U.S. Department of Labor

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Issue Date: 17 December 2008

CASE NO. 2008-LCA-00011

In the Matter of:

DONGSHENG HUANG, *an individual*,
Prosecuting Party,

vs.

ULTIMO SOFTWARE SOLUTIONS, INC.,
Respondent.

Appearances:

Dongsheng Huang,
Pro Se

Manpreet Singh Gahra, Esq,
For Ultimo Software Solutions, Inc.

Before: William Dorsey,
Administrative Law Judge

Decision and Order

I. Introduction.

This matter arose from the enforcement by the Administrator of the Wage and Hour Division of the Department of Labor ("Department") of promises[1] the Respondent, Ultimo Software Solutions, Inc., ("Ultimo"), made to the Department in a labor condition application filed to obtain an H-1B visa for the Prosecuting Party, Dongsheng Huang. The H-1B visa program is created by the Immigration and

[1] Those promises arise from required statements embedded in the application, which the regulations sometimes call "attestations." 20 C.F.R. § 655.730(c)(2) (2008). The attestation topics are described in detail at 20 C.F.R. §§ 655.731 to 655.734.

Nationality Act, as amended (INA) at 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b) and 1182(n) (West Supp. 2008).[2]

Labor condition applications and the employer attestations they contain can lead the Departments of Homeland Security and State to approve and issue H-1B visas for aliens to enter the United States as non-immigrants for limited terms of employment in specialty occupations.[3] The Administrator found Ultimo liable to Mr. Huang for unpaid wages in the amount of $11,774.48, without imposing a civil penalty. CX4 at15, 49.[4] Mr. Huang timely requested *de novo* review on February 5, 2008 to contest the amount due to him and to allege that the Respondent unlawfully terminated him in retaliation for bringing the H-1B violations to the Department's attention. 20 C.F.R. § 655.820 (2008). The Department's program standards for labor condition applications and the régime to enforce employers' attestations are found in regulations published at 20 C.F.R. Part 655, subpart I (2008).

The hearing took place on August 5 and August 8, 2008 in San Francisco, California. The Administrator did not participate as a party. Mr. Huang and Lance Jensen, Vice President of Operations for Ultimo, testified. Of Ultimo's 10 exhibits, exhibits 5, 8, and 10 were received into evidence at the beginning of the trial, the balance of them at its close. Tr. at 13, 325. Mr. Huang's (Claimant's) exhibits 1-7 were admitted into evidence. Tr. at 169-170; 325. Mr. Huang also submitted post-hearing evidence on August 18, 2008 that is admitted as CX8.[5] Mr. Huang submitted Proposed Findings of Facts on September 2, 2008; Ultimo submitted its Closing Brief/Proposed Findings of Fact on October 23, 2008. The disputed issues include whether Ultimo:

- improperly denied Mr. Huang salary;
- retaliated against him by terminating his employment and attempting to have his visa revoked for complaining to the Department that he was not being paid; and

[2] The H-1B visa program for temporary employment in the United States of non-immigrants in "specialty occupations" and as "fashion models of distinguished merit and ability" was created in the amendments to the INA by the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978. Congress has amended the H-1B visa program several times since its creation.

[3] Specialty occupations require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or more advanced academic degree in the specific specialty as a minimum requirement for entry into the occupation. 8 U.S.C. § 1184(i)(1). Computer programming is one example of a specialty occupation.

[4] "Tr." refers to the transcript of the hearing. "CX" refers to exhibits of Mr. Huang as the Claimant. "RX" refers to exhibits of the Respondent Ultimo.

[5] Ultimo raised no objection to this post-hearing filing in its closing brief. CX8, which was requested during the course of the hearing, shows the calculations for the damages Mr. Huang claims. Tr. at 83-84, 325-326.

- owes him the value of fringe benefits, and travel expenses.

I find in Mr. Huang's favor. Ultimo failed to pay the required wages and benefits it had committed to pay in its labor condition application for Mr. Huang's H-1B visa; Ultimo's pretextual reasons for terminating him, combined with the close temporal proximity of his termination to the time Ultimo learned that Mr. Huang had complained to the Department, prove that it intentionally retaliated against him in violation of the H-1B whistleblower protection portion of the INA and the Department's regulations. He is entitled to the salary specified in his labor condition application for its full term plus fringe benefits, first because Ultimo failed to pay him until it terminated him on July 12, 2007, and thereafter as a make-whole remedy for its employment discrimination against him as a whistleblower. Ultimo also must correct its misstatements in the papers it filed to obtain Mr. Huang's admission to the United States under the H-1B program, and forward the H-1B extension approval notice from the USCIS to him.

The framework of statutes and regulations that govern labor condition applications first will be reviewed, followed by an exploration of how Ultimo violated obligations it took on when it applied for Mr. Huang's admission to the United States in H-1B status, and finally the remedial actions Ultimo must take will be specified.

II. Statutory And Regulatory Framework.

This section summarizes the steps to apply for an H-1B visa, the promises an employer makes in the papers filed to obtain it, and how those promises are enforced, particularly when whistleblowers complain that employers have shirked their obligations.

A. Visa Applications

Employers may hire non-immigrant professionals temporarily to work in specialty occupations under the INA's H-1B visa program. 8 C.F.R. § 214.2(h)(4) *et seq.*; 20 C.F.R. § 655.700 *et seq.* The employer names the worker as the beneficiary in an H-1B petition it files with the United States Citizenship and Immigration Services component of the Department of Homeland Security ("USCIS"), and pays the applicable fees.[6] 8 U.S.C. § 1182(n); 8 C.F.R. § 214.2(h)(2)(iii). A labor condition

[6] The filings include Form I-129, "Petition for a Nonimmigrant Worker" together with the forms, "H Classification Supplement to Form I-129" and "H-1B Data Collection and Filing Fee Exemption Supplement." The fees for an H-1B petition begin with a base filing fee of $320. 8 C.F.R. § 103.7(b)(1) (listing Form I-129 filing fee). A petition by an employer with 26 or more full-time employees requires a $1,500 fee, while one from an employer with 25 or fewer full-time employees requires a $750 fee. INA § 214(c)(9)(B), 8 U.S.C. § 1184(c)(9)(B). Most employers filing an initial H-1B petition, and H-1B employers filing a petition on behalf of an alien currently employed as an H-

application[7] (LCA) that the Secretary of Labor has certified is a necessary part of a complete H-1B petition to the USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1). That LCA specifies, among other things, the job, its salary, the employment period, and its geographic location. The employer also attests that it will abide by the LCA program's requirements. [8]

The USCIS approves or denies the petition in a written decision. 8 C.F.R. §§ 103.2(a)(8), 214.2(h)(9) & (10). That agency enjoys broad authority; it may revoke a petition it has previously approved, even after it expires. 8 C.F.R. § 214.2(h)(11). The approved H-1B petition is used to obtain a visa from the Department of State that admits the alien professional to work in the United States temporarily, *i.e.*, for a period of up to three years. 8 C.F.R. § 214.2(h)(9)(iii)(A)(1). Before the three-year term expires, the employer may petition to extend the stay in the United States, or a different employer may petition on the alien professional's behalf. 8 C.F.R. § 214.2(h)(2)(i)(D) and (15)(ii)(B). No extension may give an H-1B temporary worker a total period of admission that exceeds six years. 8 U.S.C. § 1184(g)(4); 8 C.F.R. § 214.2(h)(13)(iii)(A). At the end of the six-year period, the alien professional must either seek permanent resident status or depart the United States. 8 C.F.R. § 214.2(h)(13)(iii)(A). The alien may be eligible for a new six-year period of admission as an H-1B non-immigrant by remaining outside the United States for at least one year. *Id.*

B. Attestations in Applications

The H-1B visa program, by design, deprives employers of economic incentives to prefer non-immigrant professional employees, because their wages and benefits must equal those that would be paid to American workers. Amendments to the INA enacted in the American Competitiveness and Workforce Improvement Act of 1998[9] (the Competitiveness Amendments) created some of these disincentives. The employer attests in the LCA that it will pay the H-1B non-immigrant professional the greater of the job's actual wage rate or the prevailing wage rate throughout the entire period of authorized employment, and will pay for non-productive time.[10] 8

1B temporary worker by another employer, also must pay a fraud prevention and detection fee of $500. INA § 214(c)(12)(A) and (C).

[7] The LCA is the Department's Form ETA 9035, which was set out at 65 Fed. Reg. at 80,240 to 80,251 (Dec. 20, 2000); its current version is available on line at www.foreignlaborcert.doleta.gov/pdf/eta9035v50.pdf.

[8] The four attestations on the Huang LCA are found at RX 6 at page 3 of 4, in section F of that form.

[9] Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. 105-277, 112 Stat. 2681.

