PETITION APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley

Square, in the City of New York, on the 19th day of October, two thousand twenty-one.

PRESENT:

JOHN M. WALKER, JR.,
WILLIAM J. NARDINI,
STEVEN J. MENASHI,
Circuit Judges.

Arvind Gupta,

Plaintiff-Appellant,

v.

Headstrong, Inc., Genpact Limited, Secretary of the United States Department of Labor,

Defendants-Appellees.

20-3657

FOR PLAINTIFF-APPELLANT:

ARVIND GUPTA, pro se, New York, NY.

FOR DEFENDANTS-APPELLEES:

DANA G. WEISBROD, (Anna K. Broccolo, Leo Ernst, on the brief), Jackson Lewis, P.C., New York, NY (*for* Headstrong, Inc. and Genpact Limited);

Benjamin H. Torrance, Assistant U.S. Attorney, for Damian Williams, United States Attorney for the Southern District of New York, New York, NY (*for* the Secretary of Labor).

Appeal from a judgment of the United States District Court for the Southern District of New York (Abrams, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Plaintiff-Appellant Arvind Gupta, proceeding pro se, appeals from (1) the denial of his motion for attorney's fees and litigation costs, and (2) the grant of attorney's fees to Defendants-Appellees Headstrong, Inc. and Genpact Limited (together "Headstrong"). With respect to Gupta's motion, the district court concluded that no statute or contract provided for attorney's fees, and that, in any event, Gupta was not a prevailing party who would be entitled to attorney's fees or litigation costs. As for Headstrong's motion for attorney's fees, the court found that Gupta and Headstrong entered into a settlement agreement in 2008 stating that Gupta

would pay attorney's fees to Headstrong if he breached the settlement agreement by initiating further litigation, which is exactly what Gupta did. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review a district court's award of attorney's fees for abuse of discretion. *McDaniel v. County of Schenectady*, 595 F.3d 411, 416 (2d Cir. 2010). An abuse of discretion occurs "when (1) the court's decision rests on an error of law (such as application of the wrong legal principle) or clearly erroneous factual finding, or (2) its decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions." *Id.* (quoting *Kickham Hanley P.C. v. Kodak Ret. Income Plan*, 558 F.3d 204, 209 (2d Cir. 2009) (alteration omitted)).

The district court did not abuse its discretion by denying Gupta attorney's fees. Under the "American rule," "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 370 (2019). To determine whether Congress intended to depart from the American Rule presumption, we look first to the

language of the statute at issue. *Id.* at 372. "Congress must provide a sufficiently 'specific and explicit' indication of its intent to overcome the American Rule's presumption against fee shifting." *Id.* (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975)).

Gupta, who was hired by Headstrong on an H1-B visa,[1] principally alleged in his complaint that Headstrong failed to pay him wages he earned during the course of his employment there. Gupta argues that 8 U.S.C. § 1182(n)(2)(C)(i)(I), the provision of the statute that governs H1-B visas, permits him to obtain attorney's fees in pursuing any allegedly withheld wages. But, as the district court concluded, this provision does nothing of the sort. Instead, the statute permits the Secretary of Labor to impose "administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) as the Secretary determines to be appropriate" for violations of the H1-B visa program. 8 U.S.C. § 1182(n)(2)(C)(i)(I). On its face, the statute does not provide that a *court* may award attorney's fees, nor does it offer any "'specific and explicit' indication of its intent to overcome the American rule[.]" *Peter*, 140 S. Ct. at 372. The

[1] The H-1B visa program permits nonimmigrant foreign workers to work temporarily in the United States in "specialty occupation[s]." 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n).

reference in the statute to "administrative remedies" is not sufficient to "invoke attorney's fees with the kind of clarity" required to depart from the American rule. *See id.* (concluding that a statute's reference to "expenses" was not sufficient to permit award of attorney's fees).

Gupta does not argue that any contractual provision provided him with the right to recover attorney's fees, nor could he. The 2008 settlement agreement executed by the parties provides that Gupta would pay "reasonable attorneys' fees" to Headstrong if Gupta breached the settlement agreement, App'x at 158, but it contains no parallel provision permitting Gupta to recover fees from Headstrong. Accordingly, Gupta cannot recover attorney's fees under any statute or contractual provision.

Nor did the district court abuse its discretion in denying litigation costs to Gupta. Gupta primarily argues that he was a prevailing party and was entitled to recover litigation costs. Under Federal Rule of Civil Procedure 54(d)(1), litigation costs other than attorney's fees "should be allowed to the prevailing party." But a plaintiff is the prevailing party in a litigation only when "he has received a judicially sanctioned change in the legal relationship of the parties." *CRST Van Expedited, Inc. v.*

E.E.O.C., 578 U.S. 419, 422 (2016) (internal quotation marks omitted). Usually, this occurs "when a plaintiff secures an enforceable judgment on the merits or a court-ordered consent decree." *Id.* (alterations omitted). But it can occur in other contexts, such as when the plaintiff secures a settlement of the litigation that grants him the same kind of relief he sought in the complaint. *See Lyte v. Sara Lee Corp.*, 950 F.2d 101, 103–04 (2d Cir. 1991).

Here, Gupta has not obtained any change in the relationship between Headstrong and himself that would merit an award of litigations costs. As the district court concluded, the parties have remained in the same positions throughout the entire litigation, with Headstrong refusing to pay any additional wages to Gupta after the settlement, and no administrative agency or court requiring Headstrong to do otherwise. And while Gupta is correct that a plaintiff may, in some circumstances, be deemed a prevailing party if he is involved in litigation that ends in a settlement, see id., that authority is of no relevance here, since the 2008 settlement was executed *before* any of the litigation began. Consequently, the parties' relationship remained unchanged throughout the administrative and court proceedings, such that Gupta is decidedly not a prevailing party entitled to costs.

Finally, the district court did not abuse its discretion in awarding attorney's fees to Headstrong under the parties' settlement agreement. "[P]arties may agree by contract to permit recovery of attorneys' fees, and a federal court will enforce contractual rights to attorneys' fees if the contract is valid under applicable state law." *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1313 (2d Cir. 1993). Although New York follows the American Rule, it permits parties to recover attorney's fees in a contract if the intention to provide for such fees "is unmistakably clear from the language of the [contract]." *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 (1989). Here, the settlement agreement expressly stated that Gupta would pay any "reasonable attorneys' fees" incurred by Headstrong as a result of Gupta's breach of the settlement agreement. App'x at 158. Gupta clearly breached that agreement – which provided that Gupta would not subsequently sue or file any claims relating to unpaid wages – when he filed a Department of Labor complaint, followed by this federal lawsuit, in 2017. In light of that breach, Headstrong was entitled to attorney's fees under the terms of the agreement.

Gupta next argues that the district court abused its discretion in awarding fees to Headstrong because Headstrong is a wealthy company. When

determining whether the requested amount of attorney's fees is reasonable, courts consider "the difficulty of the questions involved; the skill required to handle the problem; the time and labor required; the lawyer's experience, ability and reputation; the customary fee charged by the Bar for similar services; and the amount involved." *F.H. Krear & Co. v. Nineteen Named Trustees,* 810 F.2d 1250, 1263 (2d Cir. 1987) (internal quotation marks omitted). The district court appropriately applied these factors and did not abuse its discretion by imposing approximately $100,000 in attorney's fees.

We have considered all of Gupta's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe
UNITED STATES COURT OF
APPEALS * SECOND CIRCUIT *

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARVIND GUPTA,

Plaintiff,

v.

HEADSTRONG, INC., GENPACT LIMITED, and SECRETARY OF THE U.S. DEPARTMENT OF LABOR,

Defendants.

No. 17-CV-5286 (RA)

MEMORANDUM OPINION & ORDER

DATE FILED: SEPTEMBER 28, 2020

RONNIE ABRAMS, United States District Judge:

Plaintiff Arvind Gupta, proceeding *pro se*, brought this action against Defendants Headstrong, Inc. and Genpact Limited (collectively, "Headstrong")

for wages allegedly owed to him under the H-1B provisions of the Immigration and Nationality Act and for judicial review, under the Administrative Procedure Act, of orders of the Department of Labor dismissing his administrative claims against Headstrong. On September 9, 2019, the Court issued an Opinion and Order granting Headstrong's motion to dismiss, granting the Department of Labor's motion for summary judgment, and denying Gupta's motion for summary judgment. Now before the Court are Gupta's motion for attorneys' fees and costs and Headstrong's motion for attorneys' fees. For the reasons that follow, Gupta's motion is denied and Headstrong's motion is granted, subject to the modifications discussed below.

BACKGROUND[1]

Familiarity with the facts and procedural history of this case is assumed. The Court here provides only a brief overview of the factual and procedural background that is relevant to the instant motion.

In early 2006, Headstrong hired Gupta, a citizen of India, to work in the United States pursuant to an H-1B visa. The H-1B visa program

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[1] Unless otherwise noted, the factual background is taken from the Amended Complaint. Dkt. 93 ("Am. Compl.").

permits non-immigrant foreign workers to work temporarily in the United States in "specialty occupation[s]." 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n). Headstrong filed a Labor Condition Application ("LCA") with the Department of Labor ("DOL"), and United States Citizenship and Immigration Services ("USCIS") approved Gupta's H-1B petition for a period of authorized employment running from April 24, 2006 until November 8, 2007. Under the INA, an employer who hires a non-immigrant foreign worker pursuant to an H-1B visa is obligated to pay that employee a stipulated wage rate, which is specified in the LCA, for the entire period of authorized employment. 20 C.F.R. § 655.730(d); *see* 8 U.S.C. § 1182(n)(1)(A), (2)(C)(vii)(I). This wage obligation applies even for periods of "nonproductive" time "due to a decision by the employer," though it does not apply if the employer effects a "bona fide termination" of the employee. 8 U.S.C. § 1182(n)(2)(C)(vii)(I), (IV); 20 C.F.R. 655.731(c)(7)(i), (ii).

On November 14, 2006, Headstrong notified Gupta that he would be terminated and, after November 28, 2006, it did not assign him any further work. In December of 2006, Headstrong and Gupta entered into a severance agreement. Then, in April of 2008, Gupta, who was counseled at the time, sent Headstrong a request for payment of further wages

allegedly owed to him for the period of his authorized employment. In May of 2008, Gupta and Headstrong entered into a settlement and release agreement, which was notarized and signed by both parties. Dkt 58-2 (the "Settlement Agreement"). Pursuant to the Settlement Agreement, Headstrong agreed to pay Gupta a lump sum payment of $7,000. *Id.* ¶ 1. In addition, Gupta and Headstrong agreed to a comprehensive mutual release of claims. *Id.* ¶¶ 3, 5, 11. Pursuant to this release, Gupta agreed to "release and forever discharge" Headstrong "of and from all . . . suits, actions, causes of actions, charges, complaints, grievances, judgments, damages . . . which [he] ever had, now ha[s], or which may arise in the future, regarding any matter arising on or before the date of [his] execution of" the Settlement Agreement. *Id.* ¶ 3. He also agreed "not to sue or file a charge, complaint, grievance, or demand for arbitration against" Headstrong "in any forum." *Id.* ¶ 5. The Settlement Agreement further provided that Headstrong may recover attorneys' fees and any other damages incurred as a result of Plaintiff Gupta breaching his obligations under the Settlement Agreement:

> In the event of a breach by You or any Releasor of any provision of this Agreement and Release, and without limiting in any way remedies available

> to the Company for such breach, You agree to indemnify and hold harmless the Releasees from and against any and all losses, liabilities, damages, and expenses, including reasonable attorneys' fees, that any Releasee may incur or suffer arising out of or in connection with any breach of a representation or agreement by You or any Releasor.

Id. ¶ 10. In February of 2010, Gupta sent Headstrong an email purporting to rescind the Settlement Agreement.

After entering into the Settlement Agreement, Gupta filed a complaint with the DOL alleging that Headstrong had failed to pay him wages owed during the period of his authorized employment. After several years of back-and-forth within the DOL, and the resolution of a separate action filed in this Court,[2] an Administrative Law Judge ("ALJ")

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[2] Gupta filed that action in August of 2012. See Gupta v. Headstrong, Inc., 12-CV-6652 (RA). In December of 2012, Gupta and the DOL entered into a stipulation and order of remand, in which the DOL agreed to reconsider Gupta's administrative claims. See Dkt. 23. Headstrong, which was not a party to that stipulation, filed a motion to dismiss the complaint, which the Court granted without prejudice in August of 2013. See Gupta v. Headstrong, Inc., 12-CV-6652

issued a 40-page decision and order addressing Gupta's claims. Am. Compl. Ex. 4 at 2–41. As relevant here, the ALJ determined that the applicable period of Gupta's authorized employment with Headstrong was April 24, 2006 until November 8, 2007, and that Headstrong had effected a bona fide termination of Gupta on February 2, 2007. The ALJ thus concluded that Headstrong was obligated to pay Gupta wages through February 2, 2007, even though Gupta had stopped working for Headstrong on November 28, 2006. The ALJ calculated the back wages Headstrong owed to Gupta, and subtracted the approximately $8,000 that Headstrong had already paid Gupta pursuant to the December 2006 severance agreement. Accordingly, the ALJ concluded that Headstrong's back wage obligation to Gupta was approximately $11,500. The ALJ then considered the May 2008 Settlement Agreement. It concluded that Gupta's allegations of fraud had no merit, and that Headstrong's "obligation to pay him back wages, or benefits, or travel expenses of any kind, was completely extinguished by [Gupta's] execution of the settlement agreement and release, and the concomitant payment of $7,000.00." *Id.* at

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(RA), 2013 WL 4710388, at *4 (S.D.N.Y. Aug. 30, 2013). After Gupta appealed the Court's decision and subsequent orders, the Second Circuit dismissed the appeal on March 11, 2015. See Gupta v. Headstrong, Inc., 14-3437 (2d Cir. March 11, 2015).

39. The ALJ further noted that although the $7,000 lump sum payment was less than the $11,500 owed to Gupta, the settlement amount "represent[ed] a reasonable compromise" and was paid to Gupta within 45 days of his attorney's demand letter. *Id.* at 39 n.60. Accordingly, the ALJ concluded that Headstrong did "not currently owe any back wages, or any other amount of money," to Gupta. *Id.* at 41.

On January 26, 2017, the Administrative Review Board ("ARB") affirmed the decision and order of the ALJ, finding that "the extensive evidentiary record amply supports the ALJ's factual findings, including her determination that the parties' settlement and release of claims extinguished all claims against Headstrong." Am. Compl. Ex. 2 at 4. While declining to address Gupta's "collateral attacks" to the May 2008 Settlement Agreement, the ARB noted that the Agreement was "facially valid" and upheld the ALJ's decision as "consistent with ARB precedent." *Id.* On February 14, 2017, the ARB denied Gupta's motion for reconsideration.

On March 16, 2017, Gupta commenced this action in the Northern District of Illinois. His complaint principally alleged that Headstrong had breached its employment agreement with Gupta by failing to pay him all the wages it owed to him, and

that the Secretary of Labor had erred in dismissing Gupta's claims. The case was transferred to this Court in July of 2017. The Secretary of Labor answered the complaint and Headstrong filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). On March 30, 2018, this Court granted Headstrong's motion, holding that the May 2008 Settlement Agreement was valid and barred Gupta's claims. Dkt. 78. The Court granted Gupta leave to amend, while instructing him that his amended allegations "would need to adequately allege both why the agreement is voidable, and why his retention of the lump-sum payment for the past ten years did not ratify it." *Id.* at 10.

On June 25, 2018, Gupta filed the Amended Complaint, asserting six claims solely against Headstrong, and an additional 14 claims jointly against Headstrong and the Secretary. Dkt. 93. The Secretary answered the Amended Complaint, Dkt. 101, while Headstrong informed the Court that it would rely on its previously-filed motion to dismiss, Dkt. 94. Gupta then filed a motion for partial summary judgment. Dkt. 111. Headstrong filed a request, Dkt. 118, which the Court granted, Dkt. 122, to stay Gupta's summary judgment motion as it pertained to Headstrong pending the resolution of its motion to dismiss. The Secretary, meanwhile, opposed Gupta's motion and cross-moved for

summary judgment on all of Gupta's claims against the Secretary. Dkt. 123.

On September 9, 2019, the Court issued an Opinion and Order granting Headstrong's motion to dismiss, granting the Department of Labor's motion for summary judgment, and denying Gupta's motion for summary judgment. Dkt. 136 ("September 2019 Opinion"). As in its prior March 30, 2018 Opinion and Order, the Court again held that the May 2008 Settlement Agreement was valid and enforceable, and that it barred Gupta's claims. *Id.* at 7-11. The Court further held that the DOL's decisions dismissing Gupta's claims against Headstrong were supported by substantial evidence and not arbitrary, capricious, or contrary to law. *Id.* at 12-13. After Gupta appealed the Court's decision, the Second Circuit dismissed the appeal on August 18, 2020. *See Gupta v. Headstrong Inc., et al.*, 19-3044 (2d Cir. Aug. 18, 2020).

On October 3, 2019, Headstrong filed a motion for attorneys' fees, Dkt. 143, which Gupta opposed on December 9, 2019, Dkt. 165, and which Headstrong replied in support of on December 23, 2019, Dkt. 168. On December 2, 2019, Gupta filed his own motion for attorneys' fees, Dkt. 159, which Headstrong opposed on December 16, 2019, Dkt. 166, and which Gupta replied in support of on

December 24, 2019, Dkt. 169. On September 23, 2020, in response to a Court Order, Headstrong filed a revised version of its billing records with fewer redactions, as well as information about the experience of the attorneys for whom it seeks fees. Dkt. 176.

DISCUSSION

I. Gupta's Motion for Attorney's Fees

Gupta moves for $2,333.33 in attorneys' fees related to the May 2008 settlement negotiations with Headstrong, during which time he was represented by counsel. Dkt. 160 ("Pl. Mem.") ¶¶ 19-20. Headstrong argues that Gupta lacks any statutory or contractual grounds for his motion for fees. See Dkt. 166 ("Headstrong Opp'n") at 4 ("Gupta has not pointed to a single statute, court rule or any provision in an agreement between the parties which would allow him to collect the Attorneys' Fees from the Headstrong Defendants."). For the reasons that follow, the Court agrees.

The "'basic point of reference' when considering the award of attorney's fees is the bedrock principle known as the 'American Rule': Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides

otherwise." *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 370 (2019) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–253 (2010)). In other words, under the American Rule, "the presumption against fee shifting applie[s] by default." *Id.* at 371. "[T]he American Rule presumption is most often overcome when a statute awards fees to a 'prevailing party.'" *Id.* at 371. That said, "Congress has indeed enacted fee-shifting statutes that apply to nonprevailing parties" and "the American Rule applies to such statutes." *Id.* "New York follows the "American Rule" on the award of attorneys' fees." *Versatile Housewares & Gardening Sys., Inc. v. Thill Logistics, Inc.*, 819 F. Supp. 2d 230, 241 (S.D.N.Y. 2011).

Gupta's claims in this action arise under state contract law and under the Immigration and Nationality Act (INA) and its implementing regulations. *See* Am. Compl. at 13-57. Gupta argues that a provision of the INA, 8 U.S.C. § 1182(n)(2)(C)(i)(I), which authorizes the Secretary to "impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) as the Secretary determines to be appropriate," supports the proposition that he is entitled to attorneys' fees here. Pl. Mem. ¶ 6. Gupta fails, however, to identify any cases holding: (1) that this provision of the INA

authorizes the Secretary to award attorneys' fees, (2) that this provision of the INA authorizes a court to award attorneys' fees, or (3) assuming this provision of the INA does, in fact, authorize a court to award attorneys' fees, that such fees are available even where, as here, the plaintiff's claims were denied and his complaint was dismissed.

"To determine whether Congress intended to depart from the American Rule presumption, the Court first 'look[s] to the language of the section' at issue." *Peter*, 140 S. Ct. at 372 (quoting *Hardt*, 560 U.S. at 254). "While the absence of a specific reference to attorney's fees is not dispositive, Congress must provide a sufficiently specific and explicit indication of its intent to overcome the American Rule's presumption against fee shifting." *Id.* (internal quotation marks, citations, and brackets omitted) (holding provision of the Patent Act that requires applicants who file action in federal court to pay "[a]ll expenses of the proceeding," 35 U.S.C. § 145, does not overcome the American Rule's presumption against fee shifting to permit the Patent and Trademark Office to recover attorneys' fees). As Congress provided no such "specific and explicit indication of its intent to overcome the American Rule" in 8 U.S.C. § 1182(n)(2)(C)(i)(I), the Court finds that provision

does not defeat the presumption that each litigant must pay his own attorneys' fees.

Gupta cites the ARB's decision in *Delcore v. W.J. Barney Corp.*, ARB No. 96-161, ALJ No. 1989-ERA-038 (ARB Oct. 31, 1996) for the proposition that fees and costs are available here. Pl. Mem. ¶ 6. *Delcore*, however, involved violations of the Energy Reorganization Act of 1974 ("ERA"), which provided at the time that if the Secretary of Labor found a violation of the Act, it "shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued." *Blackburn v. Reich*, 79 F.3d 1375, 1377 (4th Cir. 1996) (quoting 42 U.S.C. § 5851(b)(2)(B)). In contrast to that provision of the ERA, Gupta's cited provision of the INA, 8 U.S.C. § 1182(n)(2)(C)(i)(I), does not contain any statutory language providing for attorneys' fees or otherwise indicating Congress's intent to overcome the American Rule.

Gupta's claims against Headstrong are also distinct from immigration-related fee-shifting cases brought under the Equal Access to Justice Act (EAJA), which permits a prevailing party in an

"adversary adjudication" before an administrative agency to recover fees from the Government. 5 U.S.C. § 504(a)(1); *see also Ibrahim v. U.S. Dep't Homeland Sec.*, 912 F.3d 1147 (9th Cir. 2019) (allowing EAJA fee-shifting for a procedural due process claim related to denial of a visa). Here, Gupta seeks fees against Headstrong, a private entity, rather than the Government. In any event, for the reasons described below, Gupta is not a prevailing party.

Moreover, Gupta is not entitled to attorneys' fees pursuant to the parties' May 2008 Settlement Agreement. As described above, the Settlement Agreement provided:

> In the event of a breach by You or any Releasor of any provision of this Agreement and Release, and without limiting in any way remedies available to the Company for such breach, You agree to indemnify and hold harmless the Releasees from and against any and all losses, liabilities, damages, and expenses, including reasonable attorneys' fees, that any Releasee may incur or suffer arising out of or in connection with any breach of a

> representation or agreement by You or any Releasor.

