fluency was unmatched by any other employees at Native Technologies. The fact that Mr. Ryan may have had other engineers employed in Denver and at other locations is necessarily irrelevant to this proceeding, as only employees at the "same facility or establishment" as the H-18 alien are comparable for actual wage purposes. 29 C.F.R. § 507.731(a)(1). Therefore, Mr. Ryan was required to pay the prevailing wage as determined pursuant to 29 C.F.R. § 507.731(a)(2).

Pursuant to this regulation, the employer must make a determination as to the prevailing wage by reference to an "independent authoritative source" or any "legitimate sources of wage data" such as a state employment security agency (SESA),[5] a union contract, Davis-Bacon or Service Contract Act wage surveys. 29 C.F.R. § 507.760(e)(1)(A), (B) and (C).

According to the LCA submitted by Mr. Ryan, Mr. Mordovskoi was to receive $25.00/hour for his position as Senior Engineer. In computing this wage rate, Respondent contends that he relied on information received from the Arizona Department of Economic Security (hereinafter "DES"). However, in an interview with the investigator, Mr. Ryan stated that he, in fact, came up with the wage figure "off the top of [his] head." (See EX-10-3(AJ)). Thus, Mr. Ryan and Native Technologies did not provide the investigator with any documentation of a legitimate wage survey completed prior to the filing of the subject of the LCA. In fact, the only document pertaining to a prevailing wage that Mr. Ryan turned over to the Wage and Hour investigator was a copy of information requested from the DES and the local SESA, on June 6, 1995, the date of the opening of the investigation, over two years after the LCA was filed. (See EX-6 (AJ)).

The LCA required that Mr. Ryan compensate the H-1B alien at the prevailing wage for a "Senior Engineer." Such classification is the one for which Mr. Ryan applied for, and upon grant of the non-immigrant visa and the commencement of employment by Mr. Mordovskoi, Respondent was required to pay the appropriate wages. The H-1B regulations do not permit an employer to apply for one occupation, and subsequently develop a prevailing wage for another. Mr. Ryan argues that it was never intended that Mr. Mordovskoi would be employed in the occupation listed on the LCA. In the very least, such an argument is against public policy.

Twenty-nine C.F.R. § 507.731(b) requires that, in the event the employer chooses not to use a SESA prevailing wage determination, the employer shall develop and maintain documentation sufficient to

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[5]A prevailing wage rate supplied by a SESA, before filing the LCA, if for the occupation listed on the LCA, will not be disturbed by the Department of Labor. 29 C.F.R. § 507.760(e)(1)(ii)(C)(1). Any other source of prevailing wage data must meet the requirements of 29 C.F.R. § 507.760(e)(2)(iii)(C)(2) and (3), which require extensive documentation of the methodology employed. The documentation must be retained in a public access file for one year longer than the authorized period of employment for the alien as requested on the LCA, or until a complaint with the Department of Labor is resolved. 29 C.F.R. § 507.760(a) and (c), and 29 C.F.R. § 507.800(c).

meet its burden of proving the validity of the wage statement. Further, the employer shall also document that the wage rate paid to the H-1B non-immigrant is no less than the required wage rate. In this case, Respondent recorded a rate of pay of $25.00/hour on the LCA. I find that Respondent has (1) not submitted sufficient documentation to establish that $25.00/hour is the prevailing rate of pay, and (2) such a rate is in violation of 29 C.F.R. § 507.731(b) as it is below the required SESA rate. (See EX-5(AJ)).

It is important to note that the role of the ETA in approving the LCA's is purely ministerial, and is limited to a determination that the LCA is complete and "not obviously inaccurate." 29 C.F.R. § 507.740(a)(1). In fact, the ETA makes no determinations as to whether or not the stated wage rate is the appropriate one for the stated occupation. Id. A representation to this effect is stated on the face of the LCA. The employer is the ultimate guarantor of the truth of the information attested to on the LCA; certification of the LCA by the ETA does not indicate that said information is correct or approved as to its content. 29 C.F.R. § 507.740(c). It is for this reason that the LCA requires the applicant to sign a Declaration under penalty of perjury that the information on the LCA is correct and true.

For enforcement purposes, I find that the representations on the LCA shall be viewed as a contractual promise made by the employer in exchange for the granting of the H-1B specialty visa for the chosen employee, to employ the H-1B alien in the stated occupation for the period of time specified in the LCA, and to compensate the H-1B alien at no less than the greater of the prevailing wage for the listed occupation or the actual wage paid to similarly qualified employees in the employer's workforce.