[10] The Competitiveness Amendments included this statutory requirement, confirming the position the Department had adopted by regulation in late 1994. The regulation, 29 C.F.R. § 655.731(c)(5)(i)

U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(c)(7)(i). The prevailing wage rate is the average wage paid to professionals who are similarly employed in the occupation listed on the LCA, at the location where the H-1B employee will work; ordinarily the employer obtains it by contacting the State Employment Security Agency that has jurisdiction over the geographic area where the H-1B worker will be stationed. 20 C.F.R. § 655.731(a)(2)(iii)(A). If the employer has other workers with "substantially the same duties and responsibilities" as the H-1B worker who earn more than the area's "prevailing wage," their compensation becomes the "actual wage" the H-1B worker must receive. 20 C.F.R. § 655.731(a)(1). Should the employer have no other employees with comparable duties and responsibilities, it is free to pay the H-1B worker more than the area's prevailing wage, which becomes the H-1B worker's "actual wage." *Id.*

Employers violate the INA if they place full-time H-1B workers on "non-productive status due to a decision by the employer (based on factors such as lack of work) or . . . to fail to pay the non-immigrant full-time wages . . . for all such non-productive time." 8 U.S.C. § 1182(n)(2)(C)(vii)(I). This sort of non-productive time often is called "benching." It can occur when a company brings H-1B workers into the United States intending to contract their labor out to other entities, rather than to use the workers' labor directly in its own business. Acting more as an employment broker than as a traditional employer, the employer pays the alien workers nothing until it places them; it then begins to pay them out of money collected from the entities that actually use the workers' professional skills. *See* 65 Fed. Reg. 80,171-80,172 (Dec. 20, 2000). Ultimo engaged in this forbidden benching with Mr. Huang, which is detailed in the findings made in Section III of this decision.

As another condition of an LCA, the employer attests that it offers benefits[11] to its H-1B non-immigrant workers on a par with those offered to U.S. workers it employs in similar jobs. As one example, health insurance plans must be offered "on the same basis and in accordance with the same criteria" that the employer offers to American workers. 8 U.S.C. § 1182(n)(2)(C)(viii); 20 C.F.R. § 655.731(c)(3)(i).

(1995), required that wages begin no later than the first day the H-1B non-immigrant is in the United States, and continue throughout employment, including all periods the worker was non-productive for reasons related to employment, such as for training or for lack of assigned work. *See* the commentary at 65 Fed. Reg. 80,169 (Dec. 20, 2000). Ultimo agreed in the LCA to pay the required wage and to "pay for non-productive time," and to offer "benefits on the same basis as U.S. workers." RX6, pg. 3 of 4, section F(1) (Labor Condition Statements) and H (Declaration of Employer).

[11] This means that "health, life, disability, and other insurance plans" as well as "retirement and savings plans, and cash bonuses and non-cash compensation, such as stock options (whether or not based on performance) must be offered on the same basis, and in accordance with the same criteria, as the employer offers [them] to United States workers." 8 U.S.C. § 1182(n)(2)(C)(viii).

When it signs the application and submits it to the Department, an employer represents that the statements in its LCA are accurate and acknowledges that it will comply with its obligations under the H-1B visa regulations. RX6 at Section H of the LCA; CX3 at 34 (same); 20 C.F.R. § 655.805(d). It re-affirms those obligations when it petitions the USCIS to approve the H-1B visa application. 20 C.F.R. § 655.805(d).

A *bona fide* termination of employment that absolves the company from its obligation to pay the H-1B non-immigrant salary and benefits requires the employer to prove: (1) an actual meeting of the minds between the employer and the non-immigrant that the employment relationship has ended; (2) notice by the employer to the USCIS of that termination, and (3) when appropriate, payment by the employer for the non-immigrant's return home. *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5 & n. 3 (ARB Mar. 30, 2007) (Order of Remand). These elements arise from the INA and its regulations. Prompt notice of the employment's end allows the USCIS to cancel the employer's petition to admit the alien. 20 C.F.R. § 655.731(c)(7)(ii)[12] and 65 Fed. Reg. 80,171 (Dec. 20, 2000) (describing *bona fide* terminations); *see also* 8 C.F.R. 214.2(h)(11) ("If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition [at USCIS]"). An employer becomes liable for the reasonable costs of the H-1B non-immigrant's return transportation if it dismisses the non-immigrant before the period of authorized admission expires. 8 U.S.C. § 1184(c)(5)(A); 8 C.F.R. § 214.2(h)(4)(iii)(E); 20 C.F.R. § 655.731(c)(7)(ii).

C. Enforcement

The Department administers the LCA process and its enforcement provisions. 20 C.F.R. § 655.705(a). The INA authorizes the Department "to determine whether an employer has engaged in misrepresentation or failed to meet a condition of the LCA," and to impose fines and penalties on culpable employers. 20 C.F.R. § 655.700(a)(4).

[12] This regulation of the Secretary of Labor says that: "Payment need not be made if there has been a bona fide termination of the employment relationship. INS regulations require the employer to notify the INS 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))."

D. Whistleblower Protections

Title 20 of the Code of Federal Regulations implements the employment protection provision that the Competitiveness Amendments added to the H-1B visa program at 8 U.S.C. § 1182(n)(2)(C)(iv). Those who employ H-1B workers may not discriminate against them in any manner for complaining internally (to the employer) or externally (to the government) about violations of H-1B program requirements. Under it:

> No employer subject to this subpart . . . shall intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee . . . because the employee has . . . [d]isclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation . . . of the INA or any regulation relating to sections 212(n) or (t) . . . or . . . [c]ooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements . . . of the INA or any regulation relating to sections 212(n) or (t).
>
> 20 C.F.R. § 655.801(a).

The Competitiveness Amendments "essentially codifie[d] current Department of Labor regulations concerning whistleblowers." 144 Cong. Rec. S12752 (Oct. 21, 1998) (remarks of Sen. Abraham);[13] *see also*, 65 Fed. Reg. 80,178 (finding that Congress intended that the Department interpret and apply whistleblower protections for H-1B non-immigrants using the principles it had developed in adjudications under its existing nuclear and environmental whistleblower protection programs implemented with regulations published at 29 C.F.R. part 24).

The pendency of a whistleblower retaliation complaint permits an H-1B worker to remain in the United States during the term of the H-1B visa, and to seek other appropriate employment, even though the worker no longer is employed by

[13] Sen. Abraham was referring in that passage to Departmental whistleblower protection regulations that last had been amended on Feb. 9, 1998. Those "Procedures for the Handling of Discrimination Complaints Under Federal Employee Protection Statutes" address complaints of retaliation made under the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); the Water Pollution Control Act, 33 U.S.C. § 1367; the Toxic Substances Control Act, 15 U.S.C. § 2622; the Solid Waste Disposal Act, 42 U.S.C.§ 6971; the Clean Air Act, 42 U.S.C. § 7622; the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610 and Section 211 (formerly Section 210) of the Energy Reorganization Act of 1974, as amended on October 24, 1992 in the Energy Policy Act of 1992, 42 U.S.C. § 5851. *See*, 63 Fed Reg. 6614; those amended regulations had been codified at 29 C.F.R. part 24.

the employer who petitioned for his or her H-1B status. 8 U.S.C. §§ 1182(n)(2)(C)(v); 1182(t)(3)(C)(v); 20 C.F.R. § 655.801(c); USCIS Memorandum 08-06 (May 30, 2008).[14]

These principles are applied to Mr. Huang's experience at Ultimo in the following section.

III. Factual Background.

A. Employment History

Mr. Huang is a Chinese national who earned a bachelor's degree in computer science at the State University of West Georgia in Carrollton, Georgia in 2001; he returned to work in China. RX1. He responded to an internet advertisement offering work under the H-1B visa program to skilled software professionals. Tr. at 14. After several calls and e-mails, Ultimo's President Subhash Pasumarthy[15] e-mailed a job offer to Mr. Huang on July 12, 2005 at a starting salary of $60,000 per annum.[16] CX1 at pgs. 1-3; Tr. at 14-15. Mr. Huang then provided the required documents for an H-1B visa. Tr. at 17. The LCA Ultimo filed for Mr. Huang was based on an actual wage of $60,000 per year. CX1 at 32 (the LCA at part C on rate of pay); RX6 at pg. 2 of 4 (same). Ultimo's letter to the USCIS of July 27, 2006 that formed part of the H-1B visa application confirmed that annual salary (RX1, letter of 7/27/05, final page), as did the H-1B petition itself. CX3 at 13 (Form I-129 petition to the USCIS, at part 5, para. 6). Ultimo's August 2, 2005 petition for his H-1B visa was approved by the USCIS on December 20, 2005, to admit him to the United States from December 20, 2005 to September 15, 2008. RX1 at 1; CX3 at pg. 2.

Mr. Pasumarthy represented in his e-mail offering the job that Ultimo was an approved contractor for IT services for the state of California and would bid on all government IT projects within the state. CX1 at 2. He also explained that Ultimo placed its workers at several other companies. Mr. Huang understood from his

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[14] Available at www.uscis.gov/files/nativedocuments/AC21_30May08.pdf.

[15] Subhash Pasumarthy's name appears in different forms throughout the record; he signed the Huang job offer letter, the employment agreement and the LCA as Subhash Babu (CX3 at 1; CX3 at 10; RX6 at pg. 4 of the LCA), and when he wrote to the USCIS in July 2007 he gave his name in the return address as Venkata S. Pasumarthy (Tr. at 46 and CX4 at 47). Venkata S. Pasumarthy is also the incorporator of Ultimo Software Solutions, Inc., a California corporation, and its chief executive officer. CX7 at 2, 6.

[16] Three days later, Mr. Pasumarthy sent a job offer letter, which differed slightly in content. CX3 at 1. The Employment Agreement For Professional Services the parties executed is CX7 at 7-10.

written employment agreement[17] that Ultimo would send his résumé out to various client agencies, and if they were interested, Ultimo would contact Mr. Huang to set up an interview, in the hope that he would be hired. Tr. at 24-25.

Mr. Huang arrived in San Francisco from Shanghai, China on March 22, 2006. Tr. at 17. He moved into Ultimo's corporate apartment after a brief meeting with Mr. Pasumarthy that day, and reported on March 23, 2006 for his first day of work. Tr. at 18.