May 2008 Agreement ¶ 10. The Settlement Agreement defines "Releasors" to include Gupta, and his heirs, privies, executors, administrators, assigns, successors-in-interest, and predecessors-in-interest, and defines "Releasees" to include Headstrong and its parent organizations, affiliates, subsidiaries, predecessor organizations, successors, assigns, present or former directors, shareholders, partners, members, officers, employees, and agents. *Id.* ¶ 3. The Settlement Agreement thus unambiguously provides that Headstrong may seek fees in the event of Gupta's breach, but includes no parallel provision enabling Gupta to seek fees.

In sum, neither the INA nor the parties' May 2008 Settlement Agreement provides that Gupta is entitled to seek attorneys' fees from Headstrong. The Court thus holds that the American Rule presumption applies, and Gupta is not entitled to recover attorneys' fees.

II. Gupta's Motion for Costs

Gupta also seeks $2,099.28 in costs associated with the May 2014 ALJ hearing, $1,244 in other costs related to the litigation filed in 2012, $540 in

costs related to his appeal in that case, and $1,410 in costs related to this litigation. Dkt. 160 ("Pl. Mem.") ¶¶ 18, 21-25. In total, Gupta seeks $5293.28 in costs. *Id.* Headstrong argues that Gupta is not entitled to costs because he is not a prevailing party. Headstrong Opp'n at 2-3. Once again, the Court agrees.

Fed. R. Civ. P. 54(d)(1) provides that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Gupta, citing *Roadway Exp., Inc. v. Admin. Review Bd.*, 6 F. App'x 297 (6th Cir. 2001), argues that because the ALJ found that Headstrong had engaged in an H-1B violation, he does not need to prove that he is a prevailing party in order to receive reimbursement for costs. Pl. Mem. ¶ 8; *see also* Dkt. 169 ("Pl. Reply") ¶ 2 (citing *Roadway Express* for the proposition that "in administrative cases costs are assessed against the party found to be in violation of the statute"). In *Roadway Express*, however, the Sixth Circuit analyzed attorneys' fees and costs under a different statutory scheme, the Surface Transportation Assistance Act ("STAA"), which the court held is not governed by the prevailing party doctrine. *See Roadway Exp.*, 6 F. App'x at 301. The case does not stand for the general proposition that parties found in violation of any statute owe

attorneys' fees and costs, and explicitly distinguishes the STAA from fee-shifting statutes that use the prevailing party standard. *See id.*

Gupta also argues that in any event, he is the prevailing party. *See* Pl. Mem. ¶¶ 10-12. The Court disagrees. A party is a prevailing party "if there is a 'judicially sanctioned change in the legal relationship of the parties' favoring it, including an 'enforceable judgment[t] on the merits.'" *Megna v. Biocomp Labs., Inc.*, 225 F. Supp. 3d 222, 224 (S.D.N.Y. 2016) (quoting *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S. Ct. 1642, 1646 (2016)). "The prevailing party is one who 'succeeds on a significant issue in the litigation.'" *Id.* (quoting *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d. Cir. 1989)).

Although, as described above, the ALJ found that Headstrong owed back wages of approximately $11,500, she determined that "Headstrong's "obligation to pay him back wages, or benefits, or travel expenses of any kind, was completely extinguished by [Gupta's] execution of the settlement agreement and release, and the concomitant payment of $7,000.00." Am. Compl. Ex. 4 at 39. The ALJ further noted that although the $7,000 lump sum payment was less than the $11,500 owed to Gupta, the settlement amount

"represent[ed] a reasonable compromise" and was paid to Gupta within 45 days of his attorney's demand letter. *Id.* at 39 n.60. Accordingly, the ALJ concluded that Headstrong did "not currently owe any back wages, or any other amount of money," to Gupta. *Id.* at 41. The ARB affirmed the decision and order of the ALJ, finding that "the extensive evidentiary record amply supports the ALJ's factual findings, including her determination that the parties' settlement and release of claims extinguished all claims against Headstrong." Am. Compl. Ex. 2 at 4. Similarly, this Court held that "the May 2008 Agreement unambiguously released the claims that Gupta asserts against Headstrong in this case" and upheld the Department of Labor's decision concluding that the parties had settled Headstrong's wage obligation and released Gupta's claims. September 2019 Opinion at 11-13.

Gupta thus plainly did not obtain a "'judicially sanctioned change in the legal relationship of the parties' favoring it, including an 'enforceable judgment[t] on the merits.'" *Megna*, 225 F. Supp. 3d at 224 (quoting *CRST Van Expedited, Inc.*, 136 S. Ct. at 1646). Gupta sought back wages, and his efforts failed, as Headstrong and Gupta are in the same position they were when this

III. Headstrong's Motion for Attorneys' Fees

Headstrong also seeks attorneys' fees, in the amount of $210,163.00. Dkt. 144 ("Headstrong Mem.") at 1. Headstrong only seeks reimbursement for attorneys' fees incurred in relation to Plaintiff's claims in federal court and does not seek fees in connection with the administrative proceedings. *Id.*, *see also* Dkt. 145 ¶ 5; Dkt. 176 at 1. Headstrong contends that Gupta breached the Settlement Agreement's covenant not to sue, and that it is therefore entitled to fees pursuant to the Agreement's fee-shifting provision. ("Headstrong Mem.") at 1. For the reasons that follow, the Court agrees that Headstrong is entitled to fees, yet finds the amount of Headstrong's requested fee award unreasonable.

As described above, under the American Rule, there is a presumption that each party is responsible for its own attorneys' fees unless a statute or contract provides otherwise. *See Local 1180, Communications Workers of America, AFL-CIO v. City of New York*, 392 F.Supp.3d 361, 377 (S.D.N.Y. 2020). The American Rule provides that "parties may agree by contract to permit recovery of attorneys' fees, and a federal court will enforce contractual rights to attorneys' fees if the contract is

valid under applicable state law." *Id.* (citing *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 74 (2d Cir. 2004)). "Under New York law, a contract that provides for an award of reasonable attorneys' fees to the prevailing party in an action to enforce the contract is enforceable if the contractual language is sufficiently clear." *NetJets Aviation, Inc. v. LHC Communications, LLC*, 537 F.3d 168, 175 (2d Cir.2008). In other words, "the rule in New York is that when a contract provides that in the event of litigation the losing party will pay the attorneys' fees of the prevailing party, the court will order the losing party to pay whatever amounts have been expended by the prevailing party, so long as those amounts are not unreasonable." *Diamond D Enterprises USA, Inc. v. Steinsvaag*, 979 F.2d 14, 19 (2d Cir.1992). Thus, in addressing a contractual claim for attorneys' fees, a court must determine what constitutes "a reasonable amount of fees." *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1313 (2d Cir.1993).

For the reasons expressed in the Court's September 9, 2019 Opinion and Order, the May 2008 Settlement Agreement is valid and enforceable under New York law and unambiguously released Headstrong from the claims that Gupta asserts in this case. September 2019 Opinion at 7-11. By filing this action in contravention of his sworn agreement

to "release and forever discharge" Headstrong "of and from all . . . suits," as well as his agreement "not to sue or file a charge, complaint, grievance, or demand for arbitration against" Headstrong "in any forum," Gupta plainly breached the Settlement Agreement. Settlement Agreement ¶¶ 3, 5.

The Court's analysis regarding the validity of the Settlement Agreement extends to the validity of its fee-shifting provision, which the Court finds enforceable because it is "sufficiently clear." *NetJets Aviation, LLC*, 537 F.3d at 175. That provision unambiguously states that should Gupta "breach" any provision of the Agreement, he agrees to "indemnify and hold harmless the Releasees from and against any and all losses ... including reasonable attorneys' fees, that any Releasee may incur or suffer arising out of or in connection with any breach." Settlement Agreement ¶ 10. Gupta argues that this provision is inapplicable because Headstrong never filed a counterclaim for breach of contract. Dkt. 165 ("Pl. Opp'n") ¶ 7. Yet the relevant inquiry here is whether a party breached a contractual fee provision that is valid under state law, not whether Headstrong counterclaimed for breach of contract or proved damages. *Local 1180*, 392 F.Supp.3d at 377. Because Gupta's breached the May 2008 Settlement Agreement by filing the two related federal actions against Headstrong, the

Court holds that Headstrong is entitled to collect attorneys' fees pursuant to the parties' valid May 2008 Settlement Agreement.

The Court finds, however, that Headstrong's request for $210,163.00 in attorneys' fees is unreasonable. Under the law of this Circuit:

> In determining the reasonableness of attorneys' fees in the context of a contractual claim, a court examines a variety of factors, including "the difficulty of the questions involved; the skill required to handle the problem; the time and labor required; the lawyer's experience, ability and reputation; the customary fee charged . . . for similar services; and the amount involved."

HSH Nordbank AG New York Branch v. Swerdlow, No. 08 CIV. 6131 (DLC), 2010 WL 1141145, at *6 (S.D.N.Y. Mar. 24, 2010) (quoting *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1263 (2d Cir.1987), *aff'd sub nom. HSH Nordbank AG New York Branch v. St.*, 421 F. App'x 70 (2d Cir. 2011). "It is also appropriate for a court to consider the amount of fees requested in relation to the amount of damages at stake in the litigation." *Vista Outdoor*

Inc. v. Reeves Family Tr., No. 16 CIV. 5766, 2018 WL 3104631, at *4 (S.D.N.Y. May 24, 2018) (citing *Swerdlow*, 2010 WL 1141145, at *6). "Counsel are, of course, required to present detailed contemporaneous billing records. The court is not, however, required to 'set forth item-by-item findings concerning what may be countless objections to individual billing items.'" *Swerdlow*, 2010 WL 1141145, at *6 (quoting *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994)). "At the end of the day, "[t]he presumptively reasonable fee boils down to what a reasonable, paying client would be willing to pay, given that such a party wishes to spend the minimum necessary to litigate the case effectively.'" *Vista Outdoor*, 2018 WL 3104631, at *4 (quoting *Simmons v. New York City Transit Auth.*, 575 F.3d 170, 174 (2d Cir. 2009)). "Ultimately, '[w]here a district court has awarded attorneys' fees under a valid contractual authorization, . . . it has broad discretion in doing so, and an award of such fees may be set aside only for abuse of discretion.'" *Swerdlow*, 2010 WL 1141145, at *6 (quoting *In re Goldstein*, 430 F.3d 106, 110 (2d Cir. 2005)).

Here, a number of factors point to the unreasonableness of Headstrong's requested fees. As an initial matter, the damages at stake in this action were just a fraction of the fees that Headstrong now seeks. New York courts "'will rarely find reasonable

an award to a plaintiff that exceeds the amount involved in the litigation.'" *Antidote Int'l Films, Inc. v. Bloomsbury Pub., PLC*, 496 F. Supp. 2d 362, 364 (S.D.N.Y. 2007) (quoting *F.H. Krear & Co.*, 810 F.2d at 1254). "However, the amount 'involved' in the litigation is not the amount actually recovered but instead the 'amount reasonably in controversy in a litigation.'" *Vista Outdoor Inc.*, 2018 WL 3104631, at *5 (quoting *Diamond D. Entes. USA, Inc.*, 979 F.2d at 19-20). Although Gupta sought a range of compensatory damages in addition to punitive damages, Am. Compl. at 39-43, the ALJ found that Headstrong owed Gupta approximately $11,500 in back wages—just $4,500 more than the $7,000 Headstrong had already paid Gupta pursuant to the May 2008 Settlement Agreement. Am. Compl. Ex. 4 at 39. The ALJ's calculation reflects that the damages "reasonably in controversy" in this action pale in comparison to the $210,163.00 that Headstrong expended on its attorneys' fees. *Vista Outdoor Inc.*, 2018 WL 3104631, at *5. The Court thus reduces Headstrong's requested fee award by thirty percent.

In addition, the Court finds that this action did not involve any particularly difficult questions, and accordingly that no unique degree of skill was required to defend the action. *See F.H. Krear & Co.*, 810 F.2d at 1263. Rather, defending this action

involved applying basic principles of contract law, given that Gupta had signed an unambiguous release of his claims. The Court thus reduces Headstrong's requested fee award by an additional twenty percent, for a total reduction of fifty percent.

The Court nonetheless finds that some of the factors identified above favor the reasonableness of Headstrong's requested fee award. In particular, defending this action, the prior related action Gupta filed in 2012, *see Gupta v. Headstrong, Inc.*, 12-CV-6652 (RA), and the Second Circuit appeals required a significant expenditure of time and labor over eight years. The time and effort required to litigate these cases was compounded by the fact that Gupta filed an unusually high number of motions, many of which the Court denied, and some of which were frivolous. *See* Headstrong Mem. at 3; Dkt. 145-1 (listing 23 motions Gupta has filed).

Finally, the Court finds that the rates charged by Headstrong's counsel, Jackson Lewis, are reasonable in light of the firm's significant experience defending companies in labor disputes. Courts in this district have recognized Jackson Lewis as "a nationwide management-side law firm with a well-known and respected employment and labor law practice." *Bryant v. Potbelly Sandwich Works, LLC*, No. 17-CV-07638(CM)(HBP), 2020 WL

563804, at *6 (S.D.N.Y. Feb. 4, 2020). Headstrong's lead attorney from Jackson Lewis, Dana Glick Weisbrod, graduated from law school in 2004. *See* Dkt. 176 at 2. Her requested hourly fees range from $400 for work performed in 2012, when she was eight years out of law school, to $480 for work performed in 2019, when she was fifteen years out of law school. See Dkt. 176-1 ("Billing Records") at 2, 117. In light of Ms. Weisbrod's experience, the Court finds these proposed rates reasonable when compared to the rates courts have approved for attorneys with comparable experience at commercial firms in this district. *See, e.g., Vista Outdoor Inc.* 2018 WL 3104631, at *6-7 (awarding 2016 rate of $633 to associate who was seven years out of law school and 2018 rate of $693.75 to associate who was fifteen years out of law school at a large commercial law firm). The Court thus declines to further modify Headstrong's requested fee award.

In sum, the Court concludes that Headstrong is entitled to half its requested attorneys' fee award—or $105,081.05—to compensate it for the eight years its attorneys have litigated this and related actions.

CONCLUSION

For the foregoing reasons, the Court denies Gupta's motion for attorneys' fees and grants Headstrong's motion, subject to the modifications discussed above. The Clerk of Court is respectfully directed to terminate the motions pending at Docket Entries 143, 159, and 162.

SO ORDERED.

DATED: September 28, 2020
New York, New York

/s/ Ronnie Abrams
Ronnie Abrams
United States District Judge

APPENDIX C

U.S. Department of Labor
Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

ARB CASE NOS. 15-032, 15-033

ALJ CASE NO. 2014-LCA-008

DATE: JANUARY 26, 2017

In the matter of:

ARVIND GUPTA,
PETITIONER/
CROSS-RESPONDENT,

v.

HEADSTRONG, INC.,
RESPONDENT/
CROSS-PETITIONER,

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:
Arvind Gupta, pro se, Mumbai, MH, India

For the Respondent:
Dana G. Weisbrod, Esq.; *Jackson Lewis, P.C.;* New York, New York; Forrest G. Read, IV, Esq.; and Michael H. Neifach, Esq.; *Jackson Lewis, P.C.;* Reston, Virginia

Before: Paul Igasaki, *Chief Administrative Law Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the H-1B provisions of the Immigration and Nationality Act, as amended, 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n)(2) (INA) (Thomson Reuters 2016) and the regulations at 20 C.F.R. Part 655, subparts H, I (2016). Arvind Gupta (Gupta) appeals and Headstrong, Inc. (Headstrong) cross-appeals the Administrative Law Judge's (ALJ) Decision and Order (Jan. 21, 2015) (D. & O.) dismissing this case. The Board affirms the dismissal.

BACKGROUND

This case was previously before the Administrative Review Board (ARB or Board). In 2012, the ARB affirmed the dismissal of that case. *Gupta v. Headstrong, Inc.*, ARB Nos. 11-008, 11-065; ALJ No. 2011-LCA-038 (ARB June 29, 2012)(no hearing or appeal available where Labor Department's Wage and Hour Division (WHD) does not investigate). Gupta sought review.

While the case was pending before the United States District Court for the Southern District of New York, WHD and Gupta entered into a "Stipulation and Order of Remand and Dismissal" based on WHD's determination that the record was incomplete for purposes of judicial review. The order vacated WHD's determination that Gupta's complaints were untimely and remanded the matter to WHD "for a new decision on Gupta's complaints and request for investigation" and to "address whether Gupta's alleged telephonic complaint of January 2008 rendered his complaint timely, and whether any aspect of Gupta's complaints should be deemed timely based on equitable tolling." The court dismissed the case. *Gupta v. Headstrong, Inc.*, No. 1:12-cv-06652-RA (S.D.N.Y. Dec. 10. 2012). Headstrong was not a party to the stipulation.

In 2014, WHD investigated and found that Headstrong was liable for $5,736.96 in back wages but had already paid these back wages. Complainant's Exhibit 1. Gupta requested a hearing before an administrative law judge. After holding a formal evidentiary hearing on May 6, 2014, the ALJ issued her decision on January 21, 2015.[1] The ALJ dismissed the case based on the parties' Confidential Settlement and Release Agreement (May 8, 2008) and concomitant $7,000.00 payment. Respondent's Exhibits 15-17. The ALJ found that the settlement included a release of all claims and that the parties' execution of it "fully extinguished" any claim Gupta may have had related to his employment with Headstrong. The ALJ concluded that in light of the parties' 2008 settlement and release of claims, negotiated while Gupta was represented by counsel, Headstrong "does not now owe" back wages, benefits, damages, or interest and "has no current monetary liability" to Gupta. D. & O. at 23, 39, 40. The ALJ specifically rejected Gupta's arguments that the settlement was ineffective, void, fraudulent, or that Gupta had rescinded it. The ALJ also concluded that Gupta's June 2008 written complaint was timely and that Headstrong effected a bona fide termination of Gupta's employment on February 2, 2007. D. & O. at 32-33, 37-40. Gupta appeals the ALJ's dismissal and

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1 *Gupta v. Headstrong, Inc.*, ALJ No. 2014-LCA-008 (Jan. 21, 2015).

Headstrong cross-appeals the ALJ's finding that the written June 2008 complaint was timely filed.

The ARB certified four issues for review: (1) whether the ALJ erred in finding that the settlement extinguished all liability; (2) whether the ALJ erred in finding the June 2008 complaint timely; (3) whether the ALJ erred in finding that Headstrong was obligated to provide Gupta return transportation costs to India; and (4) whether the ALJ erred in determining the back wage obligation.

STANDARD OF REVIEW

The Administrative Review Board has authority to review final decisions arising under the Immigration and Nationality Act, as amended, 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n)(2) and its implementing regulations, 20 C.F.R. § 655.845. *See also* Secretary's Order No. 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012)(delegating to the ARB the Secretary's authority to review cases arising under the INA).

DISCUSSION

Upon review, the Board finds that the extensive evidentiary record amply supports the ALJ's factual findings, including her determination

that the parties' settlement and release of claims extinguished all claims against Headstrong. Gupta attacks the settlement as ineffective, void, and fraudulent, and claims that he rescinded it. However, Gupta has evoked no statute, regulation, or precedent authorizing the Board to adjudicate collateral attacks on a facially valid contract. The Board is an administrative body with only the authority emanating from statutes, implementing regulations, and delegations of authority.[2] The ARB has, however, affirmed an ALJ's dismissal based on the parties' settlement in an INA case involving this same complainant. *Gupta v. Compunnel Software Grp.*, ARB No. 16-056, ALJ No. 2011-LCA-045 (ARB Apr. 29, 2016). In that case, as well as this, the settlement included a release of all claims related to Gupta's employment. Gupta's claims that this settlement is ineffective, void, fraudulent, or has been rescinded by him, are collateral issues that we do not address in this instance.[3] Because the ALJ's

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[2] *See, e.g., Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 5 n.10 (ARB Nov. 28, 2012) (saying the same)(citing *Wonsock v. Merit Sys. Prot. Bd.*, 296 Fed. Appx. 48, 50 (Fed. Cir. 2008)).

[3] Gupta may choose to return to district court. See 20 C.F.R. § 655.850. After the court remanded this case to the Labor Department in 2012, the court issued several orders through 2015 directing Gupta to exhaust his administrative remedies before filing another motion. However, when Gupta persisted in filing motions with the district court, the court

conclusion that the settlement extinguished all claims is consistent with ARB precedent, we uphold it. We, therefore, affirm the ALJ's dismissal of this case.[4]

CONCLUSION

Accordingly, the ALJ's dismissal of Gupta's case is **AFFIRMED**. All pending motions, as well as Gupta's recent filing asserting supplemental authority, to which Headstrong has responded, are

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indicated, as late as December 1, 2015, that it may impose sanctions. *Gupta v. Headstrong, Inc.*, No. 1:12-cv-06652-RA (S.D.N.Y. Dec. 1, 2015).

[4] On this record, we doubt whether Gupta had a right to pursue his claims by seeking a formal hearing. The Administrator, Wage and Hour Division, in his amicus brief, asserts that while an H-1B employee may file a complaint notwithstanding any release of his claims in a settlement agreement entered into by the employee and his H-1B employer, the employee cannot seek a formal evidentiary hearing because he effectively waived his right to do so in the settlement agreement. It appears that Gupta waived his right to a hearing and, by extension, any authority we may have to review the settlement agreement, by signing it. *Cf. Khandelwal v. Southern Cal. Edison*, ARB No. 97-050, ALJ No. 1997-ERA-006 (ARB Mar. 31, 1997)(employer named in an employee protection provisions case filed with Occupational Safety and Health Administration under the Energy Reorganization Act can request termination of investigation based on settlement agreement entered into before complaint was filed). Administrator's Amicus Brief at 17-21.

DENIED as moot. Headstrong's cross-appeal is **DENIED** as moot as it cannot affect the outcome of the case. This matter is **DISMISSED** with prejudice.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

APPENDIX D

U.S. Department of Labor
Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002
(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 21 January 2015

Case No.: 2014-LCA-00008

In the matter of

ARVIND GUPTA
Complainant

v.