Upon approval of the LCA by the ETA and upon arrival of the H-1B alien at the employer's place of business, the employer cannot then change the occupation of the employee from that stated on the LCA; nor may the alien be paid a wage rate that is lower than the actual or prevailing wage rate for that listed occupation. The employer may not reduce the stated number of hours the alien is to be employed; nor can he limit the application period for which the alien is authorized to work on the H-1B visa. If the alien's skills are insufficient to employ the alien at the stated occupation, he may be employed to do lesser work, but must continue to be compensated at the occupational rate entered on the LCA. The regulations do not provide for contingent funding of a position; nor do they permit a probationary period where the alien's job skills will be assessed for assignment to an appropriate position paid at a different rate than for the stated occupation on the LCA. The regulations expressly state that "once the prevailing wage rate is established, the H-1B employer then shall compare this wage with the actual wage rate for the specific employment and must pay the nonimmigrant at least the higher of the two wages." 29 C.F.R. § 507.730(e)(1)(iii).

The evidence and facts of this case establish that Ryan completed no wage survey prior to filing the LCA, requested no SESA prevailing wage rate for the listed occupation, and had no similarly qualified employees in Flagstaff. Therefore, the applicable wage rate is the SESA wage rate for the *listed* occupation, as this is the appropriate prevailing wage rate pursuant to 29 C.F.R. § 507.730. In consultation with ETA, the investigator determined that the prevailing wage rate for the occupation code and title entered on the LCA, based on Mr. Mordovskoi's experience and education, was the rate for the "engineer IV" classification, at an annual rate of $53,544.00. (See EX-3(RMD)). Expressed as an hourly rate, the appropriate prevailing wage rate as determined by the SESA is $25.74/hour for the Flagstaff, Arizona area. (See EX-5 (AJ)).

While Respondent may not have *intentionally* misrepresented a material fact on the LCA, he did *negligently* fail to meet at least one of the stated conditions in the LCA. From the onset, Respondent failed to properly provide for the appropriate payment of wages in violation of 29 C.F.R. § 507.805(a)(2)(I). Therefore, I find that Mr. Mordovskoi should have been compensated at a rate of $25.74/hour, which is the appropriate SESA rate as determined by the Administrator.[6]

Length of Employment

Complainant asserts that he was employed by Respondent commencing August 29, 1994. Respondent asserts that the employment did not begin until January of 1995, as evidenced by the Employment Agreement signed on January 27, 1995, and by Respondent's record of wages paid. (See EX-F(IM)). However, the evidentiary record proves that while Mr. Mordovskoi did not receive the anticipated NASA work, he may have been employed translating Russian e-mail for Aerojet, and doing projects for other entities, including Sprint International and the Department of Defense. (See Declaration of Mr. Mordovskoi and Project Addendum and accompanying exhibits; see also EX-H(IM), (EX-1 (1)), and (EX-I(3)). Respondent nonetheless insists that while Mr. Mordovskoi did perform work for the company, he was not employed "because it [Respondent] had no contract, and no means by which to pay his salary." (See Native Technologies Response to Complainant's Motion for Summary Judgment, April 23, 1997, pg. 3-4). While I am in no position to make a determination as to the financial status of Native Technologies, and even in light of the fact that Respondent's argument may be somewhat insensible, it is my opinion that Mr. Mordovskoi was not employed by Respondent from August 29, 1994 through December, 1994.

As the party seeking to impose sanctions, the Complainant in this matter has the burden of persuasion, by a preponderance of the evidence. See In the Matter of Cornet Enterprises, Inc., 95-LCA-1 (November 1, 1995). The evidentiary record proves that Mr. Ryan personally, or under the name Ryan International or Native Technologies, sent invoices to the companies whose projects Mr. Mordovskoi had worked on. It is argued that such invoices are statements of work completed by Mr. Mordovskoi on behalf of Respondent. (See EX-3(IM)); see also EX-I(1)). However, I find that such records merely prove that Mr. Mordovskoi may have provided services, but not that he was an employee of Native Technologies. Furthermore, Complainant argues that through a company profile (EX-H(IM)), in a contract proposal to the U.S. Department of Energy dated November 22, 1994 (EX-I-1(IM)), and in a letter to Mel McIlwain of GenCorp, Aerojet Propulsion Division (EX-I-3(IM)), Mr. Ryan represented Mr. Mordovskoi to be an employee of his company. Complainant did not, however, submit any records of time actually worked; I was not provided with any substantial evidence establishing the employment connection for this period. It is a well-established rule of business practice that a company may list "associates" in a company profile. These associates are not necessarily company "employees." Mr. Ryan maintains that

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[6]The regulations in effect at the time of the investigation herein provide at 29 C.F.R. § 507.840(c) that the administrative law judge is not authorized to review the validity of a SESA wage rate, or require source data used in the compilation thereof. Thus, the SESA rate of $25.74/hour, as determined by the Administrator to be the applicable one for the purposes of this proceeding, is not subject to further challenge or review by the Respondent or the Court.