On March 29, 2006, Mr. Pasumarthy's wife, Smita, e-mailed Mr. Huang a sample résumé. CX1 at 16. I infer that she expected Mr. Huang to study it and to use it as a guide to create his own.[18] Tr. at 18. By April 3, 2006, Mr. Huang began training at Ultimo's San Jose office on TIBCO, an enterprise wide computer program, which training was scheduled to last four weeks. Tr. at 19; CX1 at 17-19. After those four weeks (on May 12, 2006), his TIBCO trainer, Jyoti Aryasomayajula, e-mailed Mr. Huang an updated résumé. The evidence about how this résumé differed from its previous versions is unclear. Jyoti Aryasomayajula told Mr. Huang to go through that iteration of his résumé very carefully and to consult with her if he had any doubts about what it should say. Tr. at 22; CX1 at pg. 29. The significance of this e-mail's date will become apparent later.

Various Ultimo employees soon began to market Mr. Huang's programming skills using his résumé. On Tuesday, May 16, 2006, Harjeet Singh, Ultimo's Vice-President of Sales and Marketing, told Jyoti by e-mail that he had a number of TIBCO opportunities, including a six-month assignment that would pay $70 per hour at Allstate Insurance for a candidate "with excellent communication and consultative skills" who was "an extremely energetic self starter" rather than "an order taker," and asked her for two suitable candidates. CX1 at 51. Jyoti quickly returned a message to Harjeet that "we have one person ready to be sent out," attaching Mr. Huang's résumé (he went by the nickname Michael in Ultimo's office), whom she described as "a fresher" suitable for work in "all basic requirements, i.e., no Staffware or Workflow as of now." *Id.* at 56. Harjeet then telephoned Mr. Huang about the Allstate job in TIBCO administration. CX1 at 43. Harjeet's e-mail told Mr. Huang that Ultimo's marketing staff would be forwarding him information about other positions too. *Id.* Harjeet advised him to speak slowly and clearly when he called Ultimo client companies "so that it kills the accent." Tr. at 25; CX1 at 43-44. Harjeet Singh copied his message to Smita Pasumarthy and Jyoti

[17] The Employment Agreement said that the employee will "render services to THIRD PARTY Clients that [Ultimo] submits employee [to] for interviews and contacts." CX3 at 7 [capitalization in the original].

[18] She and her husband held a meeting with Mr. Huang that evening. Tr. at 18. This meeting's content, as well as the details surrounding Mr. Huang's first few weeks of employment at Ultimo, is in dispute. *See text below.*

Aryasomayajula, as he did for e-mails on the next day (Wednesday, May 17) about other potential jobs, *viz.*, one traveling between Oregon and the San Francisco Bay area, and another in Dallas. CX1 at 45 & 47. Harjeet Singh himself worked from India, not out of Ultimo's San Jose headquarters. Tr. at 297, 303.

On May 16, 2006 another of Ultimo's marketing employees, Sachin Kumar Sharma, e-mailed Mr. Huang about a job opportunity at a company in New York City called Kishore that he had sent Mr. Huang's résumé to. Tr. at 24; CX1 at pgs. 34-36. Sharma instructed Mr. Huang to:

> "represent Ultimo Software Solutions Inc. as your employer and me Sachin as your manager. Please inform me as and when you get a call from my client [Kishore] so that I can organize an interview for you ASAP."
>
> CX1 at 35.

No copy of this e-mail went to Smita Pasumarthy, Jyoti Aryasomayajula or anyone else at Ultimo (including Harjeet Singh), which is contrary to Ultimo's testimony that valid marketing efforts would have been copied to one or more of those employees. Tr. at 238-239, 300. Mr. Sharma gave Ultimo's San Jose headquarters as his address on that e-mail, although he too worked from India. Tr. at 303. Mr. Huang received similar e-mails seeking to market his services to clients of Ultimo from May 2006 through August 2006 (of which more later).[19] Tr. at 26. Despite these marketing efforts, no prospective employer chose to interview Mr. Huang in May 2006. Mr. Pasumarthy assured him that marketing takes time and this was normal. Tr. at 27-28.

Not long after he arrived at Ultimo, on either March 28 or 29, 2006, Mr. Huang and Mr. Pasumarthy had a conversation while Lance Jensen and Smita Pasumarthy also were present. Tr. at 18. Mr. Huang claims that Mr. Pasumarthy praised him at the meeting and told him he was going to do well. Tr. at 18. Ultimo, on the other hand, claims that this meeting was convened to discuss Mr. Huang's lack of technical skills and his problems communicating clearly in English. Tr. at 103-04. Mr. Huang had another talk with Mr. Pasumarthy on June 2, 2006, which would have been after Mr. Huang's unsuccessful attempts to compete for TIBCO work at Allstate Insurance, at Kishore in New York City, and at the other employers in the Oregon/San Francisco Bay Area and in Dallas. That conversation escalated into a heated discussion, with Mr. Pasumarthy voicing concerns about Mr. Huang's accented English, his informal dress, and his office etiquette. Tr. at 28-30. Mr. Pasumarthy threatened to send him back to his parents in China, and take him back in six months. Tr. at 28. Mr. Huang told Mr. Pasumarthy that his parents

[19] The details surrounding Ultimo's efforts to market Mr. Huang's skills after he moved to Houston, as well as Mr. Singh's and Mr. Sharma's status with Ultimo then, are in dispute. *See text below.*

were not in China, but visiting his brother who lived in Houston, Texas. Mr. Pasumarthy told him to go to Houston to look for work, and that if he didn't, Mr. Pasumarthy would cancel his H-1B visa. *Id.* On June 4, 2006, Mr. Huang moved to Houston, with Ultimo paying for the air travel. Tr. at 30. Before he left for Houston, he received no salary from Ultimo.[20] After spending time staying with his brother, Mr. Huang then began paying for his own living expenses elsewhere and has remained in Houston.

Mr. Huang never received paying work from Ultimo in Houston, he continued to be "benched." Co-workers of Mr. Huang also complained of being benched without pay.[21] Ultimo always had intended to bench Mr. Huang. The job offer Mr. Pasumarthy originally e-mailed detailed the company's benching policy unapologetically:

> "We will pay you at the start $60k per annum subject to being on a project . . . If you are on the bench between projects we will maintain your pay at the regular rate for two weeks and at half pay for another two weeks. This should encourage you to try to do your best to be on a project."
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> CX1 at 1-2.

And that is exactly what happened. No client hired Mr. Huang, and until the Department's intervention, Ultimo paid him nothing.

Mr. Huang contacted the company frequently after his move to Houston to find out about interviews, but heard little. As of August 2006, he had still not received any work, pay, or benefits from Ultimo. Tr. at 34, 161-162. He broached his concerns with Mr. Pasumarthy in an e-mail of August 8, 2006 to ask how the marketing of his résumé was going. Tr. at 34; CX1 at 102. He asked when he could expect to receive pay and health insurance, and why he was receiving so few interviews. CX1 at 102. Mr. Pasumarthy did not reply.[22] Tr. at 35. Mr. Jensen

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[20] Mr. Jensen testified Mr. Huang wasn't paid for the time he worked at Ultimo from March 23, 2006 until he claimed Mr. Huang was fired on April 13, 2006. Tr. at 161-162. The reason he was not paid appears to have been Ultimo's illegal policy of benching employees, which legal advice later led it to abandon. Tr. at 163-164.

[21] Amir Wasti and another employee both left the Ultimo because they got no work. Tr. at 35. The Administrator's finding in this investigation showed another employee had been benched. RX8, CX4 at 18 (finding as the first of four violations that Ultimo was guilty of the "failure to pay the required wage rate for nonproductive time.")

[22] Mr. Jensen testified that Mr. Pasumarthy filtered his e-mail account to prevent further e-mails from Mr. Huang from being delivered to his computer. The implication was that the e-mails were filtered because Mr. Huang had been fired. I find it more likely that they were filtered to spare Mr. Pasumarthy from recurrent entreaties for the salary and benefits Ultimo owed.

acknowledged that Mr. Huang was probably benched, and was at a loss to explain why Mr. Huang was not paid after he arrived at Ultimo. Tr. at 160-165. Under the Department's H-1B regulations, salaried employees must be paid no less frequently than monthly, while Ultimo's Employment Agreement with Mr. Huang promised he would be paid every two weeks (presumably the same pay cycle non-H-1B American employees had). 20 C.F.R. § 655.731(c)(4); CX3 at 7. Mr. Huang ultimately decided to complain to the government. Tr. at 36-37.

B. Investigation Of The Complaint

After a frustrating search for the correct government office, Mr. Huang made a telephone complaint to the San Jose office of the Department of Labor on October 16, 2006,[23] which he later followed up with a written complaint on April 24, 2007. Tr. at 37, 43, 262. He provided the Department with some of the same e-mails found in exhibit CX1. Tr. at 263-265. Ramon Huaracha, a Wage and Hour Investigator in the Department's San Jose office, was his initial contact at the Department. Mr. Huang expressed concern early on (in October, 2006) that if Ultimo knew he complained to the Department, we would get no work and Ultimo could revoke his H-1B status. CX 4 at 30. Mr. Huaracha told him of the availability of whistleblower protection, but suggested to Mr. Huang that it was safer to wait for an assignment through Ultimo, and then try to transfer from Ultimo to another H-1B employer. *Id.* Mr. Huang agreed to wait longer for an assignment, but when he still got nothing through Ultimo by April, 2007, he asked Mr. Huaracha to move forward. *Id.*, CX4 at 3-5. On June 13, 2007, Mr. Huaracha informed Mr. Huang by letter that there was reasonable cause to investigate Ultimo. Tr. at 44; CX4 at 6.