HEADSTRONG, INC.
Respondent

APPEARANCES: ARVIND GUPTA, pro se
The Prosecuting Party

DANA WEISBROD, Esq.
FORREST REID, Esq.
For the Respondent

BEFORE: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER

Background

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(n) (2005) ("INA" or "the Act"), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I, C.F.R. § 655.700 et seq.[1] The Prosecuting Party is not represented by counsel.[2]

Procedural History

The case involves a complaint the Prosecuting Party initially filed against a former employer, the Respondent, with the Wage-Hour Division ("WHD") of the Department of Labor, in 2008. The complete

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[1] Unless otherwise specified, citations to federal regulations are to Title 20, Code of Federal Regulations

[2] As this decision reflects, in 2008 the Prosecuting Party was represented by an attorney, who negotiated a settlement agreement on behalf of the Prosecuting Party. This attorney did not enter an appearance in this matter and does not represent the Prosecuting Party at this time.

procedural history of this litigation is long and complex. The most salient facts are as follows:

1. In about June 2008 the Prosecuting Party filed a complaint with WHD, alleging that the Respondent committed various infractions relating to the Prosecuting Party's employment as an H-1B nonimmigrant employee; WHD determined that the complaint did not warrant an investigation and denied the complaint, based on WHD's conclusion that the complaint was untimely (filed more than 12 months after the Respondent's alleged infractions).

2. The Prosecuting Party claims that he provided additional information to WHD between 2008 and 2010; in June 2010 WHD again denied his complaint, stating that the complaint was untimely and did not warrant an investigation.

3. The Prosecuting Party then submitted a request for a hearing to the Office of Administrative Law Judges ("OALJ"), and the matter was assigned to me for adjudication.

4. In October 2010 I dismissed the Prosecuting Party's complaint, finding no jurisdiction to hold a hearing in cases where WHD determined that an investigation was not warranted. Case No. 2010-LCA-00032 (ALJ Oct. 12, 2010).

5. The Prosecuting Party appealed, and on June 29, 2012 the Administrative Review Board ("ARB" or

"Board") affirmed my dismissal of his complaint.[3] ARB Case Nos. 11-008, 11-065 (ARB June 29, 2012).

6. The Prosecuting Party then filed an action appealing the ARB's decision in the United States District Court, Southern District of New York. Case No.12:cv-06652. On December 6, 2012, the Prosecuting Party entered into a Stipulation and Order of Remand and Dismissal with the Department of Labor. Based on this agreement, WHD's determination that the Prosecuting Party's complaints were untimely was vacated, and the matter was remanded to WHD for a new decision on the timeliness of the Prosecuting Party's 2008 complaint against the Respondent.[4]

7. On March 13, 2014, WHD issued a Determination Letter informing the Prosecuting Party that, after an investigation, it had determined

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[3] Additionally, in 2011 the Prosecuting Party filed yet another complaint with WHD, which WHD refused to investigate and rejected as untimely. He appealed to OALJ, and in July 2011, I dismissed the matter on the same basis I dismissed his earlier complaint (lack of a WHD investigation). Case No. 2011-LCA-00038 (ALJ July 19, 2011). The Prosecuting Party appealed to the ARB, which assigned a case number (11-065) and consolidated that appeal with the Prosecuting Party's appeal of my October 2010 dismissal.

[4] The Respondent was not a party to the Stipulation and Order of Remand and Dismissal.

that the Respondent owed back wages in the amount of $5,736.96 to the Prosecuting Party and had failed to provide him with a copy of the Labor Condition Application ("LCA") pertaining to him. Further, WHD stated in the Determination Letter, the Respondent had already paid the back wages. No civil money penalties were assessed.

8. On March 14, 2014 the Prosecuting Party submitted his "Hearing Request and Complaint" (hereinafter, "Hearing Request") to the Chief Administrative Law Judge; it was received in the Washington, DC office of OALJ on March 24, 2014.[5]

9. The case was assigned to me and on April 4, 2014 I issued a "Notice of Hearing and Pre-Hearing Order" setting the hearing for May 6, 2014, in New York City.

10. The hearing was held as scheduled. The Prosecuting Party traveled from India and attended the hearing in person.

11. By Order dated June 11, 2014, I granted the Prosecuting Party's unopposed Motion to Admit Facts; by Order dated August 18, 2014, I admitted the Prosecuting Party's post-hearing evidentiary submissions.

12. The parties submitted post-hearing briefs by the deadline of September 10, 2014.

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[5] The Prosecuting Party mailed his Hearing Request from his current home in India.

13. By fax on September 11, 2014, the Prosecuting Party submitted a "(Renewed) Motion for Relief." By Order dated September 16, 2014, I informed the parties that I considered the Prosecuting Party's Motion to be a motion for an expedited decision; I advised the parties that, notwithstanding the practice to issue decisions in the order in which hearings were held, and that I had approximately 50 cases that were "older" than the Prosecuting Party's, I would endeavor to issue a decision in this matter by January 15, 2015.

The Prosecuting Party's Motions

Prior to, during, and after the hearing, the Prosecuting Party submitted multiple motions to me. I have reviewed the Prosecuting Party's motions and my adjudications of the motions. I reaffirm my prior determinations. I find it appropriate to discuss, briefly, some of the Prosecuting Party's motions, and the rationale for my determinations.[6]

Motions Regarding Status of Genpact Limited

In his Hearing Request, the Prosecuting Party listed both the Respondent (Headstrong, Inc.) and another entity (Genpact Limited) (hereinafter,

[6] More complete discussions are found in the orders adjudicating the motions.

"Genpact") as Respondents. He asserted that Genpact Limited is the "publically held parent of Headstrong, Inc.," but did not otherwise articulate why Genpact should be listed as a party. Hearing Request at 30.

In my April 4, 2014 "Notice of Hearing and Pre-Hearing Order," I directed the Respondent to inform me whether it objected to Genpact being designated as a party. Order of April 4, 2014, at 2. Respondent objected. By Order dated April 21, 2014, I found that Headstrong, Inc. should be the sole respondent, because it was the entity that employed the Prosecuting Party and submitted the relevant LCAs to the Department of Labor and U.S. Customs and Immigration Service ("USCIS").[7]

On May 12, 2014, the Prosecuting Party filed a "Motion for Certification of the Issue of Genpact's Party Status for Interlocutory Review by ARB." I denied the Motion by Order dated May 28, 2014.

On review of the entire record in this matter, including the record of the hearing and the parties' post-hearing submissions, I find there is no evidence

[7] I also noted there is no evidence in the WHD Determination Letter that it had ever investigated Genpact, and reiterated that, under the regulation, only matters that WHD has investigated are proper subjects for a hearing.

to justify adding Genpact as a party. Specifically, I find that Genpact was not in any way involved in the employment of the Prosecuting Party by the Respondent; its only involvement to date has been in defending the Prosecuting Party's attempt to have it included in the litigation.

Motion for "Default" Decision

Prior to the hearing, on April 16, 2014, the Prosecuting Party submitted a motion for a default decision against the Respondent ("Complainant's (sic) Motion for an Order Declaring Respondent in Default for Failure to Defend and Default Decision"), in which he averred that because the Respondent did not file an answer to his March 14, 2014 Hearing Request within 30 days, he was entitled to a default decision. The Respondent filed an answer in opposition to the motion and also filed "Respondent's Special Exception Answer, General Denial, and Affirmative Defenses."

By Order dated April 21, 2014, I denied the motion, finding the Respondent's submissions timely. On April 30, 2014, the Prosecuting Party filed a motion for reconsideration of my Order denying his motion for a default decision. On May 21, 2014, I denied the motion for reconsideration and noted, in addition to the other rationales for denying

a default decision set out in my Order of April 21, 2014, that the Respondent had appeared at the hearing and had put forth a defense. Therefore, I stated, issuing a default judgment was both unnecessary and inappropriate. On May 27, 2014, the Prosecuting Party submitted a second motion for reconsideration, which I denied by Order dated June 11, 2014.

On review, I adhere to my earlier determination that it is inappropriate to issue a default judgment against the Respondent. Notwithstanding the Prosecuting Party's contentions, the record reflects that the Respondent timely entered an appearance; timely submitted its required pre-hearing statement; participated in pre-hearing conferences; appeared at the hearing and put on its case; and filed post-hearing submissions. Accordingly, I find there is absolutely no basis, in law or fact, to issue a default judgment against the Respondent.

Discussions of Issues Prior to the Hearing

In the same Order in which I denied the Prosecuting Party's default motion, and in advance of the pre-hearing conference (held on April 28, 2014, per my Order of April 4, 2014; see Order of Apr. 4, 2014 at 4-5), I provided information to the parties

about what issues I would address at the hearing. Order of Apr. 21, 2014, at 3. Specifically, I informed the parties that, in accordance with § 655.820(c)(3), a request for hearing was limited to "the issue or issues stated in the notice of determination giving rise to such request." Id. Therefore, I stated, the hearing was limited to matters relating to the Prosecuting Party's employment under two specific LCAs (EAC-07-010-52367, EAC-06-122-50383), for the periods validated by the Department of Labor. Id. I also informed the parties that I would not consider any aspect of the Prosecuting Party's request for hearing that alleged other "adverse actions by the Respondent or that sought damages (compensatory or punitive)." Id.

At the pre-hearing conference on April 28, 2014, I reiterated that I would limit my adjudication of the Prosecuting Party's claim for back wages to the time periods covered in the LCAs. Transcript of Apr. 28, 2014 conference at 11, 29-30. I also informed the parties that, because the Prosecuting Party alleged that the Respondent retaliated against him and this allegation was investigated, I would adjudicate the Prosecuting Party's allegation of retaliation. Id. at 11-12, 30-31, 32-33. In addition, I told the parties, I would entertain testimony on the issue of whether the Respondent should have paid living expenses for the Prosecuting Party. Id. at 31. I

informed the parties that I saw no provision in the regulation for compensatory or punitive damages, or for litigation costs and attorney's fees.[8] Id.

An additional pre-hearing conference was held on April 30, 2014. At that time I listed the issues to be adjudicated in this matter as follows:

- What is the Prosecuting Party's entitlement to back pay, if any?
- What is the date his employment with the Respondent ended?
- What entitlement to benefits does he have?
- Has the Respondent engaged in any acts of retaliation or discrimination against the Prosecuting Party?
- What has been the effect of the failure to provide the Prosecuting Party with a copy of his LCA?
- Was there any misrepresentation of a material fact (as to the relevant work location)?
- Did the Respondent fail to provide reasonable cost for return transportation, apart from an airline ticket? [9]

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[8] As previously stated, the Prosecuting Party is not represented by counsel.

[9] I informed the parties that I would address this issue in the context of whether there was a bona fide termination of the

- Does the 2008 settlement extinguish any claim for back wages or benefits?[10]

Transcript of Apr. 30, 2014 conference at 22-23.

The Respondent also stated that it wished me to address the issue of whether the Prosecuting Party's complaints were timely. Id. at 26-28. And I informed the Prosecuting Party that, if he prevailed, I would issue an order covering the issue of recoupment of litigation costs. Id. at 30-31. As to the issue of compensatory or punitive damages, I informed the parties that I would allow the Prosecuting Party to submit evidence, but because I was unaware of any authority that would permit me to award damages, I would not make any finding regarding damages. Id. at 34-35.

Issues Disposed of at the Hearing, and Post-Hearing

At the hearing, the Respondent moved for a directed verdict as to all aspects of the Prosecuting

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Prosecuting Party's employment. Transcript of Apr. 30, 2014 conference at 25-26.

[10] The conference transcript contains a transcription error. The transcript states: "Does the 2008 settlement extend any claim for back wages or benefits"? Transcript of Apr. 30, 2014 conference at 23. Based on my notes, I believe the word should be "extinguish," not "extend."

Party's case. Hearing Transcript (T.) at 299. I denied the Respondent's Motion regarding most of the Prosecuting Party's case, but granted the motion as to two issues: compensatory and punitive damages, and the Respondent's alleged retaliation against the Prosecuting Party. T. at 301. Later in the hearing, I realized that I had granted the Respondent's motion for directed verdict without having asked the Prosecuting Party for his position. T. at 326. I invited the Prosecuting Party to make a written motion for me to reconsider my action, which he did on May 12, 2014. [11] By Order dated August 18, 2014, I informed the parties that, on reconsideration, I adhered to my prior determinations that the Prosecuting Party had not established a prima facie case that the Respondent had engaged in acts of discrimination or retaliation against him; therefore, a directed verdict in favor of the Respondent on the issue of retaliation was appropriate. Order of Aug. 18, 2014, at 4-6. I also informed the parties that compensatory damages were not appropriate in this

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[11] By Order dated May 21, 2014, I informed the parties that, in order for the parties to address fully the issues the Prosecuting Party raised in his Reconsideration Motion, it would be necessary for the parties to have access to the transcript of the hearing. I therefore set deadlines for the Respondent's answer and the Prosecuting Party's reply that took into consideration the time necessary to obtain a transcript. The parties timely filed submissions.

matter, and there was no statutory authority for me to award punitive damages. Order of Aug. 18, 2014, at 6. By Order dated August 28, 2014, I denied the Prosecuting Party's request for reconsideration of my order.

On review, I adhere to my prior determinations. Specifically, I find that the record before me does not indicate that the Respondent engaged in any acts of retaliation against the Prosecuting Party motivated by the Prosecuting Party's filing of a complaint against the Respondent to enforce the Department of Labor's H-1B regulations. See § 655.801(a). Rather, as I noted in my Order of August 18, 2014, the Prosecuting Party's allegations of retaliation appear to be complaints about the actions and positions the Respondent has taken in defending against the Prosecuting Party's complaints to WHD and the Prosecuting Party's actions in litigating the instant matter. Order of Aug. 18, 2014 at 5-6. For example, the Prosecuting Party asserts that the Respondent retaliated against him when it "took [the] following adverse actions," by "Making [Prosecuting Party] go through a full litigation to recover his wages and benefits guaranteed by [the] INA," and by "Not participating in any DOL offered Settlement Judge program that could have resulted [in a] 'fair and

reasonable' settlement." Prosecuting Party's Hearing Request at 18 (emphasis in original).

On review of the entire record, I find that the Respondent's actions appear to have been motivated by its decision to mount a defense against the Prosecuting Party's actions in filing complaints against the Respondent. I find that such acts are not retaliatory in that they are not among the actions listed as retaliatory under § 655.801(a). Rather, they involve the Respondent's lawful responses to the Prosecuting Party's actions, after the Prosecuting Party initiated complaints or legal actions against the Respondent. As a party in an investigative complaint or in litigation, the Prosecuting Party does not have the luxury of dictating or controlling his opponent's strategy or response. Rather, so long as the Respondent's actions are within the panoply of lawful options, the Prosecuting Party must accede to the Respondent's decision.

I have reviewed the entire record, and I note that the overwhelming number of submissions from the parties in this matter have come from the Prosecuting Party. In general, it appears that in the administrative processing of this matter at WHD, and in litigating this matter before me, the Respondent has done little more than respond to the issues that the Prosecuting Party has raised, and, in

general, has filed matters with me only in response to the Prosecuting Party's filings.

The issue of whether the Prosecuting Party can receive compensatory damages requires further discussion. The current rule states that under certain circumstances (violation of specified parts of § 655.810), the Administrator may impose "such other administrative remedies as the Administrator determines to be appropriate," including appropriate equitable or legal remedies." § 655.810(e)(2). The specified parts of § 655.810 for which such remedies are authorized include discrimination or retaliation. See § 655.810(b)(iii). In addition, as also discussed in my August 18, 2014 Order, I noted that at least one administrative law judge has commented that compensatory damages are included among the "appropriate legal or equitable remedies" that can be awarded under 20 C.F.R. § 655.810(e)(2) ("other administrative remedies").[12] Kersten v. LaGard, Inc. 2005-LCA-00017 (ALJ, May 11, 2006, slip op. at 6). I conclude, therefore, that if I were to find that the Prosecuting Party has established that the Respondent retaliated against him unlawfully, I have the discretion to fashion appropriate remedies, which could include compensatory damages.

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[12] Awards of back wages and fringe benefits, civil money penalties, and disqualification from the H-1B program are not included in § 655.801(e); they are covered in §655.810(a)-(d).

Nonetheless, as discussed above, I have found no instance of retaliation or discrimination in this matter, and so compensatory damages are not appropriate.

Issues to be Addressed in this Decision

Based on the discussions at the pre-hearing conference(s), the assertions the parties made at the hearing and the parties' filings, including their pre-hearing statements and post-hearing briefs, I find the issues to be determined in this Decision are as follows:

- Whether the Prosecuting Party's various complaints to WHD were timely;

- Whether the Respondent completed a bona fide termination of the Prosecuting Party's employment so as to extinguish Respondent's responsibilities to pay the Prosecuting Party wages and, if so, the effective date of the Respondent's termination of the Prosecuting Party's employment;

- If the Respondent completed a bona fide termination of the Prosecuting Party's employment, whether Respondent's proffer of funds for return travel was sufficient;

- Whether the Respondent owes the Prosecuting Party any back wages and, if so, the amount of back wages owed,[13] and the time period for which the Respondent's wage liability applies;[14]

- Whether the Respondent failed to pay the Prosecuting Party applicable fringe benefits (including per diem payments while employed), in violation of the Act and the applicable regulations; and, if so, the monetary value of the fringe benefits;

- Whether the Prosecuting Party's acceptance of a payment from the Respondent in 2008 to settle his informal complaint against the Respondent extinguishes any liability on the part of the Respondent to pay back wages

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[13] At the hearing, I remarked that the record did not indicate how the Department of Labor arrived at the back wage liability of $5,736.96 (see CX 1, CX 34), and I would re-examine the issue of the amount of any back wage liability. T. at 325.

[14] At the hearing, I granted the Respondent's Motion for directed verdict for back wage liability for any period prior to November 27, 2006, because there is no evidence of record that the Respondent failed to pay the Prosecuting Party's wages prior to that date. T. at 330. I also reiterated that I believed that my jurisdiction was limited, as to back wages, to the period of the approved LCA, which expired on November 8, 2007. Id.

and/or the monetary value of benefits to the Prosecuting Party;

- In the event that the Respondent has any current liability to the Prosecuting Party for back wages and/or fringe benefits, whether the Respondent also owes the Prosecuting Party interest and, if so, the rate and amount of interest owed;

- Whether the Respondent failed to provide the Prosecuting Party with a copy of the LCAs pertaining to his employment; and

- Whether the Administrative Review Board's determination that another employer, Compunnel, owes the Prosecuting Party back wages, affects the Respondent's potential liability to the Prosecuting Party in this matter.

In this Decision, I have considered all the evidence of record, including the documentary evidence, whether or not I have specifically discussed the item of documentary evidence at issue. I also have considered the testimonial evidence, and the post-hearing arguments of the parties.

Evidence

At the hearing, I admitted into evidence the Prosecuting Party's Exhibits (CX) 1-32. T. at 8. I also admitted into evidence the Respondent's Exhibits (RX) 1-24, and 26-32.[15] T. at 18. Post-hearing, I admitted the Prosecuting Party's unopposed motion to "admit facts," thereby including two admissions in the hearing record. See Order of June 11, 2014. I also admitted the Prosecuting Party's Exhibits CX 33-38.[16]

Prosecuting Party's Evidence[17]

The Prosecuting Party's most salient exhibits are summarized as follows:

- CX1: WHD Administrator's Determination Letter, dated March 13, 2014.
- CX 2: Respondent's offer letter to the Prosecuting Party, dated March 13, 2006, with copy (unsigned) of employment contract. The

[15] I did not admit Respondent's Exhibit 25 (RX 25). T. at 130-31.

[16] See Order of August 18, 2014. The Respondent did not object to the Prosecuting Party's Motion to admit the exhibits, so I presumed that the Respondent had no objection to their admission.

[17] Prosecuting Party's exhibits are sequentially paginated (Index is pages 1-12, exhibit CX 1 is pages 13-18, etc.).

employment contract, between the "Company" [Headstrong, Inc.] and the Prosecuting Party, reflects the employment is "at-will" and that the Prosecuting Party is to be employed beginning March 27, 2006 at a salary of $8,750.00 per month ($105,000.00 per year), with a "standard benefits package" and location of employment in New York. The employment contract defines the term "companies" as the Company, its Parent and any "Related Company" and their respective successors and assigns.

- CX 3: LCA filed by Respondent on March 16, 2006, covering time period from March 16, 2006 to March 16, 2009, location Fairfax, Virginia, salary $105,000.00 per year.[18]
- CX 5: H-1B approval notice, receipt No. EAC-060122-50383, dated March 23, 2006, reflecting approval of a visa to cover Respondent's employment of Prosecuting Party from April 4, 2006 ("04/24/2006") to November 8, 2007 ("11/08/2007").
- CX 6: Respondent's "Summary of Employee Benefit Plans 2005/2006."
- CX 8: LCA filed by Respondent on October 10, 2006, covering time period from October 10,

[18] This exhibit reflects that the Prosecuting Party received the copy of the LCA in July 2011, pursuant to a Freedom of Information Act request.

2006 to November 8, 2007, location New York, salary $105,000.00 per year.

- CX 9: H-1B approval notice, receipt No. EAC-07-010-52367, dated October 16, 2006, reflecting approval of a visa to cover Respondent's employment of Prosecuting Party from October 12, 2006 ("10/12/2006") to November 11, 2007 ("11/08/2007").
- CX 10: Respondent's letter, dated November 14, 2006, signed by Human Resources Director Patricia Somerville, terminating Prosecuting Party's employment, effective November 27, 2006.
- CX 12: Prosecuting Party's earnings statement from Respondent for November 2006.
- CX 13: Prosecuting Party's signed separation agreement, dated December 6, 2006.
- CX 15: Copy of Respondent's check to Prosecuting Party, dated December 6, 2006, in the amount of $8,055.94. Per Prosecuting Party, the payment represents severance pay and vacation balance.[19]
- CX 16: Copy of letter from Respondent ("Headstrong Services, LLC") to USCIS, dated

[19] The check is drawn on the account of Headstrong Services LLC. In his Index to Exhibits, the Prosecuting Party stated that Headstrong, Inc., did not pay the severance but rather the severance was paid by "Headstrong Services LLC."

January 15, 2007, referring to EAC-07-010-52367 and stating that Prosecuting Party was no longer employed by Respondent. Letter has stamp (rather illegible) in lower right corner.[20]

- CX 17: Copy of receipt for airline ticket for Prosecuting Party, from Newark NJ to Bangalore, India. Ticket issued January 26, 2007, date of travel February 24, 2007.[21]
- CX 19: "Confidential Settlement and Release Agreement," signed by Prosecuting Party on May 8, 2008, in which the Prosecuting Party agreed to release the Respondent from any claim relating to Prosecuting Party's employment with Respondent that arose on or before the date of the agreement, in consideration of payment of $7,000.00.[22]
- CX 20: Copies of checks: From Respondent to Prosecuting Party's attorney's law firm, dated May 9, 2008, in the amount of $7,000.00; and from Prosecuting Party's attorney's law firm

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[20] In his Index to Exhibits, Prosecuting Party asserts that the date letter was mailed is not known; Prosecuting Party also asserts that the Letter was sent by Headstrong Services, LLC and allegedly refers to employment by the entity.