Native Technologies has "no employees for which there are no contracts," nor has the company had any "employees during the past three years excepting Juri [Mr. Mordovskoi] from January 1, 1995, to April 16, 1995." (See EX-10-4(AJ)). Upon finding that Complainant has failed to meet the appropriate burden of persuasion, I must agree with this contention.

Willful Failure to Meet Stated LCA Condition: Employment Agreement

Respondent willfully failed to pay the recorded LCA wage rate to Mr. Mordovskoi, thereby committing a violation pursuant to 29 C.F.R. § 507.805(a)(2)(i).

In January, 1995, Tom Ryan and Mr. Mordovskoi entered into an Employment Agreement indicating that Mr. Mordovskoi would receive $20.00/hour, or five dollars less per hour than the wage rate stated on the LCA. (See EX-E(IM)). The document was signed on January 27, 1995. Mr. Mordovskoi received compensation, however, under the agreement beginning on January 9, 1995 and continuing through until April 16, 1995. Respondent did not file an amended LCA or notify the INA of this reduction in pay. Therefore, upon entering into such an agreement Respondent has acquiesced to its own failure to meet a stated condition of the LCA.

Mr. Mordovskoi's earnings from Thomas Ryan and Native Technologies are set forth in documents supplied by Ryan's accountants. (See EX-8(AJ)). These records indicate receipt of compensation by Mr. Mordovskoi at a wage rate of $20.00/hour for 40-hour workweeks. (See id.).

The standard for determining willfulness in an H-1B case is that enunciated in Brock v. Richland Shoe Co., 486 U.S. 128, 133 (1988). Under the Richland Shoe standard, an employer is found to be in "willful violation" if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited. In this matter, Respondent was aware that he had represented to the ETA that Mr. Mordovskoi would be compensated at $25 per hour. Respondent subsequently entered into an agreement providing compensation of only $20 per hour. I will not concern myself with the fact that Respondent did not receive the anticipated "NASA" contract. My only concern is that Mr. Mordovskoi be compensated at the rate for which he traveled to the United States for, irrespective of where the funding is obtained. The regulations do not allow for contingent wage rates. An employer must pay the "required" wage rate pursuant to 29 C.F.R. § 507.731, and as explained above. Respondent indicated that the $25.00/hour rate was placed on the face of the LCA "because that is the amount the company intended to pay Iouri if it had been awarded the NASA contract." I find that allowing such a contingency is in not within the purview of regulations and counter to public policy as the employer has an obligation to comply with the terms of the LCA.

No Offset Allocation

In March of 1995, Mr. Mordovskoi received his first paycheck for January 1995 workweeks, compensated at a rate of $20.00/hour. The first check was for the gross amount of $5000.00. However, in addition to federal and state withholding deductions, Respondent also deducted $1,483.08 for rent and utilities on the apartment that Respondent had secured and rented on behalf of Mr. Mordovskoi and his

family. Neither a verbal nor written agreement was ever entered into with respect to who was to pay the cost of this apartment.

Under the Interim Final Rule which was in effect until January 18, 1995, an employer was not entitled to offset wage liability or to deduct from wages the cost of in kind benefits such as a paid apartment, car allowance or similar benefit. Congress acknowledged that this was the case in prefatory statements to the revised Final Rule, stating that:

> [t]he principal focal point in rulemaking, with regard to the payment of wages, has been the matter of whether 'in kind' perquisites or direct or indirect payment other than cash constitute wages. On this point, the Department has take the position in the interim final and the Proposed Rule, as well as in the administration and enforcement of the program, that such wage credit is not permitted.

59 Fed. Reg. 65652 (1994).

The Final Rule, effective January 19, 1995, does permit offsets and deductions, however only under extremely limited circumstance. 29 C.F.R. § 507.731(c)(2)(I), (ii) and (iii). The Final Rule provides, in essence, that "wages paid" are those "shown in the employer's payroll records as earnings from the employee, and disbursed to the employee, cash in hand, free and clear . . . except for deductions authorized under §(c)(7)"; "payments reported to the Internal Revenue Service as the employee's earnings, with appropriate withholding for the employee's tax"; and "payments of the tax reported and paid to the IRS." Id.