Adriana Iglesias of the Department investigated the Huang complaint. Tr. at 44. She informed Mr. Huang he was not listed as an H-1B employee of Ultimo,[24] so she asked if she could disclose his name in the course of her investigation. Tr. at 44; CX4 at 20; 20 C.F.R. § 655.800(d) (offering to protect the identity of those who provide information in confidence to the Department about violations of H-1B program standards). Mr. Huang gave Ms. Iglesias permission to reveal his name in an e-mail sent to her on July 10, 2007. Tr. at 44; CX4 at 21. Retaliation is not

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[23] The top of Department's intake form gives the date of the first telephone interview as 10/16/06. CX4 at 1. Mr. Huang also stated in his written retaliation complaint that he first complained to the Department of Labor in October, 2006. CX4 at 30.

[24] Mr. Huang believes this information was omitted because the company was trying to conceal him from the Department of Labor. CX4 at 12. Regardless of whether this was the case, this omission at the very least reflects Ultimo's casual attitude toward their record-keeping obligations under the H-1B program, which were not followed carefully. The Administrator found Ultimo failed to make documents available for inspection at its worksite as 20 C.F.R. § 655.760 requires. RX8. Ultimo never challenged that finding by requesting a hearing.

directly dealt with in the Administrator's amended findings of January 24, 2008, but Ms. Iglesias's narrative report shows she understood Mr. Huang was concerned about it. CX4 at 11.

C. Administrator's Findings and Mr. Huang's Hearing Request

Ms. Iglesias informed Mr. Huang of the investigation's results on November 30, 2007.[25] Tr. at 48-49; CX4 at 14. The Administrator's findings (as amended on January 24, 2008) ordered Ultimo to pay back wages in the amount of $20,540.48 to two H-1B non-immigrants, one of whom was Mr. Huang. RX8. He was to receive $11,744.48 of this amount, for not paying wages from his arrival in the United States on March 22, 2006 until June 4, 2006.[26] CX4 at 11. Net of tax deductions Mr. Huang received $6,531.68. CX4 at 49-50; RX10. Those are the only wages (or any other payments) Ultimo made to him in 2007. CX4 at 50. Mr. Huang requested a hearing to challenge those findings, Ultimo didn't.

In addition to notifying Mr. Huang of the investigation's findings, Ms. Iglesias also told Mr. Huang (incorrectly) that the USCIS revoked his H-1B visa in August 2007.[27] Tr. at 49-50. This was the first Mr. Huang knew of a possible cancellation of his H-1B status. On December 6, 2007, Mr. Huang e-mailed Susana Rincon at the Department of Labor to claim whistleblower protection. CX4 at 23-24. He e-mailed two additional documents explaining his retaliation claim to Ms. Rincon on December 17, 2007. CX4 at 23-33. She acknowledged receiving them that day. CX4 at 29.

Mr. Huang did not sign the Receipt for the Payment of Lost or Denied Wages because he believed Ultimo owed him more money in back wages and benefits. Tr. at 267-71; CX4 at 49 (DOL form WH-58). Ultimo, however, accepted these findings and sent Mr. Huang a check for back wages in December 2007. Tr. at 265-266;

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[25] The Summary of Violations and Remedies annexed to the findings of Jan. 24, 2008 concluded that Ultimo had committed four violations:
(1) failed to pay the required wage rate for unproductive time; (2) failed to post notice of the LCA filing conspicuously at the place the H-1B workers would be employed; (3) failed to make the LCA and other related documents available for public examination at the place of employment; and (4) failed to comply with the provisions of 20 C.F.R. subpart H or I when it failed to obtain LCA's for the geographic areas where the H-1B employees would work. RX8.

[26] A second employee was found to have been benched for a period of two months and was awarded $8,770.00. CX4 at 12. That matter is not before me.

[27] This information proved incorrect. The USCIS revoked Ultimo's petition for the Huang H-1B visa on December 21, 2007. CX4 at 40. The USCIS appears to have rescinded that revocation almost immediately (on December 26, 2007), presumably due to Mr. Huang's whistleblower status. *See,* Mr. Huang's *Motion to Obtain USCIS H-1B Extension Approval Notice*, EX1 through EX4, filed Dec. 8, 2008. Ultimo never replied to that motion.

RX10; CX4 at 49. He cashed Ultimo's check only in February 2008, because Ultimo had reported that amount as income to the IRS, and he needed to file his tax return and pay his taxes.[28] Tr. at 265-266.

To show at trial that the Administrator's findings were incorrect, Mr. Huang requested records from the Department of Labor. When this request initially was denied, he obtained many documents through the Freedom of Information Act instead. Tr. at 51-55; CX4 at 7-9. Mr. Huang disagrees with some of the information he received through the Freedom of Information Act Disclosure Officer of the Wage and Hour Division.[29] In addition, Mr. Huang believes he received false responses to the interrogatories he sent to Ultimo in the course of the litigation at the Office of Administrative Law Judges.[30]

Mr. Huang believes Ultimo gave Ms. Iglesias false documents that it also offered in evidence. He alleges that what appears to be a written warning of deficient performance addressed to him dated March 28, 2006, a letter purporting to terminate him dated April 13, 2006, Ultimo's letter to the USICS requesting revocation of his H-1B visa apparently dated April 13, 2006, and a letter dated May 26, 2006 that seems to order him to vacate the corporate apartment each were created after the Department's investigation began. CX4 42-46; also offered at RX2, RX 3 and RX4; *see* Tr. at 74-79. Only after his name was revealed in the investigation, he said, did Ultimo send any visa revocation request to the USCIS—in July 2007. Tr. at 9; *see* CX4 at 41, 47.

[28] Mr. Huang's W-2 form is CX4 at 50.

[29] Mr. Huang claims the prevailing wage listed on his LCA is lower than appropriate because the LCA should have described his position as a computer software engineer, not a computer programmer. Tr. at 51-55.

[30] He believes the following responses are false:

a. Ultimo claims to have terminated Mr. Huang on April 13, 2006 and claims to have ceased contact with him after this date.
b. When asked why Richmond, Virginia was listed as his work location on the LCA, Ultimo responded that its plan was to place Mr. Huang in the Richmond branch office of the company. Mr. Huang flew to San Jose, CA. Ultimo never sent him to Richmond, VA.
c. Ultimo said it did not send Mr. Huang to Houston.
d. Ultimo claims not to be aware that Claimant's résumé was sent to any agency for employment.
e. Ultimo claimed not to be an H-1B dependent employer, but revealed in a response to another interrogatory that 35 of their 39 employees are H-1B employees.
f. Ultimo claims not to have conducted a phone interview with him.
g. Ultimo said it did not set up an interview for Claimant at Kforce in Houston.
h. Ultimo gave allegedly contradictory reasons for his termination.

IV. Analysis.

Mr. Huang alleges in his closing brief that Ultimo is liable to him for what he calls: Conspiracy/Submitting False Documents; Liability for Wages and Benefits; Discrimination; Failure to Maintain Form I-9s per IRCA mandate; Liability for Living and Travel Expenses; and Discovery Misconduct. Out of his list, the only issues that are relevant to this adjudication are whether Ultimo is liable to him for (1) back wages, fringe benefits and travel expenses, and (2) retaliatory discharge. The other derelictions by Ultimo (with the exception of possible discovery misconduct) are matters the Department may have addressed in its capacity as sovereign, but chose not to prosecute. I need not reach the discovery misconduct allegation to decide this matter.

A. Salary Due for Benching

The Administrator's investigation found that Mr. Huang was improperly benched from the time he arrived in the United States until he was terminated, which was thought to have occurred on June 4, 2006. For the reasons detailed below, I find the Administrator erred in finding Mr. Huang was terminated on June 4, 2006. The liability for benching continued until July 12, 2007; back wage liability for whistleblower discrimination begins then.

B. When Did Ultimo Terminate Mr. Huang?

Mr. Huang asserts Ultimo discriminated against him after the Department disclosed his name while it investigated his complaint in July 2007. Tr. at 46. Two days after Mr. Huang gave permission to reveal his name, Ultimo drafted a letter to the USCIS requesting it to revoke Mr. Huang's H-1B visa, and enclosed what it said was its earlier revocation request of April 13, 2006. Tr. at 45; CX4 at 41-46. It sent them by USPS express mail on July 24, 2007.[31] Tr. at 46; CX4 at 47. Ultimo did not tell Mr. Huang of its action, he learned of it through the Department later. Tr. at 49.

The employer presented a dramatically different but ultimately unconvincing version of Mr. Huang's termination. It claims to have fired Mr. Huang shortly after he arrived in the United States, when he proved an incompetent programmer. Ultimo claims that Mr. Huang was so incompetent when he arrived in San Jose from China that its officers doubted that he was the person they had hired. Tr. at 101-102. It says that although it terminated him on April 13, 2006 and repeatedly

[31] The record includes the mailing label showing Mr. Pasumarthy as the sender (in the return address). Sent on July 24, 2007, the USCIS service center in Vermont received it on July 26, 2007. Ultimo's cover letter was dated twelve days earlier, on July 12, 2007. CX4 at 41.

emphasized that he had been fired, Mr. Huang kept returning to work because he refused to accept the termination.[32] Tr. at 107, 109-10, 247; *see* Respondent's Closing Brief at 4. He also remained in the corporate apartment for six weeks more, through early June, 2006. Tr. at 111-112. Mr. Jensen testified that Mr. Huang was not in contact with him after June 2, 2006. Tr. at 119-120.