[21] Per Prosecuting Party, ticket was "not under H-1B program." (See Cover sheet to exhibit).

[22] An official of the Respondent also signed the document, on May 9, 2008.

to Prosecuting Party, dated May 16, 2008, in the amount of $4,666.67.

- CX 23: Copy of e-mail from Prosecuting Party to Patricia Somerville (Respondent's Human Resources Director),[23] dated February 11, 2010.
- CX 28: Letter from WHD to Prosecuting Party, dated January 25, 2013, informing him that WHD found "reasonable cause to conduct an investigation based on the information [he] provided." Letter from WHD to Prosecuting Party dated September 27, 2013, informing him that complaint is under investigation and investigation is in progress.
- CX 32: E-mail from Respondent's counsel to Prosecuting Party, dated April 19, 2014, forwarding copies of letters from the Respondent to USCIS relating to Respondent's LCA petition for the Prosecuting Party.[24]
- CX 34: WHD investigator's calculation of Respondent's back wage liability. CX 36:

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[23] This is the same individual who signed the letter terminating the Prosecuting Party's employment (CX 10).

[24] The date on these items is April 18, 2014. It is clear from the context of the letters that the date is in error (it appears that when the Respondent encountered electronic copies of the letters, the act of retrieving them caused a new date to be inserted). Respondent raised this issue at the hearing, and I informed the parties I would not consider the dates. T. at 6-8.

Respondent's policy document regarding "at-will" employment.

- CX 37: Respondent's policy document regarding extension of H visas.
- CX 38: Respondent's I-129 (LCA Petition) for Prosecuting Party, dated October 10, 2006, reflecting the purpose of the application is to change previously approved employment (EAC-06-122-50383), with new places of employment listed as New York City and Chicago, for a time period up to November 8, 2007, at salary of $105,000.00 per year with standard benefits.

Respondent's Evidence

The most salient of the Respondent's exhibits that I admitted into evidence are summarized as follows:[25]

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[25] Some of the Respondent's exhibits duplicate the Prosecuting Party's exhibits. These are as follows: RX 2 (duplicates CX 5); RX 10 (duplicates CX 15); RX 12 (duplicates CX 16); RX 16 (duplicates CX 19); RX 24 (duplicates CX 23). Additionally, RX 17 and 19, together, duplicate CX 20. As well, RX 1 duplicates a portion of CX 3, RX 3 duplicates a portion of CX 8, and RX 26 and 27 duplicate a portion of CX 14. In this Decision, for the sake of consistency, when referring to documents that both parties have submitted, I will refer to the Prosecuting Party's exhibit, unless a witness cited the Respondent's exhibit in testimony.

- RX 4, 5, 6: E-mails reflecting that the Prosecuting Party was informed of his termination from employment in November 2006, prior to its effective date of November 27, 2006.
- RX 7: E-mail from Prosecuting Party to Respondent's officials, dated December 4, 2006, transmitting signed separation agreement and inquiring if Respondent will consider paying reasonable costs of transportation to home country, which Prosecuting Party estimated to be $2,000; letter to Prosecuting Party, notifying him of the termination of his employment, dated November 14, 2006, and acknowledged by Prosecuting Party on December 4, 2006.[26] Also termination agreement, signed by Prosecuting Party on December 6, 2006, which duplicates CX 13.
- RX 8: Letter from Respondent's controller to WHD Investigator, dated March 21, 2013, listing wages paid to Prosecuting Party from April 2006 to December 31, 2006.

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[26] Another copy of this document, signed by the Respondent's Human Resources Director, but not reflecting the Prosecuting Party's acknowledgment, is at CX 10.

- RX 9: E-mail string regarding return travel arrangements for Prosecuting Party, dated December 5, 2006 to January 23, 2007.
- RX 13: E-mails dated January 23, 2007 through January 25, 2007, relating to purchasing the airline ticket for the Prosecuting Party's travel to India.
- RX 14: Letter from USCIS to Respondent, dated March 30, 2007, confirming that petition EAC-07-010-52367, submitted on October 12, 2006 and approved on October 24, 2006, was revoked because the Respondent no longer employed the Prosecuting Party.
- RX 15: "Demand Letter" dated April 1, 2008, from Prosecuting Party's attorney to Respondent's then-President, asserting the Respondent owes Prosecuting Party back wages, up through November 8, 2007 (expiration date of LCA) or, alternatively up to February 24, 2007 (date of air ticket to home country).
- RX 18: Transaction document indicating RX 17 (settlement check to Prosecuting Party's attorney) was cashed.
- RX 20. Excerpt of Prosecuting Party's 2008 complaint to WHD.

- RX 22: Excerpt (first page) of Prosecuting Party's complaint to WHD.[27]
- RX 23: E-mail from WHD employee to Prosecuting Party, dated June 8, 2010, informing Prosecuting Party that his complaint was "not timely:" also a copy of letter from WHD to Prosecuting Party, dated June 10, 2010, informing him that there was no reasonable cause to conduct an investigation because Prosecuting Party failed to provide evidence complaint was timely.
- RX 29: Prosecuting Party's January 2011 complaint to WHD.
- RX 30: Copy of WHD letter to Prosecuting Party, dated May 18, 2011, rejecting portions of Prosecuting Party's January 2011 complaint based on untimeliness.
- RX 31: Copy of "screenshots."[28]
- RX 32: Payroll records. Prosecuting Party's monthly earnings statements for April through November 2006.

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[27] In the Index to Exhibits, Respondent asserts that Prosecuting Party filed this document in June 2010. I note, however, that this document appears to duplicate the first page of RX 29 (Prosecuting Party's 2011 complaint to WHD).

[28] Respondent asserts that this exhibit establishes that documents at CX 32 were not created in 2014, but rather were created in 2006. (Respondent states the error was due to a programming feature that re-populates the field with a current date when the document is opened).

Stipulated Facts

At the hearing, the parties agreed to the following stipulated facts:

1. On or about March 23, 2006, the Respondent filed an H-1B petition and LCA application, for the time period through March 26, 2009, with USCIS, intending to employ the Prosecuting Party in an H-1B visa status.
2. USCIS approved the petition through November 8, 2007, petition receipt number EAC-06-122-250383.
3. The Prosecuting Party and Mr. Sahai, on behalf of the Respondent, executed CX 19 (Confidential Settlement and Release Agreement) on May 8 and 9, 2008, respectively.
4. Headstrong, Inc., the Respondent, is a company incorporated in Virginia, with its principal place of business in Virginia.
5. The Respondent maintains offices in several locations, including New York City.
6. The Prosecuting Party is a citizen of India.
7. On or about March 16, 2006, the Respondent filed an LCA with the DOL as part of the process of the government's approval for the Prosecuting Party's H-1B employment.

8. The Respondent sent the Prosecuting Party an airline ticket on February 2, 2007, for travel to Bangalore on February 24, 2007.
9. On March 13, 2006, the Respondent sent the Prosecuting Party an employment agreement in the same form as CX 2.
10. Per the parties' employment agreement, the Prosecuting Party's job location was in New York City and his job title was "Senior Consultant."
11. In the LCA the Respondent submitted in March 2006, the work location is listed as Fairfax, Virginia.
12. The LCA's job title is listed as "Project Manager."
13. This LCA "was certified" for a period of 03/16/2006 to 03/16/2009.
14. The LCA's wage rate was listed at $105,000.00 per year.
15. The Respondent did not submit a copy of the employment agreement (CX 2) to the Department of Labor.
16. USCIS approved the Respondent's LCA petition for an H-1B validity period of 04/24/2006 to 11/08/2007.
17. On November 14, 2006, the Respondent sent the Prosecuting Party the termination letter at CX 10.

18. In November 2006, the Respondent offered the Prosecuting Party separation pay in exchange for signing a general release of all claims and covenant not to sue in the form of CX 13.
19. 19. According to CX 10, all company benefits for the Prosecuting Party were to be terminated effective November 27, 2006, unless otherwise stated in the separation agreement.
20. 20. In April 2008, the Prosecuting Party's representative, Goldberg & Fliegel LLP, sent the Respondent a letter intended to revoke the Prosecuting Party's consent to the separation agreement, and to request payment of additional wages and benefits.[29]

T. at 24-27

Testimonial Evidence

As noted above, the hearing in this matter was held on May 6, 2014. The hearing took a full day, commencing at 9:49 a.m. and concluding at 8:06

[29] Based on my review of RX 15 (Goldberg & Fliegel, LLP's demand letter, dated April 1, 2008), I conclude that the hearing transcript does not accurately reflect the stipulation (there is likely a transcription error in which several words are omitted).

p.m. I summarize the testimonial evidence as follows:[30]

Alphonse Valbrune.

Mr. Valbrune was called as a witness by both the Prosecuting Party and the Respondent, and testified under oath, with his initial testimony on behalf of the Prosecuting Party. He stated that he has been employed by the Respondent for 14 years and that his direct employer is "Headstrong, Inc." Mr. Valbrune stated that he has heard of the company called "Headstrong Services," and testified that it is a "sister company" of Headstrong, Inc., because both companies are subsidiaries of a holding company called "Headstrong Corporation." Mr. Valbrune remarked that in 2006 the ultimate parent of Headstrong, Inc. was Headstrong Corporation, a private company, and that presently the parent company of Headstrong, Inc. is Genpact, Limited. T. at 43-45.

Mr. Valbrune stated that he had no involvement with the Prosecuting Party's case until

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[30] Because of constraints on witness availability (some witnesses were available only at certain times, other witnesses were available only by telephone), the witness testimony was not in order. I summarize the testimony in the order that the witnesses testified at the hearing.

2008, when the Respondent received a demand letter from the Prosecuting Party's attorney, and he identified RX 15 as that item. He stated that after he received the demand letter, he gathered documents relating to the Prosecuting Party's employment termination, consulted with counsel, and ultimately obtained a settlement and release. Mr. Valbrune stated that the settlement was for $7,000.00, involved all of the Prosecuting Party's claims that he had or may have had outstanding against the Respondent, and included a general release; he identified RX 17 as the check that the Respondent paid. The witness acknowledged that the check was drawn on "Headstrong Services," but remarked that "Headstrong Services" would have paid the check on behalf of "Headstrong, Inc.," because it was sent to the Prosecuting Party's attorney pursuant to the settlement and release agreement. T. at 45-49.

The Prosecuting Party directed the witness' attention to CX 19 (the settlement and release agreement), and acknowledged that paragraph 12 of the document reflects that the agreement supersedes any prior agreements between the Respondent and the Prosecuting Party. The witness stated that the settlement amount of $7,000.00 was arrived at by negotiation between the Prosecuting Party's attorney and the Respondent's officials. The witness identified CX 23 as an e-mail from the Prosecuting

Party, dated February 2010, in which the Prosecuting Party attempted to rescind his settlement agreement and "threatened [the Respondent] with some action if we didn't agree to the recission."[31] The threatened actions included complaints to be filed with the Department of Labor, USCIS, and the U.S. District Court for the Southern District of New York. Additionally, the witness testified, the Prosecuting Party stated he would inform the "ministry of overseas Indians" about the Respondent's harassment of Indian workers. The witness commented that the Prosecuting Party had no right to rescind the agreement. T. at 49-56.

The witness identified CX 24 and 25, e-mails from the Prosecuting Party dated November 2010 and August 2011, respectively. He acknowledged that the Respondent chose not to participate in a settlement judge proceeding with the Prosecuting Party, commenting that the Respondent had no reason to believe the Prosecuting Party would honor any additional settlement, because he was attempting to rescind a settlement he had already entered into. Mr. Valbrune reiterated that he became involved with the Prosecuting Party's case in 2008 so whatever he knows about the facts pertaining to the Prosecuting Party's employment,

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[31] At this point the witness clarified that he is an attorney who represents the Respondent. T. at 54.

he learned by reviewing documents. He identified CX 10 (termination letter dated November 14, 2006) and CX 2 (letter dated March 13, 2006, offering the Prosecuting Party employment and enclosing employment agreement), and acknowledged that the termination letter referred to the employment offer letter. T. at 56-63.

On cross-examination, Mr. Valbrune confirmed that the Respondent had never agreed that the 2008 settlement agreement with the Prosecuting Party had been rescinded, and also acknowledged that the Prosecuting Party never repaid any of the money paid to him under that settlement. He also stated that he negotiated the 2008 settlement agreement via telephone with the Prosecuting Party's attorney. The witness stated he did not negotiate directly with the Prosecuting Party and did not discuss with the Prosecuting Party the demand letter that his attorney sent to the Respondent. See RX 15. Aside from being copied on e-mails the Prosecuting Party sent on the issue of the recission of the 2008 settlement agreement, Mr. Valbrune stated, he did not have any direct communication with the Prosecuting Party and had never spoken with the Prosecuting Party until the date of the hearing. On re-direct examination, the witness reiterated it was the Respondent's position that the 2008 settlement agreement, and its

accompanying release, are valid and binding. T. at 64-67.

On direct examination by the Respondent, Mr. Valbrune stated that Genpact is the parent of Headstrong and acquired Headstrong in 2011.[32] And on cross-examination by the Prosecuting Party, the witness stated that the Respondent is a subsidiary of Genpact and that the companies share some functions, but that employees of Headstrong at the time of the acquisition have remained employees of Headstrong. T. at 67-71.

Valerie Spratling

Ms. Spratling was called as a witness by both the Prosecuting Party and the Respondent, and testified under oath, with her initial testimony on behalf of the Prosecuting Party. She stated that she has been employed by Headstrong since September 2006; the witness testified that from when she joined the company up until March of 2011, she was assigned to "Headstrong, Inc." but that she then had a break in service until November 2011; since she resumed employment, her paycheck comes from

[32] As noted above, this witness testified on behalf of both the Prosecuting Party and the Respondent. After he testified on behalf of the Prosecuting Party, I permitted the Respondent to ask questions on direct examination.

"Headstrong Services, LLC." Ms. Spratling stated that in 2006-07 she managed human resources ("HR") for Headstrong North America, reporting to Patricia Somerville, who was the Director of Human Resources for North America. She stated that Ms. Somerville contacted her and requested that she prepare the termination agreement and severance agreement for the Prosecuting Party, and identified RX 4 as the e-mail documenting that request. T. at 73-77.

The witness identified the Prosecuting Party's termination letter (CX 10) and stated she prepared that document. She stated that the first paragraph of the termination letter referred to the Prosecuting Party's March 13, 2006 offer of employment and noted that the Prosecuting Party's employment was "at will." Additionally, Ms. Spratling stated, the reason for the termination, lack of work ("layoff"), was given in the second paragraph of the letter. Ms. Spratling acknowledged that in the fourth paragraph of the termination letter the Prosecuting Party was informed that he would be paid his vacation balance as of November 27, 2006. She stated that she was the person who was identified to the Prosecuting Party as his point of contact in processing his employment termination. T. at 77-83.

Ms. Spratling identified the severance agreement the Prosecuting Party was tendered (CX 13).[33] She stated that per the agreement, the consideration for the Prosecuting Party's release was as follows: four weeks of base pay in the amount of $8,076.92, less withholdings; continuation of medical and dental benefits through November 30, 2006; and payment of vacation balance as of November 27, 2006. She stated that she notified the payroll office to release the payment to the Prosecuting Party, after the expiration of the period specified in the agreement in which the Prosecuting Party could revoke the release. T. at 83-86.

The witness identified CX 12 as e-mails relating to the Prosecuting Party's request for transportation costs; she confirmed that initially the Respondent refused to make such payment, but stated that within a day and after consultation with other officials, it was learned that the company was obligated to make such payment, and an official contacted the Prosecuting Party directly to arrange travel. She stated that the last time she had any involvement with the Prosecuting Party's termination action was when the issue of his return

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[33] The hearing transcript stated that this document was at tab 30. I find that the reference in the hearing transcript is a transcription error.

transportation was addressed and resolved. T. at 86-92.

On cross-examination, Ms. Spratling agreed that she was never advised that the Prosecuting Party was being benched for lack of work. She also agreed that the Prosecuting Party was notified on November 14, 2006 that his employment with the Respondent was to be terminated effective November 27, 2006. She also agreed that the Prosecuting Party signed the separation agreement in December 2006 and that, when travel arrangements were being discussed, the Prosecuting Party requested that his return travel date be February 24, 2007. T. at 93-96.

On re-direct examination, the witness stated that, though she had no direct involvement with the Prosecuting Party after December 2006, she was aware that an airline ticket with a return date of February 24, 2007 had been purchased, that the Prosecuting Party had approved the itinerary on January 23, 2007, and that the ticket was issued on that same date. The witness was shown CX 17 (airline e-ticket receipt);[34] she stated that the document reflects the ticket was issued to Headstrong on January 26, 2007 for the Prosecuting

[34] The transcript reflects CX 7; this appears to be a transcription error.

Party's travel on February 24, 2007, but she did not know when the Prosecuting Party actually received the airline ticket.[35] The Prosecuting Party requested that the witness review CX 15 (a check reflecting payment to the Prosecuting Party of $8,055.94, dated December 6, 2006, drawn on "Headstrong Services LLC Disbursement Account"). In response to a question regarding which entity owed the Prosecuting Party severance pay, the witness responded that, according to the separation agreement, "Headstrong, Inc." was the proper entity. T. at 96-104.

On direct examination by the Respondent, Ms. Spratling testified that Headstrong intended the Prosecuting Party's last day of employment to be November 27, 2006, and stated that the Prosecuting Party did not perform any work for the Respondent after that day and did not receive regular wages after that date either.[36] Regarding effectuating the Respondent's termination of the Prosecuting Party's employment, Ms. Spratling stated that the company must notify USCIS of an employee's termination,

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[35] At this point the Prosecuting Party stated that he did not receive the airline ticket until February 2, 2007

[36] As noted, this witness testified for both the Prosecuting Party and the Respondent. After completing testimony on behalf of the Prosecuting Party, the witness testified as the Respondent's witness

and that the Respondent does so by letter. The witness identified RX 12 as a letter that the Respondent sent to USCIS, dated January 15, 2007, to revoke the Prosecuting Party's H-1B status because of the termination of his employment. As to why the Respondent waited so long to notify USCIS, Ms. Spratling stated that sometimes employees request some delay so that they can try to find different sponsoring employers and thus remain in the United States. She stated that in this case the Respondent accommodated the Prosecuting Party's request. T. at 104-11.

On further direct examination, Ms. Spratling testified that the position that the Prosecuting Party was offered in his employment agreement (CX 2), "Senior Consultant," is an internal designation, which would not be the same position as listed on an LCA. As to the job location on an LCA, Ms. Spratling stated that the location typically is accurately listed, but on occasion if the Respondent is unaware of where the employee is to be working, the location of the corporate office was used to initiate the H-1B process, and later an amended LCA was filed to reflect the new location. Ms. Spratling admitted that there could be a time lag in filing an amended LCA. T. at 111-15.

On cross-examination, Ms. Spratling stated she was not sure which "Headstrong" entity (e.g., Headstrong Services, Headstrong, Inc.) produced the e-mail at RX 25 (initiating the termination of the Prosecuting Party's employment).[37] She stated that she had some familiarity with LCA requirements because at one point in her employment, in 2009, she managed immigration for the Respondent. As for the Prosecuting Party's LCA (CX 3), she testified that the dates in the application, March 16, 2006 and March 16, 2009, reflected the period that the employment could cover. She agreed that these were the dates for which the application was certified by the Department of Labor. As to the LCA at CX 8, the witness stated she did not have any direct knowledge of it.[38] As to the letter to USCIS at CX 17, Ms. Spratling stated she had seen it before many times, and she acknowledged that the letter was written on behalf of "Headstrong Services, LLC," even though the entity reflected on the Prosecuting

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[37] At this point, after a colloquy on how RX 25 was obtained, I disallowed the admission of RX 25. See T. at 118-31. I authorized further re-direct examination: Ms. Spratling stated she had no role in the preparation of the Prosecuting Party's LCA (RX 1), and she explained that the job title in the LCA, "Project Manager," may not be the same as the Respondent's internal designation of a job title. T. at 131-34.

[38] The Prosecuting Party referred to the document not by its exhibit number but by its sequential page number, 48, in his exhibits

Party's termination letter and separation agreement was "Headstrong, Inc." She also acknowledged that USCIS' approval of the Prosecuting Party's LCA application (CX 5), receipt number EAC-06-122-50383, was made to "Headstrong, Inc." and that the letter to USCIS at CX 17 related to receipt number EAC-07-010-52367.[39] The witness reiterated, though, that "Headstrong is all one company." T. at 135-43.

On re-direct examination, Ms. Spratling confirmed that the receipt number referred to in the Respondent's letter to USCIS [EAC-07-010-52367] is the same receipt number that appears at CX 9 (USCIS's October 2006 approval of Prosecuting Party's LCA petition).[40] The witness identified RX 14 as the USCIS' notification to the Respondent of the revocation of the approval of the Prosecuting Party's LCA petition, with the receipt number matching that on the USCIS approval notice and the January 15, 2007 letter to USCIS. In response to my question, Ms. Spratling clarified that her work in human resources involved all of the "Headstrong"

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[39] In response to the Prosecuting Party's intimation that there was no evidence USCIS received this letter, I informed him that CX 17 appears to bear a faint and barely legible receipt stamp, dated either January 26 or January 23, 2007. T. at 142-43.

[40] Respondent's counsel referred to this exhibit by its sequential page number in the Prosecuting Party's exhibits, which is 53.

companies. On the issue of vacation pay, Ms. Spratling stated that it was accrued on a monthly basis, at the rate of 6.67 hours per month. T. at 144-47.

Acky Kandar

Mr. Kandar was called as a witness by both the Prosecuting Party and the Respondent, and testified under oath, with his initial testimony on behalf of the Prosecuting Party. His testimony was taken by telephone, by concurrence of the parties. He stated that he joined Headstrong in 1999 and left in 2014. In 2006, he testified, he was responsible for a business unit that addressed large clients in New York, and he said he worked for "Headstrong Services." As to any distinction between Headstrong Services and Headstrong, Inc., Mr. Kandar stated he was aware there was some sort of structure, but was unsure what that specifically meant. He stated he did not recall any circumstances surrounding the Prosecuting Party's termination from employment, and does not recall ever meeting the Prosecuting Party. T. at 150-52.