Permissible deductions from earnings, identified at 29 C.F.R. § 507.731(7)(I), (ii), and (iii) [Final Rule], include such things as deductions required by law, deductions authorized by a collective bargaining agreement or equivalent, and deductions which (1) are authorized by the employee in writing, (2) are for the benefit of the employee, and (3) are not a recoupment of the employer's business expense.[7]

Accordingly, for the period ending January 19, 1995, Respondent may not receive an offset from backwages owed for the cost of Mr. Mordovskoi's apartment, utilities, telephone, etc., as such offsets are not authorized under the Interim Final Rule; Nor can Respondent claim such an offset prior to January 19, 1995, because Ryan did not provide Mr. Mordovskoi with a W-2 form covering the value of these perquisites for tax purposes.

The regulations provide that "any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and, in the event of an investigation, will result

[7]With respect to this latter category, all three requirements must be met.

in back wage assessment . . ."[8] 29 C.F.R. 507.731(c)(8). Thus, Mr. Mordovskoi is entitled to back wages with respect to this issue in the amount of $1,483.08.

Wage Liability

As discussed above, Mr. Mordovskoi is entitled to receive compensation in the amount of $25.74/hour for work performed during his employment with Native Technologies. To date, Mr. Mordovskoi has been compensated in the amount of $20.00/hour for this period of time. The accounting records of Native Technology bear out the allegation that Mr. Mordovskoi was doing at least full-time work during the period of January 9, 1995 through April 16, 1995. (See EX-8(AJ)). Likewise, there is no question as to the fact that Respondent did not pay Mr. Mordovskoi at a rate of $25.74/hour; Nor did Respondent pay the lower stated LCA rate of $25.00/hour. As explained above, the SESA rate is the appropriate rate for the determination of back wage liability.

Therefore, I find Respondent liable for the difference between the wages paid, $20.00/hour, and the SESA rate, $25.74, for the period beginning January 9, 1995 and terminating April 16, 1995, computed at 40 hours per workweek.

Administrator's Assessment of Penalties

The Administrator assessed civil money penalties against Respondent in the amount of $3000.00. $1000 of this amount was assessed for Respondent's failure to accurately *specify* the rate of pay or alternatively *misrepresenting* a material fact on the LCA. As discussed above, such a violation did occur. Thus, I affirm this penalty. An additional penalty of $1000.00 was also assessed for Respondent's willful failure to *pay* the required wage rate. As such a violation flows from Respondent's failure to "specify" or "misrepresent" a material fact on the LCA, I must likewise affirm this $1000 penalty.

Finally, the Administrator assessed another $1000 penalty, stating that Respondent failed to comply with 29 C.F.R. 507.800(d) by submitting two falsified documents to an officer of the Department of Labor. Complainant argues that Mr. Ryan gave the investigator an LCA which was different from the one filed with the ETA because it had added to it the acronym "NASA." (See EX-1, 2 (RMD) and (AJ)). Complainant further argues that Mr. Ryan gave the Administrator a document from the Arizona DES, representing that it was a SESA survey. The document also contained on it information that had never been provided by the DES. (See EX-6, 7 (AJ)). In any manner, while I find that these facts are true, there is no evidence to suggest that Mr. Ryan intended to beguile or mislead the Administrator. Therefore, I find that Mr. Ryan is not liable for $1000.00 penalty imposed by the Administrator with respect to this issue.

[8]The unauthorized wage deduction was made after the effective date of the Final Rule. As such, the Final Rule controls Respondent's conduct with respect to this issue.

ORDER

IT IS HEREBY ORDERED that:

1. The Final Determination Letter dated January 24, 1996, ordering Respondent to pay back wages in the amount of $34,555.60, is partially reversed;

2. Respondent is liable for back pay in the amount of the difference between the wages paid, $20.00/hour, and the SESA rate, $25.74, for the period beginning January 9, 1995 and terminating April 16, 1995, computed at 40 hours per workweek.

3. Respondent is liable for back pay in the amount of $1,483.08 – the amount Respondent deducted for rent and utilities it paid on Mr. Mordovskoi's apartment.

4. Respondent is responsible for the payment of a monetary penalty in the amount of $2000.00 in violation of 29 C.F.R. § 507.730(c)(1)(iii), § 507.805(a)(1), § 507.805(a)(7), §507.730(e), and § 507.805(a)(2)(i) of the Interim Final Rule.

SO ORDERED.

JOHN M. VITTONE
Chief Administrative Law Judge

JMV/pmb