None of this makes sense. Ultimo's contention that it just didn't know what to do with Mr. Huang, when he kept coming to the office and living in its apartment for many weeks after he had been fired, beggars belief. For months after the date Ultimo claims it fired him, its officers and employees maintained contact with Mr. Huang and marketed his résumé in May 2006 to Allstate Insurance, Kishore in New York City and to other employers in Oregon and Dallas. Even if I indulge the assumption the managers at Ultimo doubted Mr. Huang's competence, they seem to have been willing to send him out and take a percentage of what they could sell his services for if he were hired anywhere. Ultimo's actions, such as training him in TIBCO throughout April 2006 and having him update his résumé on May 12, 2006, and marketing his services thereafter, don't comport with a termination date of April 13, 2006. Furthermore, Ultimo's exhibits are unconvincing. These matters are discussed in the following sections.

1. *Ultimo's Ongoing Contact with Mr. Huang*

Ultimo continued to have significant contacts with Mr. Huang after April 13, 2006. E-mails from Ultimo employees such as Jyoti Aryasomayajula corroborate his TIBCO training throughout April and into May 2006. Tr. at 211; CX1 at 21 (training materials Jyoti e-mailed to him on April 20, 2006 on how to achieve fault tolerance and load balancing in TIBCO). He resided in the corporate apartment until early in June of 2006, which Mr. Jensen corroborated. Tr. at 111-112. The e-mails from Harjeet Singh and his marketing staff already discussed show joint efforts by Jyoti, Harjeet and others to market Mr. Huang to several Ultimo clients such as Allstate and Kishore in May 2006. It is more probable than not that if Mr. Huang had been terminated in mid-April, the company would neither have continued to train him, instructed him to update his résumé, marketed his skills, nor tolerated his extended stay at a corporate residence, but would have had Mr. Huang removed from its office and apartment as soon as possible. Ultimo's instruction to review and update his résumé in mid-May, when his TIBCO training just should have been completed, and the inception of its marketing efforts then reinforce this conclusion. CX 1 at 29.

The many e-mails and phone calls to Mr. Huang long after April 13, 2006 also persuade me that he was not terminated that day, or in early June 2006. Contrary to Ultimo's evidence, Mr. Huang's phone records show that he was indeed contacted

[32] Ultimo seemingly characterizes Mr. Huang as a contemporary version of Herman Melville's BARTLEBY THE SCRIVENER who, among other quirks, would not stop coming to work after being fired.

by Ultimo employees well after April 13. Jyoti Aryasomayajula, Mr. Huang's TIBCO trainer, placed a three-minute call to Mr. Huang on December 11, 2006. CX2 at 64; *see* CX2 at 120. She called to set up a technical interview with him via telephone. Tr. at 41-42; 213; CX at 120. At the agreed time, Jyoti called again on December 13, 2006. CX2 at 120. The technical interview took twelve minutes. CX2 at 64.

Besides the calls from Jyoti, Mr. Huang also spoke with Mr. Jensen. Tr. at 136. Mr. Jensen claimed he reminded Mr. Huang in December 2006 that he had been fired. *Id.* I doubt this, because I accept Mr. Huang's version of his four minute conversation with Mr. Jensen on April 17, 2007, in which he was told that if he found a project to work on through Ultimo, an acceptable rate would be $55 per hour. CX2 at 110; 121, final entry.

Ultimo's explanation for continuing to train Mr. Huang and continuing to contact him was that they did not properly notify their staff that Mr. Huang was terminated. As a new business with little experience, no uniform system of termination was in place. Tr. at 120. But Ultimo's San Jose office was very small. It had a census of only 65 employees in total[33] and even fewer locally, as most did not work in its San Jose headquarters, but for its clients elsewhere. It is likely that news of a firing would travel quickly throughout so small an office. I also find it improbable that Jyoti Aryasomayajula would not have been among the first to know if Mr. Huang were let go; she was one of the handful of people who were involved in his skills assessment and training, was not dealing with a large number of trainees in the San Jose office and, in Ultimo's evidence, had been assigned the task of salvaging him as an employee. Tr. at 102.

2. *Ultimo's Continued Marketing of Mr. Huang's Résumé*

Ultimo continued to market Mr. Huang's résumé long after the crucial dates of April 13, 2006 and June 4, 2006. Mr. Jensen testified that to the best of his knowledge, there was no activity on Ultimo's part to market Mr. Huang for work at any time. Tr. at 155. This is consistent with the answer Ultimo gave to an interrogatory, that it was "not aware of any instance in which Mr. Huang's résumé was forwarded to any agency for [any] employment purpose." CX8 at 7-8. The e-mails already discussed prove otherwise: Ultimo and its marketing employees were flogging Mr. Huang's résumé to outside employers while he resided in Ultimo's San Jose corporate apartment in May 2006. This marketing also is inconsistent with a request to vacate the corporate apartment Ultimo claims to have served on Mr. Huang on May 26, 2006. CX4 at 46. The evidence about marketing efforts after he left for Houston will be evaluated next, followed by the reasons for rejecting Ultimo's explanation that the efforts did not have their source at Ultimo.

[33] The job offer e-mail from Mr. Pasumarthy in 2005 described Ultimo as "a 40 member company." CX1 at 2. In 2005 it had 39 employees in total, of whom 35 were H-1B workers; by 2006 it had 65 employees, of whom 53 were H-1B workers. Tr. at 149-150; CX5 at 14 (answers to interrogatories).

In Houston, Mr. Huang received a call about an interview from Dan Laury of the company KForce on June 6, 2006, that was seeking to place Mr. Huang as an employee of Ultimo in a job at the BP office in Houston. Tr. at 30. On June 7, 2006, Dan Laury drove Mr. Huang to the interview. Tr. at 31; CX7 at 8.

Mr. Huang received an email about another interview for a job at AG Edwards that would have been in St. Louis, MO, this time from Harjeet Singh. Tr. at 31; CX1 at 78-83. Mr. Huang contacted Mr. Pasumarthy about these two interviews on June 22, 2006. CX1 at 84.

In late July 2006, Mr. Huang received a call from Ted Weigert of ComNet Solutions Inc. seeking to send Mr. Huang on a third interview. Tr. at 32; CX1 85-101. Mr. Weigert said he received Mr. Huang's résumé through Harjeet Singh. CX1 at 92. Mr. Huang told Weigert that "I'm still with ultimosoft." *Id.* Harjeet Singh e-mailed Weigert on July 31, 2006 that Mr. Huang (again using the nickname Michael) "is all set for the same [*viz.*, the interview]" CX1 at 98. That interview with Susan Jolly of TMobile on August 3, 2006 also turned out to be unsuccessful. *Id.*

Mr. Jensen recognized there were "some errors" in Ultimo's marketing. Tr. at 126. I accept Mr. Huang's version of events.

It is true that Ultimo had no e-mail server of its own, its employees used free Yahoo accounts, which Ultimo didn't control. Tr. at 133-135. It nonetheless is impossible to reconcile Ultimo's claim that it didn't market Mr. Huang's services with its e-mail records. Ultimo's main explanation for this continued marketing is its contention that Harjeet Singh no longer worked for Ultimo then—he was continuing to market Ultimo employees for his own account, against Ultimo's interests. Tr. at 120. The evidence regarding when Harjeet Singh may have been terminated for poaching Ultimo H-1B employees is unclear. Mr. Jensen claimed that Mr. Singh was terminated in May 2006. Tr. at 297. The evidence offered to prove this termination date was testimony by Mr. Jensen, and his assertion that Mr. Singh no longer sent carbon copies of his e-mails to Ultimo after that month.[34] Tr. at 297-98. But Sachin Sharma's attempt to place Mr. Huang at Kishore is evidenced in e-mails he copied to no one, and I have no doubt this was an authorized placement attempt. See CX 1 at 34-36. Harjeet Singh was still using his Ultimo-associated Yahoo account in his June 7, 2006 e-mail to Mr. Huang. CX1 at 78. These communications certainly appear to reflect efforts by Ultimo to market Mr. Huang's skills to AG Edwards, efforts entirely consistent with what Ultimo had described in the Employment Agreement Mr. Huang signed. *See*, the language from it quoted at fn. 17, *above*. I do not find that placement effort unauthorized by Ultimo.

[34] According to Mr. Jensen, Mr. Singh was required to "cc" the company for tracking purposes. Tr. at 301. Yet he admitted that not all employees were required to do this. Tr. at 302.

Even if Ultimo terminated Harjeet Singh in May 2006 and he continued to use his company-associated e-mail account, Ultimo still failed to provide any evidence that Mr. Huang had reason to believe Mr. Singh was no longer marketing his services to employers on Ultimo's behalf. This would validate Mr. Huang's belief that Ultimo still employed him after April (and June) of 2006 as a reasonable one. In an e-mail dated July 30, 2006 to Ted Weigert for the TMobile position that Mr. Huang had learned about through Harjeet Singh, Mr. Huang wrote that he was employed with Ultimo. CX1 at 92. He had no incentive to try to preserve a payment to Ultimo if TMobile hired him if he no longer worked there.