On cross-examination, Mr. Kandar stated that the Prosecuting Party was not under his direction and did not report directly to him. On further examination from the Prosecuting Party, the witness

stated that he knew Ricky Pool, but was unsure whether Mr. Pool worked for Headstrong Services or Headstrong, Inc., and stated that when preparing for his testimony he concluded that the Prosecuting Party had worked under Mr. Pool's supervision. T. at 152-54.

Patricia Somerville

Ms. Somerville was called as a witness by both the Prosecuting Party and the Respondent, and testified under oath, with her initial testimony on behalf of the Prosecuting Party. Her testimony was taken by telephone, by concurrence of the parties.[41]

Ms. Somerville stated that she began working at Headstrong in July 2006 and worked there until August 2008, and that she was the human resources ("HR") director. She stated that documents were retained at the corporate office, which at that time was in Fairfax. She identified CX 3, noted that the applicable employer was Headstrong, Inc., and stated that the employment period specified in that document was March 2006 through March 16, 2009, with a location of Fairfax, Virginia. She stated that

[41] Prior to her testimony, the Prosecuting Party provided copies of some exhibits to Respondent's counsel, and requested that counsel forward the documents to the witness. The witness confirmed receipt of the documents. T. at 156-59.

this was the period for which authorization was given to work in the United States, and noted that she is not an immigration specialist. Ms. Somerville stated she did not sign this LCA but has signed other ones. Ms. Somerville examined CX 5, the USCIS receipt, indicated that employment was valid from April 24, 2006 to November 8, 2007, and it related to the Prosecuting Party. Ms. Somerville identified CX 8 as an LCA that she signed in October 2006, with the employer listed as Headstrong, Inc. with dates of employment from October 10, 2006 ("10/10/2006") to November 8, 2007 ("11/08/2007"), pertaining to the Prosecuting Party. She stated she did not recall any specific details about this action, nor did she recall any specific documents that may have been filed with the LCA. She stated she did not recall why the second LCA was filed, but did note that the location in the second LCA was specified as New York. She stated that if any employee switched locations, a new LCA may have been needed. Alternatively, she also remarked, if the company did not initially know where an employee would be working, but later found out, a new LCA may have been filed. As to these particular LCAs, however, Ms. Somerville testified, she did not recall. She stated she did not know if any additional LCAs were filed pertaining to the Prosecuting Party. T. at 156-67.

The witness identified CX 10, the November 14, 2006 letter terminating the Prosecuting Party's employment, and verified that she signed the letter. She said she was unable to explain why there was no work (the reason given in the termination letter) when she also had signed, under penalty of perjury, an LCA indicating that the Prosecuting Party was to be employed through November 2007. She acknowledged that the termination letter referred to the Prosecuting Party's initial offer of employment. She stated that the offer of a severance payment was the Respondent's usual practice. Ms. Somerville identified CX 12 as the Prosecuting Party's earnings statement covering November 2006, and she stated that the amount paid was less than the regular gross pay rate, because the termination date was prior to the end of the month. She identified CX 14 as e-mails relating to the cost of air transportation, and stated that Headstrong did not provide funds to employees but rather purchased airline tickets directly. She acknowledged that the Prosecuting Party's termination letter did not indicate that air transportation back to his home country would be provided. She identified CX 17 as an e-mail containing an airline ticket e-receipt, and noted the date the e-mail was sent was February 2, 2007. T. at 167-75.

Regarding RX 4, Ms. Somerville identified it as an e-mail she sent to Ms. Spratling regarding the Prosecuting Party's termination from employment, and she stated that Rick Pool had asked her to do that. Though the date of the e-mail was November 14, 2006, she stated, she had a conversation with Mr. Pool prior to that date. She stated that according to Mr. Pool, there was no more work and so the Prosecuting Party's employment was to be terminated. Ms. Somerville commented that she could not recall any details of the decision to terminate the Prosecuting Party's employment. Regarding RX 6, Ms. Somerville stated that it contained e-mails regarding the Prosecuting Party's last day of employment, and that Headstrong determined it would remain November 27, 2006, despite the Prosecuting Party's request for leave without pay. She stated she did not know whether the termination agreement was submitted to the Department of Labor or other authority, and also did not know whether the LCA was ever withdrawn. T. at 175-80.

On cross-examination by Respondent's counsel, Ms. Somerville noted that some of the e-mail communications with the Prosecuting Party in RX 6 were sent to his work account and others were sent to a personal ("Yahoo") account. She stated that she wanted to confirm that the Prosecuting Party

was aware that it was decided that his last day was to be November 27, 2006. She stated she had authority to approve air travel for the Prosecuting Party, even though the immigration specialist was making the travel arrangements. Ms. Somerville stated that it was her understanding that an LCA does not guarantee employment for any period of time, and she confirmed that the Prosecuting Party was an "at-will" employee for the Respondent. She confirmed that the Respondent would purchase an airline ticket for a terminated H-1B employee and also confirmed that if an employee requested a specific travel date that the Respondent would attempt to accommodate that request. Ms. Somerville clarified that, though she signed LCAs on behalf of the Respondent, the content of the LCAs was prepared by the Respondent's immigration specialist. She acknowledged that, at times, the work location on an LCA was not accurate, despite the Respondent's best intentions (and if the location was uncertain the Respondent's headquarters would be designated as the work location); she also stated that, if possible, the Respondent would endeavor to submit an updated LCA reflecting an accurate location. When comparing CX8 with CX 3 (the two LCAs pertaining to the Prosecuting Party), she indicated it was probable that the second LCA was submitted because it reflected a changed work location – that is, New York. Ms. Somerville

acknowledged that it was the Respondent's practice to provide a copy of the LCA to the affected employee, and this task would have been done by the immigration specialist. T. at 180-87.

On further examination by the Prosecuting Party, Ms. Somerville reiterated that it was her understanding that submitting an LCA does not guarantee that an employee will be employed for the LCA period. She stated she could not cite a regulation or other source for this conclusion, and acknowledged this was only her opinion. In response to my question, Ms. Somerville stated that an employee who refused to sign a severance agreement would not receive a severance payment, but would receive payment of wages up to the date of termination, as well as accrued vacation pay. She stated she could not recall whether there was any specific notice period that the Respondent used when informing employees that their employment was to be terminated. T. at 187-91.

Arvind Gupta (Prosecuting Party)

The Prosecuting Party, Arvind Gupta, testified on his own behalf. He stated that he first came into contact with Headstrong in March 2006, when he was working in Atlanta. He interviewed and Rick Pool offered him long term employment.

The Prosecuting Party also commented that the recruiter told him it was Headstrong's policy to sponsor green card applications for employees after six months. The Prosecuting Party stated that he accepted Headstrong's employment offer in part because the job was for a project manager in the financial services sector, and he had an interest in that area. To join Headstrong, the Prosecuting Party stated, he resigned from his employment, which was based in India. The Prosecuting Party stated that, after some delay, his work with Headstrong started about May 1, and he moved from Atlanta to New York. But it was not a project manager position but instead was an analyst position in the "PMO Group." In August, the Prosecuting Party stated, Headstrong told him that the client had obtained someone internally for the project manager position, so that job was not available. Accordingly, he said, he worked on other projects for Headstrong for a while. Then, as of September 19, he was asked to go to Chicago to work on a short-term project, which he did. Then on November 3, the Prosecuting Party stated, that project ended, and he returned to New York, and took leave for a few days of vacation. T. at 194-97.

While he was on vacation, the Prosecuting Party stated, he got an e-mail from Mr. Pool asking him to call. He called and told Mr. Pool he was on

vacation, and said he would contact him when he returned on November 13. The Prosecuting Party stated that he called Mr. Pool on November 13 but was not able to speak with him. On the morning of November 14, he stated, Mr. Pool called him back and started yelling at him about why he did not call him immediately upon his return from Chicago. The Prosecuting Party stated that he surmised that Mr. Pool did not know about his approved leave. Then, the Prosecuting Party stated, Mr. Pool told him he was laid off – that is, he was fired. The Prosecuting Party stated he could not believe it and figured that Mr. Pool would change his mind once he cooled off. The Prosecuting Party stated he called Mr. Pool back the next day and Mr. Pool confirmed that he was to be laid off. Shortly thereafter, the Prosecuting Party said, he got a letter telling him that due to lack of work his employment was terminated. The Prosecuting Party stated he contacted several officials at Headstrong but the decision had already been made. However, the Prosecuting Party stated, Acky Kandar took his curriculum vitae ("CV") and, he believed, circulated it within the New York area. The Prosecuting Party testified that Mr. Kandar told him that no work was available at the time but in several months an alternative position may come up, and that they would not cancel his H-1B visa but rather would continue his H-1B status. T. at 197-200.

The Prosecuting Party testified that when he got his pay stub for November it did not show his full pay, and Ms. Somerville told him that his employment was terminated. At that time, he said, Mr. Kandar advised him to go ahead with the separation agreement, because if he did not, he would not receive any payment. The Prosecuting Party stated that he signed the separation agreement and received four weeks' pay. He said he did not hear anything from Headstrong and so in January 2008 he contacted them to ask about the status of his H-1B visa, which was supposed to last until November 8, 2007. At that time, he said, he got an e-mail informing him that Headstrong had told USCIS on January 15, 2007 that his job had been terminated. The Prosecuting Party stated that he disputes that, because he contacted USCIS and they told him they did not have any request from Headstrong, Inc. to cancel his visa. He remarked, though, that USCIS, "by mistake," issued a letter to Headstrong Services relating to the petition approved in October 2006. However, the Prosecuting Party stated, he did not understand this issue in January 2008, so he contacted an attorney, who contacted Headstrong and made a demand based on the information that was available at that time. The Prosecuting Party said that after a while the attorney told him that Headstrong had offered

$7,000.00 on a take-it-or-leave it basis, which he took, and the attorney received a check for $7,000.00 from Headstrong Services, LLC. T. at 200-202.

In January 2008, the Prosecuting Party stated, he contacted the Department of Labor and informed them he had not received wages up to November 2007 from Headstrong. At the time, the Prosecuting Party stated, the Department of Labor believed his complaint to be untimely, and asked for more information. He said he provided information as requested by the Department of Labor, but ultimately, in April 2009, he left the United States and returned to India. He said that he continued to press his case with the Department of Labor from India. The Prosecuting Party testified that he filed cases against Headstrong in 2010 and 2011, which were dismissed, but eventually, in 2013, the Department of Labor found reasonable cause to investigate his allegations, and then conducted an investigation. T. at 202-205.

The Prosecuting Party acknowledged that in December 2006, when he was out of work, he contacted Headstrong about payment for his return to India. However, he said, Headstrong's offer to pay for an airline ticket did not necessarily indicate that Headstrong had terminated his employment. He said he was aware of many instances in which employees

traveled between India and the United States, and just because the employer may have paid for the ticket did not mean an employee had been terminated. He reiterated that Headstrong, Inc. never informed him of the termination of his H-1B visa. He remarked that he contacted USCIS and obtained copies of documents, none of which show that Headstrong, Inc. informed USCIS about the termination of his employment or withdrew any of the two approved petitions. He said that under such circumstances, because there was no termination of employment, Headstrong was not obligated to pay any return transportation; however, he asked about return transportation because he was not working and figured he could leave the United States until work became available and he could return. The Prosecuting Party stated that he was available for work, and remained fully available for work, from November 2006 up to the present. T. at 205-06.

Additionally, the Prosecuting Party remarked, "Headstrong should make me whole for ... whatever actions it has taken. And Headstrong is legally obligated to do it. ... These minimum program requirements have to be met by all employers and Headstrong cannot be the exception to it. It has to comply with law." T. at 206-07.

On cross-examination, the Prosecuting Party conceded that his employment agreement with the Respondent set his first day of work as sometime early in April 2006. He also conceded that a project for him did not become available until May 2006, but he was paid his full salary for April. The Prosecuting Party further conceded he was basically paid the amount due under his employment agreement through November 27, 2006, though he said that the amount he was actually paid for that time period was about $300 to $400 less than he was due, on a prorated basis. He stated he was aware that USCIS only approved Headstrong's H-1B visa petition through November 8, 2007, and acknowledged that it was his position that Headstrong owed him wages up to at least that date. He confirmed that after Mr. Pool informed him of his impending termination, he reached out to several officials, but denied that he tried to get them to delay the termination date. The Prosecuting Party also confirmed that he spoke with Mr. Kandar, but denied that he indicated a concern about keeping his H-1B status active; rather, he stated, he informed Mr. Kandar that Headstrong's action [in terminating his employment] was contrary to the law, as he understood the law to be. He confirmed that after circulating his curriculum vitae, Mr. Kandar told him that no position was available, but also said that Mr. Kandar told him that his H-1B visa would not be cancelled and he would be offered

a position as soon as one became available. The Prosecuting Party disagreed that Mr. Kandar told him that a termination date of November 27, 2006 stood; rather, he stated, Mr. Kandar told him that the termination letter would stand. The Prosecuting Party acknowledged that the letter reflected that his employment would be terminated as of November 27, 2006. T. at 213-23.

The Prosecuting Party stated that he informed Headstrong officials that it was possibly a violation of H-1B program regulations to have him working in Chicago, because his "appointment letter" specified a New York work location. He acknowledged that he performed no work for Headstrong after November 27, 2006 and that he signed a separation agreement on December 4, 2006. He also acknowledged he received separation pay of $8,076.92, less withholding, which was equivalent to four weeks' wages. As for accrued vacation pay, the Prosecuting Party acknowledged receiving a payment, but stated he was unsure whether the amount tendered was accurate. T. at 223-26.

On the issue of a return airline ticket, the Prosecuting Party acknowledged requesting an airline ticket back to India; however, he stated, by doing so it was not his intention to "conclude" his termination of employment. He acknowledged,

however, that in an e-mail at RX 26 he attempted to get the Respondent to pay the cost of his air travel by citing the regulation that requires an employer to pay the cost of return transportation if an employee is dismissed from employment; he also acknowledged that shortly after this e-mail, the Respondent agreed to pay for an airline ticket. The Prosecuting Party further acknowledged that an employer must notify USCIS in order to effect a bona fide termination of an H-1B worker's employment. He stated that Headstrong, Inc. never notified USCIS. T. at 227-33.

The Prosecuting Party acknowledged that he entered into a confidential settlement agreement with Headstrong and received $7,000.00 in exchange for releasing his claims against the company. He also acknowledged that Headstrong Services, LLC issued a check in that amount to his attorney's law firm. He stated that he later received a check from his attorney for a smaller amount. The Prosecuting Party further acknowledged that in February 2010 he sent an e-mail to Headstrong stating that he wished to rescind the 2008 agreement. The Prosecuting Party acknowledged that the Department of Labor did not investigate his 2008 complaint, but stated he was not sure whether the reason was the alleged untimeliness of his complaint; and he acknowledged that his 2008 complaint did not raise the issue of retaliation. See

RX 20. As for the Prosecuting Party's 2011 complaint (RX 29), the Prosecuting Party acknowledged that initially, the Department of Labor refused to investigate because of concerns as to the timeliness of the complaint. He stated that it was his belief that the Department of Labor investigated his claims, at least in part, in 2010. He also stated that the WHD's Determination Letter, dated March 2014, addressed all of his complaints, including his complaint of retaliation. See CX 1. The Prosecuting Party conceded that he received the WHD's letter of May 2011, relating to his 2011 complaint, but stated that this letter was an "incomplete answer" to his complaint. T. at 233-49.

As for his other employers, the Prosecuting Party said that he resigned from his Indian employer, "Wipro Technologies," in order to take a position with Headstrong, but did not resign from a U.S. employer. He conceded that he had filed a complaint with the Department of Labor asserting that Wipro owed him wages, and said he currently has a lawsuit pending against that company in federal court in California. T. at 249-56.

The Prosecuting Party acknowledged a claim against Compunnel is pending with the ARB [Administrative Review Board]. The Prosecuting Party conceded that he claims to still be employed by

both Headstrong and Compunnel, and stated he is not involved in litigation regarding any other claim of employment during the period he was employed by Headstrong. He acknowledged that after receiving the November 14, 2006 termination letter, he engaged in employment discussions with Compunnel, and stated that such discussions occurred approximately November 20 to 22. The Prosecuting Party acknowledged that he subsequently interviewed and was hired for a position at Compunnel. He stated that he was paid wages by Compunnel for the following periods: February to July 2007; and December 2007 to March 2008. He stated that he was also paid wages by an employer in India for the period from May 2010 to December 1, 2010. The Prosecuting Party stated that in 2009 he took steps to establish a consulting company in India, but eventually decided not to do so. T. at 256-70.

Regarding job applications, the Prosecuting Party stated that he may have filled out "hundreds or thousands" of job applications online since November 2006, and when he listed Headstrong as an employer he indicated employment up to November 27, 2006. He stated that the first time he returned to India after April 1, 2006 was in April 2009. He stated that he believed that the receipt date for Compunnel's H-1B petition was about December 10 or 11, 2006, with employment dates of

February 27 or 28, 2007 through April 30, 2009. T. at 271-274

In response to my questions, the Prosecuting Party clarified that it was his position that in order to effect a bona fide termination of his employment, the Respondent was required to notify USCIS to cancel both LCAs [EAC-06-122-50383 and EAC-07-010-52367].[42] T. at 275-76.

The Prosecuting Party then testified about his asserted compensatory damages and provided facts that, in his view, justified an imposition of punitive damages against Headstrong. He stated that he was shocked by the way Headstrong treated him because Headstrong's officials promised him long-term employment. Because Headstrong terminated his employment, the Prosecuting Party stated, he suffered financially. He stated that all of his problems started due to Headstrong's violations of the H-1B program requirements, and noted that he has spent a lot of time and energy litigating his claims. He stated that he has suffered and that his character has been "totally destroyed" due to Headstrong's false promises. He stated that he has been unable to find employment and he believes this is due to Headstrong's harassment. He further

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[42] At the hearing, I referred to these LCAs by their last two digits, "83" and "67." T. at 275.

stated: "All the problems in my life for the last eight years, they all got started and got compounded by Headstrong's violations of the INA. All these violations took place in America and all the remedies have to be given by [the] USA system, the make whole relief has to be given by [the] U.S. justice system because all this was done in America, using American laws and by violating American laws and by continuing to violate these American laws." Additionally, the Prosecuting Party remarked: "I was working reasonably well, and Headstrong made false promises to me. It destroyed my career. It destroyed my personal life. It destroyed my emotional life. It destroyed the happiness of all my near and dear ones." He also stated: "So all my professional life is destroyed. My personal life is destroyed. My psychological life is destroyed and not from one year, one month, one week, it is now eight years and it is continuing." T. at 277-85.

On cross-examination, the Prosecuting Party stated that Headstrong was not putting him back into productive status, and was not using a neutral forum to settle the dispute. Rather, he said, Headstrong was making him go through "full litigation" and was doing everything in its power not to follow the law, not to pay him wages, and to keep on harassing him. He confirmed that participating in litigation has taken a big toll on him because of the

time involved and the emotional strain of the proceedings. He acknowledged he did not see any mental health professionals or request that any medications be prescribed for him, but also commented that he could not afford to do so. T. at 285-97.

David O'Shaughnessy

Mr. O'Shaughnessy testified under oath on behalf of the Respondent. He stated that he is an employee of the Respondent and when he was hired in July 2006 his position was "Comptroller North America." In that capacity, he testified, he was responsible for all of the Respondent's entities in North America, the United Kingdom, and Germany for matters such as statutory compliance, direct taxation, payroll, invoicing clients, collections, and accounts payable. He testified that RX 8 is a document he compiled in response to this litigation, reflecting payments made to the Prosecuting Party during his employment up to December 31, 2006. Mr. O'Shaughnessy stated that the Prosecuting Party's salary was $8,750.00 per month, but he was paid less than that for November 2006 because his employment was terminated prior to the end of the month, and so he was paid a pro-rata amount. The payments made in December 2006, Mr. O'Shaughnessy stated, were accrued vacation pay

and payments made pursuant to the severance agreement. The witness identified RX 10 as the check remitted to the Prosecuting Party in December 2006, number 4723. He stated that Headstrong Services, LLC paid the check because that was the entity that paid non-payroll accounts payable obligations for the Respondent. He identified RX 11 as a listing of uncleared checks in December 2006, and noted that check number 4723, paid to the Prosecuting Party, was not listed. The witness identified RX 17 as another accounts payable check from Headstrong Services, LLC, and noted the check was paid to Goldberg and Fliegel, LLP in the amount of $7,000.00 in May 2008. He stated that the documentation indicated the check was paid for "settlement." Mr. O'Shaughnessy stated that Headstrong Services, LLC was again acting as the common paymaster for accounts payable. He stated the check was cashed. T. at 305-16.

On cross-examination, the witness confirmed that neither check was a payroll check, but noted that Internal Revenue Service regulations construe payment of accrued vacation and severance as wages for tax purposes. In response to my questions, he stated that Thanksgiving was treated as a paid holiday for the calculation of the Prosecuting Party's pro-rata compensation for November 2006. On review of CX 1, he stated he was not aware how the

Department of Labor had calculated the Prosecuting Party's back wage entitlement, and stated that he compiled the document at RX 8 in response to a request from "Immigration" and had no direct contact with the Department of Labor's investigator. He stated that rate of vacation pay was calculated as follows: divide the annual salary ($105,000.00) by the number of hours in a work year (2,080) for the hourly rate; vacation was accrued at the rate of 6.67 hours per month for the Prosecuting Party; and he noted the Prosecuting Party was paid for 67 hours of accrued vacation. He confirmed that the figures in RX 8 for the severance and accrued vacation pays were gross and not net figures. T. at 316-23.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statutory and Regulatory Framework

The Act's H-1B visa program permits American employers to temporarily employ nonimmigrant aliens to perform specialized occupations in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Act defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. § 1184(i)(1). To hire an H-1B nonimmigrant alien,

the employer must first receive permission from the U.S. Department of Labor. To receive permission from the DOL, the Act requires an employer to submit an LCA to the Department. § 8 U.S.C 1182(n)(1); § 655.730(a).