According to Ultimo, if Harjeet Singh had still been its employee when he sent Mr. Huang on interviews he arranged in Houston, non-compete and non-disclosure agreements would be in Ultimo's files for the three companies that were trying to place Mr. Huang on Ultimo's behalf at BP, AG Edwards and TMobile. Ultimo doesn't have them. Tr. at 131. Ultimo also would have "prepped" Mr. Huang for the interviews. Tr. at 299-300. None of this persuades me that Mr. Huang was not an Ultimo employee after April 13, 2006. Ultimo's explanation for the muddled way it handled Mr. Huang's termination is that there was confusion at Ultimo's headquarters about the termination. Tr. at 158. If Ultimo was unsure who its employees were, there is reason to doubt Mr. Jensen's certitude that non-compete and non-disclosure agreements would have been on file for the companies where Mr. Huang interviewed, and that formal preparation would have been offered before those interviews. Ultimo did a poor job of following its internal policies and in its record-keeping.

3. *Ultimo's Exhibits About a Termination on April 13, 2006 Are Not Credible*

The documents Ultimo offered as proof of an April 13 termination date are, to put it charitably, suspicious. The first dispute revolves around whether a warning letter supposedly addressed to Mr. Huang about deficient performance, dated March 28, 2006, ever was presented to him. CX 4, 43-44. Ultimo claimed that on March 23, 2006 (his first day at work) it conducted a technical assessment, which determined that Mr. Huang lacked basic technical programming and communication skills. It said company managers doubted it was Mr. Huang that they had interviewed over the phone from China. Ultimo's Closing Brief at 4. It also claimed that in a follow-up assessment that took place a few days later (on March 28, 2006), Mr. Huang demonstrated no improvement in these skills. When its President, Mr. Pasumarthy, handed Mr. Huang a written warning of deficient performance on March 28, 2006, it said Mr. Huang "refused to accept and acknowledge receipt of the notice." Respondent's Closing Brief at 4. Mr. Huang did not sign this notice, for the signature line for receipt bears the notation "refused to

sign." CX4 at 43-44. Mr. Huang contended that this writing never was presented to him. Tr. at 76.

I disbelieve Ultimo's evidence about the March 28 warning. It is unlikely that the company could have expected Mr. Huang—or anyone—to become familiar with basic IT concepts in a few days. If, as they say, Ultimo's managers believed at their initial assessment that Mr. Huang was not the man they had hired, they would have terminated him by March 28, 2006, they wouldn't expect him to miraculously improve basic skills (knowledge of Java programming concepts, and of the software development life cycle)[35] in the 14 days Ultimo supposedly gave him to improve his deficient performance. Furthermore, throughout the testimony it appears that Mr. Huang took his job seriously and was eager to perform all duties asked of him. I consider it likely that Mr. Huang would have acknowledged this warning if he had received it. If I accepted Ultimo's version of what happened, it is unfathomable that a new employee residing in Ultimo's corporate apartment who appeared to be neither technically competent nor the person Ultimo had hired, who then refused a letter warning him about his poor performance, would not have been fired for insubordination on the spot.

As with the warning, Mr. Huang also testified that he never received a copy of the April 13, 2006 termination letter until the Department of Labor sent it to him in response to his FOIA request. Tr. at 75-78. This letter also has the words "refused to sign" in the blank where his signature would have gone. CX4 at 45. I don't believe this letter ever was presented to Mr. Huang either.

The third questionable letter that Ultimo entered into evidence is the letter Ultimo claims to have sent to the USCIS shortly after its alleged termination of Mr. Huang on April 13, 2006. This letter's very text gives good reason to doubt that Ultimo fired Mr. Huang in April 2006. It purports to request the revocation of Mr. Huang's H-1B visa. CX4 at 42. But it says Mr. Huang was terminated because he did not report to work, or was no longer in contact with Ultimo, and it did not know where he was, or even if he still was in the United States. CX4 at 42. Those assertions contradict Ultimo's evidence that after firing Mr. Huang he nonetheless regularly showed up at its office to be trained and continued to reside in its corporate apartment. It would be nonsensical (as well as untrue) to tell the USCIS that Mr. Huang never had reported to work, and Ultimo didn't know where he was.

What makes even less sense is Ultimo's explanation for the letter's text: it claims it is a form letter sent to USCIS for all its H-1B terminations. Tr. at 116, 154. I find it unlikely that each of Ultimo's terminations of H-1B employees occurred because the worker failed to appear for work and Ultimo didn't know where they were. This is one more example of Ultimo's causal attitude towards the truth in its dealings with the federal government—in this case with the USICS.

[35] *Cf.,* Tr. at 102 (testimony of Mr. Jensen).

Another reason the document is suspicious is the evidence that the USCIS never received this April 13, 2006 visa termination request. Mr. Jensen testified that he made an inquiry to the USCIS but they never found this April letter. Tr. at 117. Ultimo asserted the letter must have been lost in the mail. Tr. at 114; 167-169. Ultimo knew how to track items it sent to the government because it sent Mr. Huang's application materials to the USCIS that way. Tr. at 168. This letter was important enough (because it would terminate its liability for salary and benefits under the H-1B program) that the Ultimo likely would have used a similar form of tracking or sent it by certified mail, for receipt verification. At the very least, Ultimo would have followed up with the USCIS to confirm receipt of the termination request. In view of all the facts, it is more likely than not that Ultimo sent the USICS no termination letter about Mr. Huang in April 2006. It only sent a letter in July of 2007, after it learned that Mr. Huang was the individual who had filed a complaint about it with the Department of Labor.

4. *The Return Ticket to China*

The only significant documentary evidence in Ultimo's favor revolves around the return air travel ticket to China it claims to have purchased for Mr. Huang around the time it says it fired him. Mr. Jensen testified that the ticket was cancelled after Mr. Huang refused to accept it, which Mr. Huang denies. Tr. at 112, 218.

Ultimo offered two pieces of evidence, one a letter dated September 12, 2007 from a travel agent, and the other is some kind of travel agency receipt called a "saber record." In the letter, a manager at Sunnydale Travel, Inc. wrote that a ticket to Shanghai was issued for Mr. Huang on June 2, 2006 and that it was purchased and later cancelled by Ultimo. RX7. The letter doesn't explain why the ticket was cancelled; the travel agent would have no way of knowing if the ticket was ever offered to Mr. Huang. Indeed, by June 4, 2006 Mr. Huang left San Jose, not for China, but for his brother's home in Houston, Texas, travel that Ultimo paid for. Tr. at 30. That domestic travel likely would have been less costly than a ticket to China. Furthermore, a ticket date of early June 2006 is quite a long time after the supposed termination of April 13, 2006.

Regarding the saber record (which I take to be a reservation system some airlines use), Ultimo offered nothing to explain this document in testimony or its brief. It is difficult to understand what this cryptic print-out represents. RX7. Mr. Huang's name is in the record, along with a description of a one-way flight from San Francisco to China. *Id.* At most it appears there might have been a reservation for a ticket, but the dates are unclear. Some places on the record say June 2, 2006, while others say June 3 or June 5, 2006. In other places, the date on the saber record is March 30, 2007, which would not appear to be related to the date the travel agency

ran a report on the transaction, given the date of the travel agency's cover letter, September 12, 2007. *Id.* Because Ultimo did not adequately explain the data in this printout, I do not find it persuasive proof that a return ticket to China was actually purchased and delivered to Mr. Huang. Even if there was a ticket, the rest of Ultimo's story is so unbelievable for the reasons already set out above that I doubt Ultimo offered it to Mr. Huang in the manner it claims.

5. Ultimo Did Not Terminate Mr. Huang on April 13, 2006

There are too many discrepancies in Ultimo's arguments for me to believe that it terminated Mr. Huang on April 13, 2006. It does not make sense that the company would continue to permit Mr. Huang to come to its office (much less continue to train him), continue to let him stay in the corporate apartment, and continue to market his services to potential employers if he was no longer its employee. It seems they would have fired him earlier than April 13, 2006 if it were true that Ultimo really did not believe Mr. Huang was the person they interviewed, or if he had refused to accept a written performance warning, both things Ultimo claims occurred at least two weeks before April 13.

Furthermore, Ultimo's reasons for the continued contact, training and marketing leave me unconvinced. It cannot even keep its story straight regarding the date of termination, because it eventually changed its alleged termination date from April 13 to June 4, 2006. Respondent's Closing Brief/Proposed Findings of Fact at 8. For all of these reasons, I find Mr. Huang's evidence is more credible. Ultimo never terminated Mr. Huang on April 13, 2006. He was terminated (although Ultimo didn't tell him) on July 12, 2007, when it wrote to USCIS seeking to cancel his H-1B visa.

The H1-B portion of the INA and the implementing regulations that require the employer to pay for return travel expenses to the country of origin when an H-1B worker is terminated would not have come into play in June 2006 (as Ultimo argued) but in July, 2007. 8 U.S.C. § 1184(c)(5)(A); 8 C.F.R. § 214.2(h)(4)(iii)(E); and 20 C.F.R. 655.731(c)(7)(ii). No return travel was offered then. The failure to have informed him of the termination in July 2007, and the failure to have offered him return transportation to Shanghai, China each independently justify a finding that no *bona fide* termination took place in July 2007. Ultimo therefore remained liable to Mr. Huang for ongoing salary and benefits payments until the H-1B visa it obtained for him expired on September 15, 2008. *Mao v. Nasser Engineering & Computing Services*, ARB No. 06-121, ALJ No. 2005-LCA-36, slip op. at 9 to 11 (ARB Nov. 26, 2008); *Amtel Group of Florida, Inc. v. Yongmahapakorn (Rung)*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 3 & n.4 (ARB Jan. 29, 2008) (Order Denying Reconsideration); *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5-6 (ARB Mar. 30, 2007) (Order of Remand).