The Department has promulgated detailed regulations setting forth requirements to implement the statutory provisions. These requirements include provisions covering the determination, payment, and documentation of required wages, as well as requirements for working conditions and computation and payment of benefits. 20 C.F.R. Part 655, subpart H. Under these regulations, an employer's LCA must include, among other things, the occupational classification for the proposed employee; the actual wage rate; the prevailing wage rate and the source of such wage data; and the location (city) and period of employment. §§ 655.730-734. In most circumstances, an LCA is valid only for the period of time for which the Department of Labor has approved the employment. § 655.750(a). This period commences not earlier than the date that the application is certified and may not continue for more than three years. [43] Id. Moreover, an H-1B

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[43] The regulation recognizes that under the "increased portability" provisions of § 214(n) of the Act, employment may commence prior to the date of certification; in such instances, the inception date of authorized employment applies back to

nonimmigrant may enter the United States only with a valid visa; DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached, and is responsible for approving the H-1B visa classification for the H-1B employee. § 655.705(b). Accordingly, an H-1B nonimmigrant is authorized to be employed within the United States only for the term for which the visa has been approved. § 655.700; see also 8 C.F.R. § 214.1(e)

The regulation requires that an employer pay H-1B nonimmigrants at the "required wage rate." This rate is defined as the greater of: (1) the "actual wage rate," defined as the rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the "prevailing wage," defined as the wage rate for the occupational classification in the area of employment, at the time the LCA is filed. § 655.731(a). The employer must also provide an H-1B nonimmigrant employee with the same fringe

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the first date of employment. § 655.750(a). From the record before me, I conclude that this situation may have pertained to the Prosecuting Party's employment with the Respondent, because the Respondent employed the Prosecuting Party beginning in early April 2006, and the inception date of the approved LCA was April 24, 2006. See T. at 195 (Prosecuting Party testified he was working in Atlanta for a different employer); see also CX 5.

benefits that are provided to similarly employed U.S. workers. § 655.731(c)(3).

Once the employment period begins, the employer is required to pay an H-1B employee the required wage at the full-time rate for any time that is non-productive due to a decision by the employer.[44] However, an employer need not pay wages for H-1B workers in nonproductive status due to conditions unrelated to employment which take them away from work at their own convenience or request (e.g., touring), or which render them unable to work (e.g., temporary incapacitation due to accidental injury). § 655.731(c)(7)(ii).

The H-1B nonimmigrant's first location of employment must be at the location specified in the approved LCA. § 655.735(e). However, an employer may later place an H-1B nonimmigrant at another location for a maximum of 30 days per year, provided that the employer pays the H-1B nonimmigrant the required wage for the permanent worksite and pays the actual costs of meals and lodging.[45]

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[44] Employer-determined nonproductive time, or "benching," can result from factors such as lack of available work or lack of the individual's license or permit. 8 U.S.C. § 1182(n)(2)(C)(vii); § 655.731(c)(7)(i).

[45] If the H-1B nonimmigrant maintains an abode in the United States at the permanent worksite location and spends a

§ 655.735(b)(3), (c). Once the H-1B nonimmigrant's short-term placement has reached this limit, the employer must either file a new LCA for the new location or terminate the H-1B nonimmigrant's placement in the other location. § 655.735(f). The regulation also requires that an employer provide each H-1B employee with a copy of the LCA (form ETA 9035 or 9035E), certified by the Department of Labor and signed by the employer or its representative. § 655.734(a)(3).

After the employment has begun, an employer need not pay a nonimmigrant worker, if it has effected a "bona fide termination" of the employment relationship. § 655.731(c)(7)(ii). To terminate the obligation to pay an H-1B employee, the regulation states that the employer must notify DHS that it has terminated the employment relationship so that DHS may revoke approval of the H-1B visa.[46] 8 C.F.R. § 214.2(h)(11); § 655.731(c)(7)(ii). Additionally, in certain circumstances, the employer must provide the H-1B nonimmigrant with payment for transportation to his or her home. Id.; see also 8 C.F.R. § 214.2(h)(4)(iii)(E). Under 8 C.F.R.

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substantial amount of time at that location, the employer may station the H-1B nonimmigrant for up to 60 days per year at a location other than the permanent worksite. § 655.735(c).

[46] I note that USCIS is a component of DHS. See http://www.dhs.gov/department-components.

§ 214.2(h)(4)(iii)(E), the employer is responsible for "reasonable costs of return transportation" to the employee's last place of foreign residence, if the alien employee "is dismissed from employment by the employer" before the end of the LCA period.

A complaint must be filed not later than 12 months after the latest date(s) on which the alleged violations were committed, defined as the date(s) on which the employer allegedly failed to perform an act or fulfill a condition specified in the LCA, or the date on which the employer allegedly demonstrated a misrepresentation of material fact in the LCA. § 655.806(a)(5). No particular form of complaint is required, except that it must be in writing or, if oral, be reduced to writing by the WHD official who received the complaint. § 655.806(a)(1). Under the regulation, no hearing or appeal is available if the Administrator determines that investigation of a complaint is not warranted. § 655.806(a)(2).

After investigation, the WHD Administrator issues a determination letter, which is served on the interested parties, including the H-1B nonimmigrant whose LCA was the subject of the investigation. § 655.815(a). The determination letter sets out the Administrator's conclusions; in the event the Administrator finds that an employer committed violation(s), the Administrator's letter will prescribe

remedies. § 655.815(b)(1). For back wage obligations, under the regulation, the amount owed is defined as the difference between the amount the employee should have been paid and the amount actually paid. § 655.810(a). The Administrator also may assess civil-money penalties and other remedies, as listed in § 655.810. § 655.815(c)(1).

An interested party requests a hearing under procedures set out in § 655.840. The regulation indicates that a hearing relates to "review of a[n Administrator's] determination issued under §§ 655 and 655.815." § 655.840(a). Under § 655.840(b), an administrative law judge has the authority to affirm, deny, reverse, or modify, in whole or in part, the determinations of the Administrator. The administrative law judge is not authorized to render findings on the "legality of a regulatory provision or the constitutionality of a statutory provision." § 655.840(d).

Timeliness of the
Prosecuting Party's Complaints

The Respondent asserts that this action should be dismissed because the Prosecuting Party's complaints to the WHD were untimely. Respondent's brief at 8-11. The Prosecuting Party did not

specifically address the timeliness of his complaints. Prosecuting Party's brief.

The Prosecuting Party testified that he initially made an oral complaint to the WHD in January 2008. T. at 203. The record indicates that the Prosecuting Party made at least two written complaints to the WHD, in June 2008 (RX 20) and January 2011 (RX 29). The June 2008 complaint (form WH-4) alleged that the Respondent committed the following violations of the INA and the H-1B regulations: supplied incorrect or false information on the LCAs; failed to pay the higher of the prevailing or actual wage; failed to pay for time off due to decisions by the employer; failed to provide fringe benefits equivalent to those provided to U.S. workers; failed to provide employee with a copy of the LCA; and failed to provide reasonable costs of return transportation (apart from airline tickets) after terminating the Prosecuting Party's employment before the end of the period of authorized stay. RX 20.

Initially, the WHD declined to investigate the June 2008 complaint, based on a determination that the Prosecuting Party had failed to provide sufficient information to indicate that the Respondent committed a violation within the 12 months preceding the complaint, as required under the

regulation. RX 21; see § 655.806(a)(5). Under the terms of the settlement of the Prosecuting Party's District Court complaint, WHD's determination that the Prosecuting Party's June 2008 complaint was untimely was vacated, and the Prosecuting Party's complaint was remanded to WHD for a new investigation. Case No. 12:cv-06652 (S.D.N.Y.), "Stipulation and Order of Remand and Dismissal," Dec. 10, 2012.

The record indicates that, after the remand, WHD then investigated the issues raised in the Prosecuting Party's June 2008 complaint. CX 28. Eventually, in March 2014, WHD issued a Determination Letter. CX 1. Though the Determination Letter did not specifically address the issue of whether the Prosecuting Party's June 2008 complaint was timely, it did include findings that the Respondent owed the Prosecuting Party back wages and also that the Respondent failed to provide the Prosecuting Party with a copy of his LCA. Id. I presume, therefore, that the WHD found the Prosecuting Party's June 2008 complaint to be timely.

On review of the record, I note that the Prosecuting Party's June 2008 complaint to the WHD stated that the Respondent owed back wages to the Prosecuting Party for nonproductive periods;

the complaint also specifically cited the Respondent's dates of alleged violations as extending from 11/28/2006 to 11/08/2007 (that is, from the date after the Prosecuting Party's termination of employment to the end of the authorized LCA period).[47] Because there is evidence of record that, at the time the Prosecuting Party made his June 2008 complaint to WHD, he alleged that the Respondent committed violations up to November 8, 2007, I find there is evidence that the Prosecuting Party's allegation was timely, as he alleged violations that occurred within the 12 months preceding his complaint. Therefore, I conclude that the Prosecuting Party's June 2008 complaint, as resurrected by the settlement agreement in his District Court action, was timely. Accordingly, any allegations pertaining to the items the Prosecuting Party checked on the form WH-4, as listed above, are timely.

The record indicates that the Prosecuting Party submitted an additional complaint to the WHD in January 2011. RX 29. This complaint alleges, for the first time, that the Respondent

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[47] I note that the notation 11/28/2006 is typewritten and the phrase "to 11/08/2007" is handwritten. I presume that the handwritten addendum was made by the Prosecuting Party. In the absence of evidence to the contrary, I will presume that this notation was made in June 2008, at the time the Prosecuting Party filed his initial complaint.

retaliated against the Prosecuting Party. Additionally, the complaint specifies that the Respondent misrepresented a material fact in the LCA when it listed the work location as Fairfax, Virginia. In support of this allegation, the Prosecuting Party cited the LCA the Respondent filed in March 2006, which listed the job location as Fairfax, Virginia. The record also indicates that, by letter dated May 18, 2011, WHD informed the Prosecuting Party that no investigation was warranted as to the Prosecuting Party's allegations of the Respondent's misrepresentation in the LCA because the alleged violation occurred more than 12 months before the complaint was made. RX 30. The evidence is that the Respondent submitted the LCA in which it asserted that the Prosecuting Party's job location was to be Fairfax, Virginia, in March 2006. CX 3. This is almost five years prior to the date of the Prosecuting Party's January 2011 complaint, and is clearly untimely under the regulations. I affirm the Administrator's determination that the Prosecuting Party's allegation that the Respondent misrepresented the facts in the LCA by indicating the job was located in Fairfax, Virginia was untimely.

As for the Prosecuting Party's allegation that the Respondent retaliated against him, I find that the record does not specifically indicate whether the

WHD ever investigated this allegation. See RX 30. The WHD's letter of May 18, 2011, which informed the Prosecuting Party that it would not investigate the complaint pertaining to the Respondent's alleged misrepresentation of the Prosecuting Party's work location, does not address this allegation. Neither does the WHD Determination Letter dated March 2014. If the WHD opted not to investigate the allegations of retaliation, then the Prosecuting Party's complaint on this issue is not properly before me, because I am limited to adjudicating only those issues that WHD investigated. § 655.806(a)(2). If WHD investigated such allegations, then I have jurisdiction to adjudicate them, provided the Prosecuting Party included them in his hearing request. See § 655.820(a). The Prosecuting Party did include allegations of discrimination in his Hearing Request. Hearing Request at 16-20.

As discussed above, however, I have found that the Prosecuting Party's allegations about the Respondent's conduct do not constitute allegations of retaliation that are cognizable under the regulation, and I have granted the Respondent's motion for summary decision on such issue. Therefore, even assuming arguendo that WHD conducted an investigation, I find that my action in granting the Respondent's motion for summary decision adequately disposes of the issue.

Lastly, there is some evidence the Prosecuting Party submitted a complaint in 2010 against the Respondent. RX 23. This complaint was rejected, without investigation, as untimely.[48] Id. Because the WHD did not investigate the complaint, there is no basis for me to adjudicate it. See § 655.806(b)(2).

The Applicable H-1B Employment Period

The record firmly establishes that the applicable H-1B employment period runs from April 24, 2006 to November 8, 2007. These are the dates for which DHS approved a visa for the Prosecuting Party. CX 5, 9. As the record reflects, the Respondent's initial petition was dated March 16, 2006 and was intended to cover the period from March 16, 2006 to March 16, 2009. CX 3; see also CX 4. It listed a job location of Fairfax, Virginia. It was approved on April 24, 2006 (receipt no. EAC-06-122-50383) but only for the period from that date up to November 8, 2007. CX 5. Later, in October 2006, the Respondent submitted a second LCA petition for the Prosecuting Party; this petition was the same as the initial petition regarding the Prosecuting Party's job title and wage, but listed the job locations as New

[48] It is not clear, from the record, what allegations the Prosecuting Party made against the Respondent in the 2010 complaint.

York and Chicago, consistent with the Prosecuting Party's recent worksites. CX 8; see also T. at 195. This petition was approved on October 24, 2006 (receipt no. EAC-07-010-52367), for the period up to November 8, 2007. CX 9.

The Department of Labor has cognizance only over the period of employment covered by an approved LCA petition. § 655.805; see also Vojtisek-Lom v. Clean Air Technologies Int'l, Inc., ARB No. 07-097, ALJ No. 2006-LCA-9 (ARB July 30, 2009), slip op at 16. Therefore, the employment period for which the Prosecuting Party may seek enforcement remedies extends from April 24, 2006 (the date reflected on receipt no. EAC-06-122-50383) to November 8, 2007 (the date reflected on receipt nos. EAC-06-122-50383 and EAC-07-010-52367). Accordingly, I will consider the Respondent's wage and employment obligations to the Prosecuting Party only for the period up to November 8, 2007. As noted above, I have found that the Respondent paid all wages due the Prosecuting Party for the period up to November 27, 2006.[49] Therefore, the period for which the Respondent may be responsible for back

[49] I granted judgment in favor of the Respondent as to any wages due up to November 27, 2006. T. at 330. I will address the allegation that the Respondent failed to pay fringe benefits during the period of employment (such as per diem allowances) below.

wages is limited to the timeframe between November 28, 2006 and November 8, 2007.

Period for Which Back Wages Are Owed

Under the regulation, an employer must pay the applicable required wage to an H-1B employee throughout the entire H-1B employment period (less authorized deductions). § 655.731(c)(1). However, an employer is not required to pay an employee for periods when the employee is in a "nonproductive status" for reasons unrelated to the employment, such as travel for the employee's personal convenience. § 655.731(c)(7)(ii). In addition, an employer's obligation to pay wages to an employee is extinguished when there has been a bona fide termination of the employment relationship. Id. However, up to the time that there has been a bona fide termination, an employer's wage obligation to an H-1B continues unabated, up to the end of the authorized period of employment. Id.; see also Mao v. Nasser Eng'g & Computing Svcs., ARB No. 06-121, ALJ No. 2005-LCA-36 (ARB Nov. 26, 2008), slip op. at 10.

In this matter, the Respondent asserts that it properly terminated its employment relationship with the Prosecuting Party, by January 15, 2007. Respondent's brief at 18-22. The Prosecuting Party,

on the other hand, contends that the Respondent never properly terminated the employment relationship. Prosecuting Party's brief at 17-20.

The Board has held that there are three elements to establish a bona fide termination of employment: first, unequivocal notice to the employee that the employment relationship has been terminated; second, the employer's notice to immigration officials of the terminated employment; and third, payment for transportation back to the employee's home country.[50] Amtel Group of Fla. v. Yongmahapakorn, ARB No. 04-087, ALJ No. 2004-LCA-06 (ARB, Sept. 29, 2006), slip op. at 11-12, aff'd on recon, ARB No. 07-104 (Jan. 29, 2008); see also Gupta v. Jain Software Consulting, Inc. ARB No. 05-008, ALJ No. 2004-LCA-39 (ARB, Mar. 30, 2007), slip op. at 5-6. The Board also has held that the burden is on the employer to establish each element of the bona fide termination. Gupta v. Jain, slip op. at 5 n. 3.

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[50] Section 655.731(c)(7)(ii) states that payment for transportation back to the employee's home must be tendered under certain circumstances, and cited 8 C.F.R. § 214.2(h)(4)(iii)(E). This provision states that transportation must be provided when the employee has been dismissed prior to the expiration of the approved LCA period.

As to the first requirement, the parties agreed that the Respondent sent the Prosecuting Party a letter on November 14, 2006, informing him of the termination of employment. T. at 26; see also CX 10. Additional evidence establishes that the Prosecuting Party was aware in advance that this was the date of his proposed termination of employment because he contacted the Respondent's officials in an effort to get them to change their decision or, alternatively, delay the termination date. RX 4, 5; see also T. at 179-80.

The Prosecuting Party contends that the Respondent does not have the ability to terminate his employment, because he had a contract with the Respondent. Prosecuting Party's brief at 17-18; see also CX 2 (employment agreement). I reject this contention, because the employment agreement between the Respondent and the Prosecuting Party explicitly states that the Prosecuting Party's employment was "at-will." CX 2 at 2. The Respondent's employment policies indicate that, "except when defined by a written contract for a specified period of time, all employment with Headstrong is on an 'at-will' basis, which means that the employee may terminate employment at any time, with or without notice, and Headstrong also may terminate employment at any time." CX 36.

The Prosecuting Party also contends that the Respondent's action in terminating his employment was improper, either because the regulation requires that employment continue throughout the entire H-1B period, or because the Respondent's position that the Prosecuting Party was terminated due to "lack of work" is not consistent with its assertion in the LCA petitions that the Prosecuting Party would be employed through March 2009 (first petition) or November 2007 (second petition). Prosecuting Party's brief at 21; T. at 168, 282. Contrary to the Prosecuting Party's position, I find that there is no regulatory bar to terminating an employee's employment prior to the end of the H-1B period.[51] § 655.731(c)(7)(ii). Even though it is not necessary for an employer to justify its reasons for terminating an H-1B employee's employment, I note that the record reflects there is some evidence to support the Respondent's rationale that there was a lack of work for the Prosecuting Party. For example, the Prosecuting Party testified that after he received the termination notice, he contacted Mr. Kandar, who circulated his curriculum vitae and attempted to find him work, without success. T. at 199-200.

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[51] The regulation makes it clear that, unless and until a bona fide termination of the employment relationship is accomplished, an employer's wage payment obligation continues. But a bona fide termination extinguishes an employer's wage payment obligation.

Based on the foregoing, I find that the evidence establishes that there was neither a regulatory nor contractual bar to the Respondent's action in terminating the Prosecuting Party's employment. I also find that the Respondent notified the Prosecuting Party that his employment was to be terminated, in advance of the November 27, 2006 termination date. Thus, the Respondent satisfied this first requirement for a bona fide termination.

The second requirement for a bona fide termination is that the employer notify USCIS that the employee's employment has ended. § 655.731(c)(7)(ii). The record reflects that the Respondent notified USCIS, by letter dated January 15, 2007. CX 16; additional copy at RX 12. The notice accurately reflected the Prosecuting Party's applicable LCA (receipt no. EAC-07-010-52367). A date stamp indicates that USCIS received the Respondent's letter on January 23, 2007.[52] The Prosecuting Party contends that the Respondent's January 15, 2007 letter did not fulfill the requirement to notify USCIS, because the Respondent did not refer to the first approved LCA (receipt no. EAC-06-122-50383) and the entity that

[52] The date stamp is more legible on RX 12 than on CX 16. See T. at 142-43 (discussion of date stamp on Prosecuting Party's exhibit).

informed USCIS was not Headstrong, Inc., but was Headstrong Services, LLC. Prosecuting Party's brief at 19-20; see also T. at 228-31, 275-76.

I reject both of the Prosecuting Party's contentions. The regulation indicates that when an employer submits a subsequent LCA petition to cover the same employment period, such a petition is intended to supersede the earlier LCA. § 655.735(g); see also § 655.750(c)(3) (discussing that subsequent approved applications supersede earlier applications). Notably, a purpose of submitting a subsequent LCA petition for the same time period is to reflect a change in the location of an employee's worksite. § 655.735(g); see also § 655.735(c) and (e) (in general, workers are to be located at the areas specified in the approved LCAs). At the hearing, Ms. Spratling testified that a second LCA petition is filed when an employee's worksite is different from the site stated in the initial LCA petition. T. at 113. Based on the foregoing, I find that on January 15, 2007, the only applicable LCA was the petition approved in October 2006, specifically receipt no. 07-010-52367. And because the Respondent's notice to USCIS referenced that approved LCA petition, its notice was adequate.

As to the issue of the entity that informed USCIS, I find that it is immaterial whether the

notice referred to Headstrong Services, LLC or Headstrong, Inc. The record reflects that the Prosecuting Party's employment agreement was with Headstrong, Inc. (designated as the "Company" in the agreement). CX 1. Most notably, however, the employment agreement also specified that the term "companies" meant the Company (that is, Headstrong, Inc.), its parent, and any related company. Id. The testimonial evidence established that Headstrong, Inc. and Headstrong Services, LLC were related companies. T. at 311. Accordingly, I find that the Prosecuting Party's employment agreement with Headstrong, Inc. also embraced related companies such as Headstrong Services, LLC, and therefore Headstrong Services, LLC's notice to USCIS was adequate.

Based on the foregoing, I find that the Respondent fulfilled this second requirement for a bona fide termination of employment by January 15, 2007, the date of its notice to USCIS.

The third requirement, under the regulation, is that, where an employer dismisses the employee before the end of the approved LCA period, the employer must "provide the employee with payment for transportation home." § 655.731(c)(7)(ii); 8 C.F.R. § 214.2(h)(4)(iii)(E). The evidence of record on this issue includes various e-mail chains. CX 14, 17, 33;

RX 9, 13. These documents indicate that initially the Respondent refused to provide the Prosecuting Party with such payment (CX 14, Dec. 4, 2006); the next day, however, the Respondent acknowledged its responsibility (RX 9, Dec. 5, 2006). Ms. Somerville approved the purchase of a ticket (RX 13, Jan. 25, 2007). A ticket from Newark, NJ to Bangalore, India for travel on February 24, 2007, was issued on January 25, 2007. RX 13. The record reflects this travel date was the date the Prosecuting Party chose, and that the Prosecuting Party requested travel to Bangalore. CX 33, RX 9. By January 31, 2007, the record indicates, a ticket may have been issued but the Prosecuting Party had not received it; I infer this because the Prosecuting Party was asking about the status of the ticket.[53] CX 33. Ultimately, on February 2, 2007, the Prosecuting Party received an e-ticket. CX 17.

Though the Respondent accepted responsibility for this cost on December 5, 2006 and a ticket was issued on January 25, 2007, the Respondent did not tender the ticket to the Prosecuting Party until February 2, 2007. I therefore find that the Respondent did not meet this

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[53] It appears that the Respondent may have tried to deliver a ticket via e-mail, but confused the Prosecuting Party with another employee who had the same first and last names. CX 33; RX 9.

requirement for a bona fide termination of the Prosecuting Party's employment until that date.

The regulation does not require that an employer provide a ticket for an employee; rather, under the regulation, an employer must provide the "reasonable cost" of return transportation. § 655.731(c)(7)(iii). The cost of the ticket the Respondent paid was $950.00. RX 9. In his 2008 WHD complaint, the Prosecuting Party asserts that this payment was insufficient. See RX 20. The burden to establish the reasonableness of its payment for return travel rests with the employer. Amtel Group of Fla. v. Yongmahapakorn, ARB No. 04-087 (ARB, Sept. 29, 2006), slip op. at 11-12, aff'd on recon., ARB No. 07-104 (Jan. 29, 2008). Because the Respondent provided an airline ticket to Bangalore, India, the city of the Prosecuting Party's choice, I find that the Respondent's tender of a ticket was sufficient to establish the reasonableness of the cost of the transportation to Bangalore. Also, the Prosecuting Party did not return to India until April 2009. T. at 204. By opting to stay in the United States, he did not incur any additional travel-related expenses in February 2007. I find that, under such circumstances, by tendering an air ticket to Bangalore costing $950.00, the Respondent provided the "reasonable cost" of return transportation.

Because the Respondent did not fulfill all of the requirements to effect a bona fide termination of the Prosecuting Party's employment until February 2, 2007, I find that the Respondent effected the bona fide termination on that date. Accordingly, I further find that the Respondent's wage obligation to the Prosecuting Party continued up to February 2, 2007.

The Prosecuting Party has asserted that the Respondent continued to have a wage obligation to him, at least up to March 2009, the ending date specified in the Respondent's initial LCA petition. Prosecuting Party's brief at 20-24. The Prosecuting Party posits that the Respondent's action in offering him transportation back to India in February 2007 put him in "travel status" and converted his employment status from U.S.-based to employment based in India. Id. Because the Respondent's bona fide termination of the Prosecuting Party's employment is established, as set forth above, I find there is no basis, in law or fact, for the Prosecuting Party's position.

Interestingly, there is evidence that, shortly after the Respondent effected its bona fide termination of the Prosecuting Party's employment, the Prosecuting Party obtained employment with another employer, Compunnel. T. at 266-67. On May 29, 2014, the Board issued a Decision and Order (ARB D&O) relating to the Prosecuting Party's

complaint against that employer.[54] Gupta v. Compunnel Software Group, Inc., ARB No. 12-049, ALJ No. 2011-LCA-045 (ARB May 29, 2014).

By Order dated November 12, 2014, I invited the parties to respond regarding the effect, if any, that the ARB's determination that Compunnel owed back wages to the Prosecuting Party had on the Respondent's back wage liability, if any, to the Prosecuting Party. Both the Prosecuting Party and the Respondent submitted responses to my Order.

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[54] Under the applicable procedural regulation, I may take official notice of adjudicative facts. 29 C.F.R. § 18.201. Similar to the analogous provisions of the Federal Rules of Evidence ("FRE") and of Civil Procedure regarding judicial notice, Part 18.45 provides, "Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice." 29 C.F.R. § 18.45; see also 29 C.F.R. §18.201. However, a court may take judicial notice of a document filed in another court "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384 (2d Cir. 1992) (emphasis added); see also Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., 146 F.3d 66, 69-70 (2d Cir. 1998) (explaining, "Facts adjudicated in a prior case do not meet either test of indisputability contained in [FRE] 201(b) [Judicial Notice of Adjudicative Facts]: they are not usually common knowledge, nor are they derived from an unimpeachable source"); Bruce Lee Enters., LLC v. A.V.E.L.A., Inc., 2013 U.S. Dist. LEXIS 31155, at *28-30 (S.D.N.Y. Mar. 6, 2013).

The Board has held that, as a matter of law, an employee cannot be granted the right to work concurrently for two H-1B employers. Batyrbekov v. Barclays Capital, ARB No. 13-013, ALJ No. 2011-LCA-25 (ARB July 16, 2014), slip op. at 13. Moreover, as a practical matter, I find that employment with a second employer effectively renders an employee unavailable for work with his original employer.

The Prosecuting Party testified that he worked for Compunnel in 2007 and admitted that Compunnel paid him for the period from February 2007 to July 2007. T. at 266. Accordingly, I find that, even if the Respondent had not effected a bona fide termination of the Prosecuting Party's employment, the Prosecuting Party was not available for work with the Respondent during the time he was working for Compunnel, and so the Respondent would not have any wage obligation in those timeframes to the Prosecuting Party. See § 655.731(c)(7)(ii).

Computing Back Wages Owed to the Prosecuting Party

Under the regulation, an employer must pay an H-1B employee the "required wage" for the entire

time period up to the bona fide termination of employment, except for time periods during which the employee was not available for work based on personal circumstances unrelated to his employment. § 655.731(c)(7)(ii). Based on the foregoing, I find the applicable time period for which the Respondent may owe back wages to the Prosecuting Party is from November 28, 2006 to February 2, 2007.

The required wage is defined as the higher of the actual wage for the specific employment in question or the prevailing wage at the geographic location. § 655.715. For the Prosecuting Party's position under the applicable approved LCA in November 2006 (EAC-07-010-52367), the prevailing wage listed in the LCA was $86,237.00 per year. This is lower than the Prosecuting Party's actual wage of $105,000.00 per year. I find, therefore, that the back wages should be calculated based on the Prosecuting Party's actual wages of $105,000.00 per year, or $8,750.00 per month. Vojtisek-Lom v. Clean Air Technologies Int'l, Inc., ARB No. 07-097, ALJ No. 2006-LCA-9 (ARB July 30, 2009), slip op at 14 (computation of back wages may be based on wage rate paid to the employee).

As Mr. O'Shaughnessy noted, the Prosecuting Party's wages received for November 2006 were less

than his monthly salary because the Respondent prorated the full month's salary of $8,750.00 against the number of work days the Prosecuting Party worked up to November 27, 2006. T. at 308-09; RX 8. Per RX 8, the Prosecuting Party received $7,556.82 for the period from November 1 to November 27, 2006. In order to receive his full wage for the month of November, he must receive $8,750.00. Accordingly, I find the Prosecuting Party is owed an additional $1,193.18 for November 2006.

The Prosecuting Party is owed his full wages for the months of December 2006 and January 2007. At the rate of $8,750.00 per month, I calculate the total amount owed for these two months to be $17,500.00.

The Prosecuting Party is also owed wages for February 1 and 2, 2007. Mr. O'Shaughnessy testified that daily wages are calculated on a pro-rata basis, using the number of work days in the month. T. at 309. February 1 and 2, 2007 were a Thursday and Friday, so I will consider them to be workdays. In February, a 28-day month, there are 20 workdays. Consequently, the Prosecuting Party's daily wage rate for February 2007 would be $437.50. Accordingly, for the two days in February for which the Prosecuting Party is owed wages, the total amount owed to him would be $875.00.

In sum, the back wages the Respondent owed to the Prosecuting Party were as follows:

November 2006:	$1,193.18
December 2007:	8,750.00
January 2007:	8,750.00
February 2007:	875.00
TOTAL:	$19,568.18

The record reflects that the Respondent paid the Prosecuting Party $8,076.92 (four weeks' base salary) pursuant to the severance agreement. Because the Respondent paid the Prosecuting Party this amount in lieu of continuing to pay his wages, I deduct this amount from the amount owed by the Respondent's back wage obligation. Accordingly, the total amount owed to the Prosecuting Party is reduced to $11,491.26.[55]

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[55] I have not considered the Respondent's payment of accrued vacation time to the Prosecuting Party as a payment that should be credited toward the back wage obligation, because under the regulation, an H-1B employee is entitled to the same benefits from an employer that a U.S. worker has. § 655.731(c)(3). Though there is no specific evidence on this point, I will presume that for all workers who leave employment, the Respondent pays the employee the value of vacation days accrued but not taken. See T. at 190 (accrued vacation paid even if employee does not sign severance agreement); see also CX 6 (summary of benefits).

The record includes a back wage calculation made by a WHD investigator. CX 34. This document indicates that the WHD investigator calculated back wages for the period from January 1, 2007 to January 23, 2007.[56] The investigator also calculated back wages based on a prevailing wage of $92,789.04, rather than the Prosecuting Party's actual wage of $105,000.00.[57]

The investigator determined the total amount of back wages owed to the Prosecuting Party was $5,736.96.[58] I find that the WHD investigator's determination was not accurate because she did not

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[56] The document does not indicate how the WHD investigator determined these were the starting dates and ending dates of the Respondent's back wage obligation.

[57] I note that the prevailing wage the WHD investigator used was the prevailing wage used in the initial LCA petition, (receipt no. 06-122-50383) rather than the prevailing wage of $86,237.00 listed in the second LCA petition (receipt no. 07-010-52367). Additionally, the prevailing wage the WHD investigator used ($92,789.04) varied from the prevailing wage listed in the initial LCA petition ($92,789.00) by $0.04. See CX 3.

[58] The investigator then applied the amount of the Prosecuting Party's May 2008 settlement, $7,000.00, against this back wage liability, and concluded that the Respondent had no additional back wage liability due to the Prosecuting Party. I will discuss the effect of the Prosecuting Party's May 2008 settlement below.

use the full period for which back wages were due, and she based the Respondent's back wage obligation on the prevailing wage, rather than the actual wage.

Effect of the 2008 Settlement

As contained in the record and discussed at the hearing, in 2008 the Prosecuting Party, through his attorney, approached the Respondent with allegations that the Respondent had violated various provisions of the Act and the H-1B regulations. RX 15. After negotiations, the Respondent paid $7,000.00 to settle the Prosecuting Party's allegations. CX 19, 20; see also T. at 45-47. The check for this settlement was drawn on the account of "Headstrong Services, LLC," and was payable to the Prosecuting Party's attorney. CX 20. The Prosecuting Party has conceded he received a portion of the settlement proceeds from his attorney. T. at 235; see also CX 20.

The Prosecuting Party admitted that in 2010 he attempted to rescind the settlement agreement, based on an assertion that the 2008 settlement was fraudulent. T. at 236; see also CX 23. The Prosecuting Party contended that the 2008 settlement should be rescinded because the Respondent did not notify USCIS to cancel his

approved H-1B employment under receipt no. 06-122-50383, but only the approved H-1B employment under receipt no. 07-010-52367; therefore, he posited, there was no bona fide termination of his employment and the Respondent owed him wages through November 8, 2007, the end of the approved H-1B period. CX 23. I note that the record indicates that the Prosecuting Party has not returned the money he received in the 2008 settlement to the Respondent. T. at 64. Nor is there any evidence of record that the Prosecuting Party attempted to tender this amount back, either in 2010 when he first attempted to rescind the 2008 settlement agreement or at any time since.

At the hearing, the Prosecuting Party asserted that the 2008 settlement is ineffective or void.[59] He stated that the settlement was not paid by Headstrong, Inc., his employer, but rather was paid by Headstrong Services, LLC. T. at 234-37. At the hearing, Mr. O'Shaughnessy testified that Headstrong Services, LLC paid all non-payroll obligations of the Headstrong companies, and that because a settlement agreement was such an obligation, Headstrong Services, LLC paid it. T. at 314-16. As discussed above, I find that the fact that an obligation was not paid by Headstrong, Inc., but

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[59] The Prosecuting Party did not address the 2008 settlement in his post-hearing brief.

rather was paid by Headstrong Services, LLC does not invalidate the Respondent's action. Rather, it was consistent with the Respondent's business practice to have Headstrong Services, LLC pay such obligations, with the intent of binding all of the Headstrong entities. Accordingly, I find that the Respondent's settlement payment was valid, and was intended to address any complaint the Prosecuting Party had against his employer, Headstrong, Inc.

The record reflects that, in consideration for the settlement of his allegations and payment of the $7,000.00 tendered by the Respondent, the Prosecuting Party executed a release discharging the Headstrong, Inc., and all of its affiliated companies, from any obligation which the Prosecuting Party had, or may have, in connection with "any matter arising on or before the date of the execution" of the agreement, which was May 8, 2008. CX 19. Specifically, according to the settlement agreement, the Respondent owed no additional amounts to the Prosecuting Party for wages, back pay, bonuses, benefits, etc. As the parties stipulated, a representative of the Respondent also signed the agreement. CX 19; T. at 25. I find that this action reflects the Respondent's intention to likewise be bound by its provisions. Further, I find that the Prosecuting Party's 2010 allegation of "fraud" has no

merit. Indeed, as discussed above, I have found that the Respondent's notice to USCIS, citing only the second approved LCA (receipt no. 07-010-52367) was proper. Accordingly, I find that any claim the Prosecuting Party had regarding the Respondent's obligation to pay him back wages, or benefits, or travel expenses of any kind, was completely extinguished by the Prosecuting Party's execution of the settlement agreement and release, and the concomitant payment of $7,000.00.[60]

Respondent's Obligation to Pay Benefits

The Prosecuting Party also has alleged that the Respondent failed to pay applicable benefits during his period of employment. Under the regulation, an employer must offer an H-1B employee benefits to the same extent that the employer offers benefits to similarly-situated U.S.

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[60] I acknowledge that this amount is less than what I have computed the Respondent's back wage obligation to be. Nevertheless, I find that it represents a reasonable compromise of the Prosecuting Party's claim against the Respondent, and note in particular that the Prosecuting Party received payment approximately 45 days after his attorney sent a demand letter to the Respondent. I note that the Prosecuting Party was represented by counsel when he signed the settlement agreement. In this Decision, I render no findings relating to the Prosecuting Party's attorney's representation of the Prosecuting Party's interests.

workers. § 655.731(c)(3). The Prosecuting Party raised this issue in his 2008 complaint.[61] RX 20. The Administrator's March 2014 Determination Letter did not make an explicit finding regarding whether the Respondent failed to pay benefits to the Prosecuting Party. Notwithstanding that the Administrator's Determination did not specifically address the benefits issue, I have jurisdiction to adjudicate this aspect of the Prosecuting Party's complaint. Batyrbekov v. Barclays Capital, ARB No. 13-013, ALJ No. 2011-LCA-25 (ARB July 16, 2014), slip op. at 15-16.

The burden is on the Prosecuting Party to establish his entitlement to benefits. Id., at 16. Though the Prosecuting Party asserts that the Respondent failed to pay him benefits equivalent to those given to U.S. workers during his employment, the Prosecuting Party did not provide evidence on this issue. When the Respondent terminated the Prosecuting Party's employment, the severance agreement indicated that the Respondent would pay the Prosecuting Party's accrued vacation. CX 13. The Respondent did so. RX 8. There is no evidence of record that the Respondent's payment for accrued vacation pay was insufficient, or that the

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[61] The Prosecuting Party checked Box 4(e) on the Form WH-4, which alleges that an employer failed to pay fringe benefits equivalent to those provided to U.S. workers.

Respondent failed to pay the Prosecuting Party benefits equivalent to those paid to U.S. workers.

Under the regulation, an employer may only lawfully employ an H-1B employee at locations other than the location specified in an approved LCA for short time periods. § 655.735(c). And when an employer employs an H-1B worker for a short-term period at a worksite that is different from the worksite specified in an approved LCA, in most cases the employer must pay a per diem consisting of lodging, meal, and incidental expenses. § 655.735(b). In fact, it is not even clear, from the record, whether the Prosecuting Party raised this issue in his 2008 WHD complaint.[62] RX 20; see also T. at 201-04 (Prosecuting Party discusses his 2008 WHD complaint); 223-24 (Prosecuting Party stated he informed the Respondent (not WHD) that having him work at a site other than site specified on the LCA may be a violation).

Moreover, the issue of whether the Respondent failed to pay the Prosecuting Party applicable benefits was addressed in the 2008 settlement agreement. As noted, the 2008 settlement agreement specifically stated that the Respondent owed the Prosecuting Party no additional amounts

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[62] In his Hearing Request the Prosecuting Party raised this as a separate issue. See Hearing Request at 15.

for benefits.[63] I find, accordingly, that the parties' execution of the 2008 settlement agreement fully extinguished any claim the Prosecuting Party may have had regarding the Respondent's liability for payment of benefits relating to the Prosecuting Party's employment, whether involving vacation or health benefits, or payment of per diem expenses.

Respondent's Alleged Regulatory Violations during Employment Period

The Prosecuting Party also has alleged that the Respondent committed various regulatory violations during the employment period. As discussed above, I have found that the Prosecuting Party's allegation that the Respondent misrepresented material facts on the LCA petition by stating that his job location was in Fairfax was untimely.

In the 2008 WHD complaint, the Prosecuting Party asserted that the Respondent failed to provide him with copies of his LCAs, as required under

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[63] I find that this language could reasonably be construed to relate both to benefits equivalent to those paid to U.S. workers and benefits required under the Act's H-1B regulations. The agreement also stated that the Prosecuting Party agreed that the Respondent properly informed him of his health benefits (COBRA) options. CX 13.

§ 655.734. See RX 20. The Administrator determined that this allegation was substantiated, but did not impose any remedy, other than to direct the Respondent to provide employees with copies of their applicable LCAs in the future. CX 1. The Prosecuting Party did not include this issue in his request for a hearing before an administrative law judge. Hearing Request. Therefore, I find it is not necessary for me to adjudicate this issue. See § 655.820(c)(3).

CONCLUSION

Based on the foregoing, I conclude the following:

1. The Prosecuting Party's 2008 WHD complaint was timely.

2. The Respondent effected a bona fide termination of the Prosecuting Party's employment by February 2, 2007. Accordingly, the Respondent's obligation to pay back wages to the Prosecuting Party ended on February 2, 2007.
3. The Respondent's back wage obligation to the Prosecuting Party, as of February 2, 2007, totaled $11,491.26.

4. The Prosecuting Party failed to establish that the Respondent did not offer him benefits equivalent to those offered to U.S. workers.

5. ecause in 2008 the Prosecuting Party signed a settlement agreement and release, and accepted the sum of $7,000.00 in consideration of same, the Respondent does not now owe any back wages or payment of benefits to the Prosecuting Party. Nor does the Respondent owe any ancillary damages to the Prosecuting Party.

6. Because the Respondent has no current monetary liability to the Prosecuting Party, the Respondent does not owe any interest to the Prosecuting Party.

7. The Prosecuting Party has failed to establish that the Respondent retaliated against him. Because no retaliation is established, the Prosecuting Party has failed to establish any entitlement to compensatory damages.

8. The Prosecuting Party has not established any statutory basis for punitive damages.

ORDER

Based on the foregoing, I AFFIRM the Administrator's determination that the Respondent does not currently owe any back wages, or any other amount of money, to the Prosecuting Party. See § 655.840(b).[64]

DEPARTMENT OF LABOR
* UNITED STATES OF AMERICA *

/s/ Adele H. Odegard
ADELE H. ODEGARD
ADMINISTRATIVE LAW JUDGE

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845. To be effective, such petition shall be received by the Board within thirty (30) calendar days of the date of this Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. The Board's address is U.S. Department

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[64] My other findings are set out in the paragraph above.

of Labor, Administrative Review Board, Room S5220 FPB, 200 Constitution Ave NW, Washington, DC 20210. If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. See 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.

APPENDIX E

U.S. Department of Labor
Wage and Hour Division
26 Federal Plaza, Room 3700
New York, NY 10278-0190
Tel: (646) 587-5301
Fax: (646) 587-5387
www.dol.gov/whd/

CERTIFIED MAIL RETURN RECEIPT REQUESTED: # 7012 1010 0001 6912 0517

March 13, 2014

Alphonse Valbrune, Vice President and Head of Legal
Headstrong, Inc.
One Fountain Square
11911 Freedom Drive
Reston, VA 20190

Subject: Administrator's Determination Pursuant to Regulations at 20 C.F.R. Part 655- H-1B Specialty Occupations under the Immigration and Nationality Act (INA) administered by the Department of Labor (DOL)

Reference#: 2013-265-19582 (Case ID: 1682431)

Dear Mr. Valbrune:

Based on the evidence obtained in the recently concluded Wage and Hour Division investigation of Headstrong, Inc., under the H-1B provisions of the INA, as amended, (8 U.S.C. § 1182(n)), it has been determined that your firm committed the following violations: failure to pay wages as required and failure to provide the H-1B nonimmigrant with a copy of the Labor Condition Application. Any Labor Condition Application (LCA) (Form ETA 9035 and/or ETA 9035E) included in this investigation is listed or enclosed.

The specific violations and the remedy imposed for each violation are set forth on the enclosed Summary of Violations and Remedy. No civil money penalty is assessed as a result of the violations. Your firm has been assessed back wages in the amount of $5,736.96 to one H-IB nonimmigrant. Your firm has already paid the back wages. Your firm is liable for any ongoing violations.

You and any interested party have the right to request a hearing on this determination. Such request must be dated, be typewritten or legibly written, specify the issue(s) stated in this notice of

determination on which a hearing is requested, state the specific reason(s) why the requestor believes this determination to be in error, be signed by the requestor or by an authorized representative, and include the address at which the requestor or the authorized representative desires to receive further communications relating to the hearing request.

The request must be made to and received by the Chief Administrative Law Judge (OALJ) at the following address no later than 15 calendar days after the date of this determination:

U.S. Department of Labor
Chief Administrative Law Judge
ATTN: Deputy Secretary of BALCA
800 K Street NW., Room 400 North
Washington, DC 20001-8002

If you or any interested party do not make a timely request for a hearing, this determination letter will become a final and un-appealable order of the Secretary of Labor.

The procedure for filing a request for a hearing is provided in 20 C.F.R. § 655.820. Please note that 20 C.F.R. § 655.820(f) requires that a copy of any such request for a hearing must also be sent to me and to those parties listed below who were provided a copy

of this determination. The Department of Labor will notify any complainant and interested parties of any appeal. Due to the delayed delivery of mail in certain areas, you may wish to transmit your request to the OALJ via facsimile at 202-693-7365 to ensure timely receipt.

A copy of 20 C.F.R. Part 655 subparts H and I can be found at the following web address: http://www.access.gpo.gov/nara/cfr/waisidx_14/20cfr655_14.html.