The totality of the evidence demonstrates that an intentionally discriminatory retaliatory termination occurred on July 12, 2007. The most accurate portrayal of events requires that from July 12, 2007 forward the case be analyzed as a whistleblower protection claim, which is done in section IV (E) of this decision. To do otherwise would fail to recognize the wrongdoing the retaliation embodies. The remedies under either theory would be essentially the same, however.

C. Money Due for Unpaid Health Insurance

I reject the testimony that Mr. Huang never received health insurance because he never worked the 90 days needed to qualify for it. Tr. at 129. First, no such limitation is contained in the job offer e-mail of July 12, 2005 or the job offer letter of July 15, 2005 that described health insurance as part of the remuneration. CX1 at 2 (offering "fully paid medical insurance from Blue Cross); CX3 at 1 (stating no limitation on the offer that "[m]edical insurance will be provided by Ultimo . . ."). Nor is it found in the formal Employment Agreement. CX3 at 8 ("This offer includes . . . major medical, hospitalization and prescription drugs. [Ultimo] will pay 100% of your personal monthly medical premium.") No other writing that shows a 90-day waiting period was even-handedly imposed on all similar employees was submitted. Ultimo's own description on its website of the employee benefits it offers describes no waiting time. CX7 at 15 (printout in evidence of the website page as of July 22, 2008). Second, for the reasons already described, I do not find that Mr. Huang was fired within the first 90 days of his employment.

Health care encompasses the dental and vision benefits Ultimo also offers to its employees. The description of employee benefits on its web site says that "[a]part from Health Insurance, Dental and Vision Insurance is also provided at company's cost." CX7 at 15 (description of Group Health Plan). Mr. Huang's evidence shows that the monthly premium for medical insurance at Blue Cross (now renamed Anthem) is $144. CX8 at 18. The monthly dental premium is $39, and the Vision premium $13. These total $196 monthly.

To avoid repetition, the amount due to him for this package of health insurance benefits as a benched employee will be dealt with in the section that follows on damages Mr. Huang is due for whistleblowing. The liability is identical on both bases.

D. Summary on Benching

For the period from his arrival at work on March 23, 2006 to July 12, 2007, Mr. Huang is entitled to recover his annual salary and benefits for forbidden benching by Ultimo that violated 8 U.S.C. § 1182(n)(2)(C)(vii)(I), 20 C.F.R. § 655.731(c)(7)(i) and the attestation made in its LCA for Mr. Huang.

E. Ultimo Unlawfully Retaliated Against Mr. Huang

H-1B retaliation claims are analyzed in the same manner as other types of whistleblower claims administered by the Department of Labor. *See* 65 Fed. Reg. 80,178 (Dec. 20, 2000) *see also, Toia v. Gardner Family Care Corp.*, 2007-LCA-00006 at p. 21 (ALJ Apr. 25, 2008). First, a complainant must prove a prima facie case of unlawful discrimination by a preponderance of the evidence. To do this, the employee must show "that he engaged in a protected activity, that his employer knew about this activity, and that his employer took adverse action against him because of his protected activity." *Kersten v. LaGard, Inc.,* ARB No. 06-111, ALJ No. 2005-LCA-017, at 9 (ARB Oct. 17, 2008); *U.S. DOL, WHD v. Kutty*, ARB No. 03-022, ALJ Nos. 2001-LCA-010 through 2001-LCA-025, slip op. at 13 (ARB May 31, 2005).

1. *Protected Activity*

H-1B employees are protected from retaliation when they engage in the protected activity of informing their employer or any other person of the employer's suspected violation of any regulation relating to the INA. 20 C.F.R. § 655.801(a). They are also protected from retaliation for cooperating in investigations concerning the employer's compliance with INA requirements. *Id.* Mr. Huang engaged in protected activity when he notified Mr. Pasumarthy in an e-mail on August 8, 2006 that he was not receiving work or pay. CX1 at 102. He also engaged in protected activity when he made the telephone complaints to the Department in October 2006 and the written complaint in April 2007. CX4 at 1-2. Ultimo knew about these protected activities because Ms. Iglesias disclosed Mr. Huang's name to Ultimo shortly after she received his assent.

2. *Adverse Action*

This element of the retaliation claim is proven by the letter Ultimo sent to the USCIS seeking the revocation of Mr. Huang's H-1B visa almost immediately after it learned that Mr. Huang's complaint to the Department initiated the investigation of Ultimo. That letter also constituted the unilateral termination of Mr. Huang's employment.

3. *Causation*

Direct evidence of an employer's mental processes is so rare that most findings on whether intentional retaliation occurred depend on circumstantial evidence. *USPS Bd. of Governors v. Aikens,* 460 U.S. 711, 716 (1983). Without that direct evidence, timing or other factors may provide a basis to infer intentional discrimination.

This element of Mr. Huang's claim is proven by the date Ultimo first sent a letter to the USCIS requesting the termination of his H-1B visa—July 12, 2007. Ultimo argued in its Closing Brief/Proposed Findings of Fact that its request that the USCIS terminate Mr. Huang's visa could not have resulted from learning his name in the investigation, because a visa revocation request addressed to the USCIS already was present in Mr. Huang's file when Ms. Iglesias told Ultimo that Mr. Huang was the complainant. Respondent's Closing Brief/Proposed Findings of Fact at 14. Its brief asserts:

> A copy of this letter was also provided to [the Department's] WHD investigator immediately by Mr. Jensen when he was made aware of the fact that Mr. Huang was the complainant and WHD was specifically interested in investigating his employment with Ultimo. Mr. Jensen testified that Ms. Iglesias was present in his office when this disclosure was made and he in her presence went across the room pulled out Mr. Huang's file from the cabinet and provided it to her for inspection.
>
> Respondent's Closing Brief/Proposed Findings of Fact at 14.

Despite having the trial transcript available, Ultimo did not cite to Mr. Jensen's testimony, and so far as I can tell, Mr. Jensen never testified exactly that way. In response to a question from Ultimo's lawyer, Mr. Jensen testified more generally that after Ms. Iglesias named Mr. Huang as the complainant, "I went down to the end of the hall, grabbed his file, pulled it out, gave her copies of the documents you've shown me today." Tr. at 117-118. The April 13, 2006 letter was something Mr. Jensen had identified earlier in his testimony as RX3. Tr. at 108.

To find that the letter seeking the revocation of Mr. Huang's H-1B visa was in the file before Ultimo learned that Mr. Huang was the complainant, I would have to accept Mr. Jensen's testimony, which I am unwilling to do. The USCIS had no such letter. There is no corroboration in Ms. Iglesias' investigation materials that the April 13, 2006 letter to the USCIS was in Ultimo's file on any particular date. Ultimo provided its letter to the Department some time before the investigation was closed, for it is cataloged among the papers the Department gave Mr. Huang in its response to his Freedom of Information Act request. CX4 at 7. But the Administrator found Ultimo violated program regulations by failing to make the LCA and associated papers available for pubic examination, findings Ultimo never challenged. RX8 (Summary of Violations). For the reasons already stated, I do not believe that Mr. Huang was fired on April 13, 2006 or that any request to the USCIS to revoke his H-1B visa went out on April 13, 2006.

It bears repeating that Mr. Huang agreed that Ms. Iglesias could disclose his name to Ultimo on July 10, 2007 (Tr. at 44); Ultimo's revocation request to the

USCIS is dated July 12, 2007 (CX4 at 41) although it was not mailed to the USCIS service center in Vermont until July 24, 2007, where it was delivered on July 26, 2007. *Id.* The temporal proximity of the date that Ultimo learned Mr. Huang was the employee who filed the complaint with the Department of Labor, to the date that Ultimo drafted the only visa termination request it ever sent to the USCIS leads me to infer a causal relationship between and Mr. Huang's participation in a protected activity and his termination.

The idea that it was Ms. Iglesias who suggested that Ultimo file another copy of the April 13, 2006 termination letter with the USCIS, because it had no such letter on file, doesn't help Ultimo. She apparently had believed much of Ultimo's version of events. But there had been no termination on April 13, 2006 (or in early June 2006 either).

4. *Pretext*

After an ALJ determines that the complainant's protected activity contributed to the employer's adverse action, the employer then has the burden to articulate a legitimate, non-discriminatory reason for the adverse action, *i.e.,* a reason it would have taken the action in the absence of the protected activity. *Brune v. Horizon Air Indus., Inc.,* ARB No. 04-037, AJL No. 2002-AIR-00008, slip op. at 13-14 (2006); *Toia*, 2007-LCA-00006 at 22. Ultimo's proffered non-discriminatory reason for terminating Mr. Huang was that Mr. Huang was not a competent software worker who had the technical skills and the ability to speak clearly in English they believed he possessed when they hired him.

The worker must prove by a preponderance of the evidence that the reason(s) proffered for the adverse action were not true, but a pretext for discrimination. *US DOL, Administrator, Wage and Hour Div. v. Kutty*, ARB No. 03-022, ALJ Nos. 2001-LCA-10 to 25, slip op. at 14 (ARB May 31, 2005).

Mr. Huang's supposed lack of skills is a pretext for the discrimination because Ultimo continued to try to place him as a programmer after it says it fired him. Ultimo would not continue to market an individual who it honestly regarded as entirely unsuited to work for its clients. Nor would it market an individual who, if hired, would not generate some income for Ultimo.