Sincerely,

/s/ Maria Rosado
Maria Rosado
District Director

Enclosure(s): Copy/ List of LCAs
Summary of Violation and Remedy

cc: Chief Administrative Law Judge
800 K Street NW., Room 400 North
Washington, DC 20001-8002
(with copy of complaint per 20 C.F.R. § 655.815(b))

Administrator
U.S. Department of Labor

Wage and Hour Division
Room S-3510
200 Constitution Ave., NW
Washington, DC 20210

U.S. Department of Labor
Office of the Solicitor
Room N-2716
200 Constitution Ave., NW
Washington, DC 20210

U.S. Department of Labor
Office of the Regional Solicitor
201 Varick Street, Room 983
New York, NY 10014

U.S. Department of Labor
Wage & Hour Division,
Northeast Regional Office
170 S. Independence Mall West, Ste. 850 West
Philadelphia, PA 19106-3317

Forrest G. Read IV
Jackson Lewis, P.C.
10701 Parkridge Blvd
Suite 300
Reston, VA 20191

Complainant and other interested parties.

Summary of Violations and Remedies

Headstrong, Inc.

Violation: Headstrong, Inc. failed to pay wages as required in violation of 20 C.F.R. § 655.731. See 20 C.F.R. § 655.805(a)(2).

> The violation includes failure to pay the required wage rate for non-productive time to one H-1B nonimmigrant.

Remedy: No civil money penalty is assessed. Headstrong, Inc. is ordered to pay wages in the amount of $5,736.96 to one H-1B nonimmigrant. This amount has already been paid. Headstrong, Inc. is ordered to comply with 20 C.F.R. § 655.731 in the future.

Violation: Headstrong, Inc. failed to provide a copy of the LCA to one H-1B nonimmigrant in violation of 20 C.F.R. § 655.734. See 20 C.F.R. § 655.805(a)(5).

> The violation includes failure to provide one H-1B nonimmigrant with a copy of his LCA.

Remedy: No civil money penalty is assessed. Headstrong, Inc., is ordered to comply with 20 C.F.R. § 655.734 in the future.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of January, two thousand twenty-two.

Arvind Gupta,

Plaintiff-Appellant,

v.

Headstrong, Inc., Genpact Limited, Secretary of the United States Department of Labor,

Defendants-Appellees,

ORDER

Docket No: 20-3657

Appellant, Arvind Gupta, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe
UNITED STATES COURT OF
APPEALS * SECOND CIRCUIT *

APPENDIX G

U.S. Department of Labor
Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

ARB CASE NOS. 15-032, 15-033

ALJ CASE NO. 2014-LCA-008

DATE: FEBRUARY 14, 2017

In the matter of:

ARVIND GUPTA,
PETITIONER/
CROSS-RESPONDENT,

v.

HEADSTRONG, INC.,
RESPONDENT/
CROSS-PETITIONER,

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner/Cross Respondent:
Arvind Gupta, pro se, Mumbai, MH, India

For the Respondent/Cross-Petitioner:
Dana G. Weisbrod, Esq.; *Jackson Lewis, P.C.;* New York, New York; Forrest G. Read, IV, Esq.; and Michael H. Neifach, Esq.; *Jackson Lewis, P.C.;* Reston, Virginia

Before: Paul M. Igasaki, *Chief Administrative Law Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

ORDER DENYING MOTION FOR RECONSIDERATION

Arvind Gupta filed a complaint under the H-1B visa program provisions of the Immigration and Nationality Act, as amended, 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n)(2) (Thomson Reuters 2016) and the regulations at 20 C.F.R. Part 655, subparts H, I (2016). A Department of Labor Administrative Law Judge (ALJ) dismissed the case. Each party filed an appeal with the Administrative

Review Board (ARB or Board).[1] In a Decision and Order issued January 26, 2017, the Board affirmed the ALJ's decision and dismissed the case. The Board denied as moot Headstrong, Inc.'s cross-appeal. *Gupta v. Headstrong, Inc.*, ARB Nos. 15-032, -033, ALJ No. 2014-LCA-008 (ARB Jan. 26, 2017). On February 2, 2017, Gupta filed a motion requesting that the Board reconsider its dismissal of his appeal. Headstrong, Inc. has not filed a response.

The Board has previously identified four non-exclusive grounds for reconsidering a final decision and order. The grounds for reconsideration include, but are not limited to, whether the movant has demonstrated

> (i) material differences in fact or law from that presented to [the Board] of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the [Board's] decision, (iii) a change in the law after the [Board's]

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[1] The Secretary of Labor has delegated to the Administrative Review Board authority to issue final agency decisions under the INA. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 - 69,380 (Nov. 16, 2012).

> decision, and (iv) failure to consider material facts presented to the [Board] before its decision. [2]

Gupta's motion for reconsideration contains no argument as to any of these grounds or any other legally sufficient grounds to support his motion. Accordingly, the motion is **DENIED**

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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[2] *Kirk v. Rooney Trucking*, ARB No. 14-035, ALJ No. 2013-STA-042, slip op. at 2 (ARB Mar. 24, 2016); *OFCCP v. Fla. Hosp. of Orlando*, ARB No.11-011, ALJ No. 2009-OFC-002, slip op. at 4, n.4 (ARB July 22, 2013) (Order Granting Motion for Reconsideration and Vacating Final Decision and Order Issued Oct. 19, 2012) (citation omitted).

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARVIND GUPTA,

Plaintiff,

v.

HEADSTRONG, INC., GENPACT LIMITED, AND SECRETARY OF THE U.S. DEPARTMENT OF LABOR,

Defendants.

No. 17-CV-5286 (RA)

JUDGMENT

DATE FILED: OCTOBER 26, 2020

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Memorandum Opinion & Order dated September 28, 2020 (the "Order"), Defendants

Headstrong, Inc. and Genpact Limited's (the "Headstrong Defendants") motion for attorneys' fees is granted in the amount of One Hundred and Five Thousand Eighty One Dollars and Five Cents ($105,081.05). Plaintiff Arvind Gupta's ("Plaintiff") motion for fees is denied. Within thirty (30) days of the date of this Judgment, Plaintiff shall remit to Jackson Lewis P.C. a check made payable to "Genpact Limited" in the amount of One Hundred and Five Thousand Eighty One Dollars and Five Cents ($105,081.05) pursuant to the Court's Order.

Dated: New York, New York
October 26, 2020

SO ORDERED

/s/ Ronnie Abrams
Hon. Ronnie Abrams
United States District Judge

APPENDIX I

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

5 U.S.C. § 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case

subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

8 U.S.C. § 1182 (n)(1)(A)

(1) No alien may be admitted or provided status as a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer-
(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as a nonimmigrant described in section 1101(a)(15)(H)(i)(b) of this title wages that are at least-
(I) the actual wage level paid by the employer to all other individuals with similar

experience and qualifications for the specific employment in question, or
(II) the prevailing wage level for the occupational classification in the area of employment,
whichever is greater, based on the best information available as of the time of filing the application, and
(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

8 U.S.C. § 1182 (n)(2)(A)

The Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if

there is reasonable cause to believe that such a failure or misrepresentation has occurred.

8 U.S.C. § 1182 (n)(2)(C)(iv)

(iv) It is a violation of this clause for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

8 U.S.C. § 1182 (n)(2)(C)(vii)(I)

(I) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H–1B nonimmigrant designated as a full-time employee on the petition filed under section 1184 (c)(1) of this

title by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

8 U.S.C. § 1182 (n)(2)(C)(vii)(IV)

(IV) This clause does not apply to a failure to pay wages to an H–1B nonimmigrant for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

8 U.S.C. § 1182 (n)(2)(D)

(D) If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the application and required under paragraph (1), the Secretary shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of

paragraph (1), whether or not a penalty under subparagraph (C) has been imposed.

8 U.S.C. § 1182 (n)(4)(C)

(C) The term "H–1B nonimmigrant" means an alien admitted or provided status as a nonimmigrant described in section 1101 (a)(15)(H)(i)(b) of this title.

8 C.F.R. § 214.2(h)(2)(i)(E)

(E) **Amended or new petition.** The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

***20 C.F.R. § 655.700* What statutory provisions govern the employment of H–1B, H–1B1, and E–3 nonimmigrants and how do employers apply for H–1B, H–1B1, and E–3 visas?**

(b) *Procedure for obtaining an H–1B visa*

classification. Before a nonimmigrant may be admitted to work in a "specialty occupation" or as a fashion model of distinguished merit and ability in the United States under the H–1B visa classification, there are certain steps which must be followed:

> (1) First, an employer shall submit to the Department of Labor (DOL), and obtain DOL certification of, a labor condition application (LCA). The requirements for obtaining a certified LCA are provided in this subpart. The electronic LCA (Form ETA 9035E) is available at *http://www.lca.doleta.gov.* The paper-version LCA (Form ETA 9035) and the LCA cover pages (Form ETA 9035CP), which contain the full attestation statements incorporated by reference into Form ETA 9035 and Form ETA 9035E, may be obtained from *http://ows.doleta.gov* and from the Employment and Training Administration (ETA) National Office. Employers must file LCAs in the manner prescribed in § 655.720.
>
> (2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (DHS Form

I-129), together with the certified LCA, to DHS, requesting H–1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, DHS are set forth in DHS regulations. The DHS petition (Form I–129) may be obtained from an DHS district or area office.

(3) If DHS approves the H–1B classification, the nonimmigrant then may apply for an H-1B visa abroad at a consular office of the Department of State. If the nonimmigrant is already in the United States in a status other than H-1B, he/she may apply to the DHS for a change of visa status.

20 C.F.R. § 655.705 **What Federal agencies are involved in the H-1B and H–1B1 programs, and what are the responsibilities of those agencies and of employers?**

Four federal agencies (Department of Labor, Department of State, Department of Justice, and Department of Homeland Security) are involved in the process relating to H–1B nonimmigrant classification and employment. The employer also has continuing responsibilities under the process. This section briefly describes the responsibilities

of each of these entities.

(a) *Department of Labor (DOL) responsibilities.* DOL administers the labor condition application process and enforcement provisions (exclusive of complaints regarding non-selection of U.S. workers, as described in 8 U.S.C. 1182(n)(1)(G)(i)(II) and 1182(n)(5)). Two DOL agencies have responsibilities:

(1) The Employment and Training Administration (ETA) is responsible for receiving and certifying labor condition applications (LCAs) in accordance with this subpart H. ETA is also responsible for compiling and maintaining a list of LCAs and makes such list available for public examination at the Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210.

(2) The Wage and Hour Division of the Employment Standards Administration (ESA) is responsible, in accordance with subpart I of this part, for investigating and determining an employer's misrepresentation in or failure to comply with LCAs in the employment of H-1B nonimmigrants.

(c) *Employer's responsibilities.*
This paragraph applies only to the H–1B program; employer's responsibilities under the H–1B1 and E–3 programs are found at § 655.700(d)(4). Each employer seeking an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities, as described more fully in this subpart and subpart I of this part, including:

(1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035E or Form ETA 9035 in the manner prescribed in § 655.720. By completing and submitting the LCA, and by signing the LCA, the employer makes certain representations and agrees to several attestations regarding its responsibilities, including the wages, working conditions, and benefits to be provided to the H–1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. The LCA contains additional attestations for certain H-1B-dependent employers and employers found to have willfully violated the H–1B program requirements; these attestations impose certain obligations to recruit U.S.

workers, to offer the job to U.S. applicants who are equally or better qualified than the H–1B nonimmigrant(s) sought for the job, and to avoid the displacement of U.S. workers (either in the employer's workforce, or in the workforce of a second employer with whom the H–1B nonimmigrant(s) is placed, where there are indicia of employment with a second employer (8 U.S.C. 1182(n)(1)(E)–(G)). These additional attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. If ETA certifies the LCA, notice of the certification will be sent to the employer by the same means the employer used to submit the LCA (that is, electronically where the Form ETA 9035E was submitted electronically, and by U.S. Mail where the Form ETA 9035 was submitted by U.S. Mail). The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the U.S. Citizenship and Immigration Services (formerly the Immigration and Naturalization Service or INS) in support of the Petition for Nonimmigrant Worker, Form I–129, for an H–1B nonimmigrant. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies the employer will comply with the terms of the

LCA for the duration of the H-1B nonimmigrant's authorized period of stay.

***20 C.F.R. § 655.731* What is the first LCA requirement, regarding wages?**

(c) *Satisfaction of required wage obligation.*

(1) The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.

(2) "Cash wages paid," for purposes of satisfying the H–1B required wage, shall consist only of those payments that meet all the following criteria:

(i) 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 for

deductions authorized by paragraph (c)(9) of this section;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, *et seq.*);

(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, et seq. (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid *except that* when the H–1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (i.e., an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may 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). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

20 C.F.R. § 655.731(c)(6)(i)-(ii)

Subject to the standards specified in paragraph (c)(7) of this section (regarding nonproductive status), an H-1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant "enters into employment" with the employer.

(i) For purposes of this paragraph (c)(6), the H-1B nonimmigrant is considered to "enter into employment" when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter.

(ii) Even if the H-1B nonimmigrant has not yet "entered into employment" with the employer (as described in paragraph (c)(6)(i) of this section), the employer that has had an LCA certified and an H-1B petition approved for the H-1B nonimmigrant shall pay the nonimmigrant the required wage beginning 30 days after the date the nonimmigrant first is admitted into the U.S. pursuant to the petition, or, if the nonimmigrant is present in the United States on the date of the approval of the petition, beginning 60 days after the date the nonimmigrant becomes eligible to work for the employer. For purposes of this latter requirement, the H-1B nonimmigrant is considered to be eligible to work for the employer upon the date of need set forth on

the approved H-1B petition filed by the employer, or the date of adjustment of the nonimmigrant's status by DHS, whichever is later. Matters such as the worker's obtaining a State license would not be relevant to this determination.

20 C.F.R. § 655.731(c)(7)(i)-(ii)

(7) *Wage obligation(s) for H–1B nonimmigrant in nonproductive status*

(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.*

(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. § 655.740 **What actions are taken on labor condition applications?**

(c) *Truthfulness and adequacy of information.* DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. The burden of proof is on

the employer to establish the truthfulness of the information contained on the labor condition application.

20 C.F.R. § 655.750 **What is the validity period of the labor condition application?**

(b) *Withdrawal of certified labor condition applications.*

(3) An employer shall comply with the "required wage rate" and "prevailing working conditions" statements of its labor condition application required under §§ 655.731 and 655.732 of this part, respectively, even if such application is withdrawn, at any time H–1B nonimmigrants are employed pursuant to the application, unless the application is superseded by a subsequent application which is certified by ETA.

20 C.F.R. § 655.800 **Who will enforce the LCAs and how will they be enforced?**

(a) *Authority of Administrator.* Except as provided in § 655.807, the Administrator shall perform all the Secretary's investigative and enforcement functions under sections 212(n) and

(t) of the INA (8 U.S.C. 1182(n) and (t)) and this subpart.

20 C.F.R. § 655.801 **What protection do employees have from retaliation?**

(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).

(b) It shall be a violation of this section for any employer to engage in the conduct described in paragraph (a) of this section. Such conduct shall be subject to the penalties prescribed by sections 212(n)(2)(C)(ii) or (t)(3)(C)(ii) of the INA and § 655.810(b)(2), i.e., a fine of up to $5,000, disqualification from filing petitions under section 204 or section 214(c) of the INA for at least two years, and such further administrative remedies as the Administrator considers appropriate.

***20 C.F.R. § 655.810* What remedies may be ordered if violations are found?**

(a) 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 to (or with respect to) such nonimmigrant(s).

20 C.F.R. §§ 655.815(c)(1), 815(c)(3) **What are the requirements for the Administrator's determination?**

(c) The Administrator's written determination required by § 655.805 of this part shall:

(1) Set forth the determination of the Administrator and the reason or reasons therefor, and in the case of a finding of violation(s) by an employer, prescribe any remedies, including the amount of any back wages assessed, the amount of any civil money penalties assessed and the reason therefor, and/or any other remedies assessed.

(3) Inform the interested parties that in the absence of a timely request for a hearing, received by the Chief Administrative Law Judge within 15 calendar days of the date of the determination, the determination of the Administrator shall become final and not appealable.

20 C.F.R. § 655.820 **How is a hearing requested?**

(b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s). In such a proceeding, the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent; the Administrator may intervene as a party or appear as amicus curiae at any time in the proceeding, at the Administrator's discretion.

(2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party and the employer shall be the respondent.

20 C.F.R. § 655.850 **Who has custody of the administrative record?**

The official record of every completed administrative hearing procedure provided by subparts H and I of this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge. Upon receipt of a complaint seeking review of the final agency

action in a United States District Court, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court.

Fed. R. Civ. P.
Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 2015.)

Fed R. Civ. P.
Rule 3. Commencing an Action

A civil action is commenced by filing a complaint with the court.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

Fed R. Civ. P.

Rule 13. Counterclaim and Crossclaim

(a) COMPULSORY COUNTERCLAIM.

(1) In General. A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) Exceptions. The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) PERMISSIVE COUNTERCLAIM. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

APPENDIX J

Labor Condition Application for H-1B and H-1B1 Nonimmigrants

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035E
OMB Approval: 1205-0310
Expiration Date: 31 JAN 2012

A. Program Designation
You mut choose one

__X__H-1B _____ H-1B1 Chile

_____ H-1B1 Singapore _____ E-3 Australian

B. Employer's Information

1. Return Fax Number

2. Employer's Full Legal Name

HEADSTRONG INC

3. Employer's Address (Number and Street)

4035 RIDGE TOP STREET
SUITE 300

4. Employer's City State Zip/Postal Code

FAIRFAX VA 22030

5. Employer's Address / EIN Number

54-1253757

6. Employer's Phone Number Extension

(703) 272-6657

C. Rate of Pay

1. Wage Rate (or Rate From) (Required):

$105,000.00

2. Rate (Up To) (Optional):

$0.00

3. Rate is Per:

__X__Year _____ Week _____ Month

_____Hour _____ 2 Weeks

4. Is this position part-time?

_____ Yes ___X___ No

Please Note: Part-time hours worked by the nonimmigrant(s) will be in the range of hours stated on the INS Form(s) I-129

D. Period Of Employment and Occupation Information

1. Begin Date	3/16/2006
2. End Date	3/16/2009
3. Occupational Code	0 3 0
4. Number of H-1B or H-1B1 Nonimmigrants	0 0 1
5. Job Title	Project Manager

E. Information relating to Work Location for the H-1B or H-1B1 Nonimmigrants

1. City: Fairfax — State: VA

2. Prevailing Wage: $92,789.00

3. Wage is Per:

__X__Year _____ Week _____ Month

_____Hour _____ 2 Weeks

4. Wage Source:

_____ SESA

_____ Collective Bargaining Agreement

__X__ Other

5. Year Source Published:
2006

6. Other Wage Source:
Online Wage Library

E. Subsection A Information For Additional or Subsequent Work Location

1. City State

2. Prevailing Wage

3. Wage is Per:

____Year _____ Week _____ Month

_____Hour _____ 2 Weeks

4. Wage Source:

_____ SESA

_____ Collective Bargaining Agreement

_____ Other

5. Year Source Published:

6. Other Wage Source:

F. 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 four labor condition statements summarized below:

(1) Wages: Pay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time. Offer nonimmigrants benefits on the same basis as U.S. workers.

(2) Working Conditions: Provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed.

(3) Strike, Lockout, or Work Stoppage: No strike or lockout in the occupational classification at the place of employment.

(4) Notice: Notice to union or to workers at the place of employment. A copy of this form to H-1B or H-1B1 workers.

I have read and agree to Employer Labor Condition Statements 1, 2, 3, and 4 as set forth in Section E of the Labor Condition Application Cover Pages.

__X__ Yes **____ No**

F-1. Additional Employer Labor Condition Statements - H-1B Employers Only

Please Note: In order for an application regarding H-1B nonimmigrants to be processed, you MUST read Section F-1 - Subsections I and 2 of the Labor Condition Application cover pages under the heading "Additional Employer Labor Condition Statements" and choose one of the 3 alternatives (A, B, or C) listed below in Subsection I. If you mark Alternative B, you MUST read Section F-1 - Subsection 2 of the cover pages under the heading "Additional Employer Labor Condition Statements" and indicate your agreement to all 3 additional statements summarized below in Subsection 2.

1. Subsection 1

Choose ONE of the following 3 alternatives:

A. _X_ Employer is not H-1B dependent and is not a willful violator.

B. ___ Employer is H-1B dependent and/or a willful violator.

C. ___ Employer is H-1B dependent and/or a willful violator BUT will use this application ONLY to support H-1B petitions for exempt nonimmigrants.

2. **Subsection 2**
If Alternative B in Subsection I is marked, the following Additional Labor Condition Statements are applicable:

A. Displacement: Non-displacement of the U.S. workers in employer's work force;

B. Secondary Displacement: Non-displacement of U.S. workers in another employer's work force; and

C. Recruitment and Hiring: Recruitment of U.S. workers and hiring of U.S. worker applicant(s) who are equally or better qualified than the H-1B nonimmigrant(s).

I have read and agree to Additional Labor Condition Statements 2 A, B, and C.

___ Yes ___ No

G. Public Disclosure Information

Public disclosure information will be kept at:

__X__ Employer's principal place of business

_____ Place of employment

H. Declaration of Employer

By signing this form, I, on behalf of the employer, attest that the information and labor condition statements provided are true and accurate; that I have read the sections E and F of the cover pages (Form ET A 9035CP), and that I agree to comply with the Labor Condition Statements as set forth in the cover pages and with the Department of Labor regulations (20 CFR part 655, Subparts H and I). I agree to make this applicaton, supporting documentation, and other records, available to officials of the Department of Labor upon request during any investigation under the Immigration and Nationality Act.

1. First Name of Hiring or Other Designated Official

SHANNON

MI

2. Last Name of Hiring or Other Designated Official

CAHOON

3. Hiring or Other Designated Official Title

DIRECTOR, HUMAN RESOURCES

4. Signature - Do NOT let signature extend beyond the box

5. Date

Making fraudulent representations on this Form can lead to civil or criminal action under 18 U.S.C. 1001, 18 U.S.C. 1546, or other provisions of law.

I. Contact Information

1. Contact First Name MI

SHANNON

2. Contact Last Name

CAHOON

3. Contact Phone Number Extension

(703) 272-6657

J. U.S. Government Agency Use Only

By virtue of my signature below, I hereby acknowledge this application certified for

Date Starting 3/16/2006
and Date Ending 3/16/2009

/s/ John R Beverly, III
Chief, Division of Foreign Labor Certification
Signature and Title of Authorized DOL Official

I-06075-2302075 3/16/2006
ETA Case Number Date

The Department of Labor is not the guarantor of the accuracy, truthfulness, or adequacy of a certified labor condition application.

K. Complaints

Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division, U.S. Department of Labor. Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with: U.S Department of Justice * Office of the Special Counsel * 10th St. and Constitution Ave, NW * Washington, DC * 20530.

FORM CERTIFIED