Creating:

- a letter warning Mr. Huang of deficient performance seemingly dated March 28, 2006 (CX4 at 43),

- a termination letter purportedly dated April 13, 2006 (CX4 at 45) ,

- a letter supposedly sent to the USCIS on April 13, 2006 seeking the revocation of Mr. Huang's H-1B visa (CX4 at 42) , and

- a letter dated May 26, 2006 purporting to require Mr. Huang to vacate the corporate apartment (CX4 at 46),

after the Department's investigation began each lead me to believe that Ultimo's true reason for requesting a termination of Mr. Huang's visa on July 12, 2007 was invidious retaliation. *Cf. Reeves v. Sanderson Plumbing*, 530 U.S. 133, 147 (2000) (permitting the fact finder to infer discrimination when the employer offers a false explanation for its adverse employment action).

F. Remedies

Workers who suffer employment discrimination in violation of INA provisions are entitled to reinstatement and back wages. 20 C.F.R. § 655.810(a), (e)(2). Reinstatement is the remedy normally granted to whistleblowers. It both vindicates the rights of the worker who engaged in protected activity, and illustrates in a concrete way to other employees, through returning the employee to the jobsite, that whistleblower protection statutes offer real and effective remedies. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169, ALJ No. 1990-ERA-30, slip op. at 8 (ARB Feb. 9, 2001) (citing *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1306 (11th Cir. 1982)), *aff'd sub nom. Georgia Power Co. v. United States Dep't of Labor*, 52 Fed. Appx. 490, 2002 WL 31556530 (table) (11th Cir. Sept. 30, 2002).

1. *No Reinstatement is Possible*

Reinstatement is not a meaningful option here. Ultimo never actually had work for Mr. Huang, it benched him in violation of the INA from the day he reported for work (March 23, 2006), until it terminated him in retaliation for complaining to the Department on July 12, 2007. Ultimo had found no work for him with another company, and neither had Mr. Huang obtained work through his own efforts. From his termination on July 12, 2007 to the date the H-1B visa expired on September 15, 2008, Mr. Huang is entitled to receive as back pay the salary and benefits promised in the LCA that Ultimo filed as part of the H-1B petition for Mr. Huang. Were it not for the retaliatory termination, he would have continued in Ultimo's employment through that time (although he was benched).

2. *Salary Rate*

The wage stated in the LCA Ultimo filed sets what Mr. Huang is due. That LCA gives a job title of Programmer Analyst (Occupational Code 030) at an annual salary of $60,000. RX6 at 4; CX3 at 32 (same). "If the employee works in an

occupation other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working." 20 C.F.R. § 655.731(c)(8). *Toia*, 2007-LCA-00006 at 18. The Department does not enforce private contractual agreements, such as the terms, or subsequent change in terms, of an offer letter. *Kersten v. LaGard, Inc.,* ARB No. 06-111, ALJ No. 2005-LCA-017, at 9 (ARB Oct. 17, 2008). Those claims may be adjudicated in general jurisdiction trial courts.

Ms. Iglesias determined in her investigation that the annual salary for the position of computer programmer was $57,762 per year (CX4 at 48), but Mr. Huang believes the position of computer software engineer is the proper job description, one that would produce a higher wage. It would be impossible to choose any other job title than computer programmer, when Mr. Huang never actually worked at any job through Ultimo. He trained and sought work; the evidence is too vague about the duties of jobs he was sent to compete for. But it is unnecessary to determine whether he was capable of performing more skilled positions than those of a computer programmer. Even if Mr. Huang was, in fact, trained as a computer software engineer in TIBCO, the occupation on his LCA still determines the wage. The amount due to him is based on the salary amount specified in the LCA: $60,000 per year.

Ultimo offered no proof that Mr. Huang had other earnings, in an effort to reduce its liability for back salary. Mitigation of damages is an affirmative defense, on which the employer bears the burden to prove (1) that there were suitable positions available that the worker could have discovered, and (2) that he failed to use reasonable care and diligence in seeking them out. *Jackson v. Shell Oil Co.,* 702 F.2d 197, 201-02 (9th Cir.1983). Not only did Ultimo fail to offer the necessary proof, Mr. Huang's evidence showed that he interviewed for work in Houston. The issue is less important here than it would be in other cases, for Ultimo remains liable for salary and benefits on the alternative ground of failing to prove a *bona fide* termination of Mr. Huang.

3. *Health Insurance Benefits*

As an H-1B employee Mr. Huang was entitled to the same benefits that anyone else at Ultimo in a comparable position received. *See* 20 C.F.R. § 655.732(a). An attestation about benefits is part of the LCA application.[36] His damages include what he would have to pay to replace corporate health insurance benefits with an individual policy, including dental and vision coverage because Ultimo offered those too. The July 15, 2005 job offer letter states that "medical insurance will be

[36] The employer attests in Section F of the form that the nonimmigrant will be offered benefits and eligibility for benefits on the same basis, and in accordance with the same criteria, as offered to U.S. Workers. *See* 20 C.F.R. § 655.731.

provided by Ultimo Software Solutions, Inc." CX3 at 1. Mr. Huang had no actual out of pocket costs for medical care while Ultimo left him uninsured. In his post-trial exhibit CX8, Mr. Huang showed that health, dental and vision insurance would have cost $196 per month if he had paid for it. Ultimo is liable for that amount for the entirety of his H-1B visa eligibility from March 23, 2007 through September 15, 2008 (first for having benched him until July 12, 2007, then as whistleblower damages until the H-1B visa expired on September 15, 2008). This comes to 2 year 5 months and 24 days, which rounds for practical purposes to 30 months. The principal amount due to him totals $5,880.00.

4. 401(k) Contributions

Mr. Huang is also entitled to the $2,000 annual 401(k) contribution Ultimo makes to employees after they complete one year of service. CX7 at 15 (description of 401(k) Plan). This would be $2,000 for the period from March 23, 2007 to March 23, 2008 and $1,000 for the period of just short of six months (from March 24, 2008 to September 15, 2008), for a total of $3,000.

5. *Reimbursement for Travel and Living Expenses; Litigation Costs*

The interviews Mr. Huang attended while in Houston for jobs at BP, AG Edwards and TMobile through Ultimo corroborate his testimony that Ultimo sent him to Houston. Mr. Huang acknowledged that Ultimo paid for his travel there. Tr. at 30. He is not awarded additional travel or living expenses in Houston; employees pay normal living expenses out of their own salaries. Salary is what he is due.

Travel costs to attend the hearing are recoverable, however. Governing precedent treats a successful complainant's costs to attend the hearing (transportation, meals and incidental costs) as reimbursable. *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 at pg. 14 (Dep. Sec'y Feb. 14, 1996); *see also, Mackowiak v. University Nuclear Systems, Inc.,* 82-ERA-8 (ALJ July 25, 1986), *settled while under review* (Sec'y Apr. 18, 1989), where the ALJ allowed as a cost the Complainant's airline ticket from Alaska to Spokane, Washington for a remand hearing, as a cost of litigation reasonably incurred. Mr. Huang demonstrated in this post-trial exhibit CX8 transportation costs to and from the hearing of $ 667.99; hotel costs of $220, meals of $150, and local transportation costs (car rental, gasoline, tolls and parking) of $260.45. They total $1,298.44.

6. *Punitive Damages*

Neither the governing portions of the INA nor the Secretary of Labor's H-1B program regulations authorize the punitive damages Mr. Huang seeks, as the

August 5, 2008 Order Denying Punitive Damages explained. Nothing filed after the trial persuades me to alter that ruling.

7. *Compensatory Damages for Stress*

Compensatory damages are available under the nuclear and environmental whistleblower protection regulations that the H-1B program follows. 29 C.F.R. § 24.7(c)(1). They compensate the employee for harms such as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 33 (ARB Feb. 9, 2001). Those damages are not presumed, the worker must prove them. *Moder v. Vill. of Jackson, Wis.*, ARB Nos. 01-095, 02-039, ALJ No. 2000-WPC-005, slip op. at 10 (ARB June 30, 2003). The employee must show by a preponderance of the evidence (1) some objective manifestation of distress (sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation), plus (2) a causal connection between the employer's violation of the anti-retaliation statute and that distress. *Pierce v. United States Enrichment Corp.*, ARB Nos. 06-055, -058, -119, ALJ No. 2004-ERA-1 at 18 (ARB Aug. 29, 2008) (the worker's testimony that he felt a "tremendous sense of loss," "guilt," and "loss of self esteem," when he had neither sought nor received professional medical help for those symptoms, coupled with his failure to offer documentary evidence or witness testimony to bolster his own testimony that he had suffered mental or emotional anguish from the unfavorable personnel action, was insufficient proof to support a compensatory damage award).

No testimony at trial supports the claim Mr. Huang made in his CX8 for $100,000 as recompense for stress and related suffering from making the retaliation complaint, and worry over the potential loss of his H-1B status. Neither is there supporting documentary evidence or testimony from other witness of any emotional distress he suffered, or treatment for it. Those damages cannot be awarded.

8. *Interest, both Pre-Judgment and Post-Judgment*

Interest is due from Ultimo on what it owes Mr. Huang as an H-1B worker for back pay, health benefits, and 401(k) contributions for benching, and as his make-whole remedy for the retaliatory termination. *Mao v. Nasser Engineering & Computing Services*, ARB No. 06-121, ALJ No. 2005-LCA-36, slip op. at 11 (ARB Nov. 26, 2008); *Inkwell v. Am. Info. Tech. Corp.,* ARB No. 04-165, ALJ No. 2004-LCA-13, slip op. at 8 (Sept. 29, 2006); *Doyle v. Hydro Nuclear Servs.,* ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989- ERA-022, slip op. at 16-18 (May 17, 2000). The rate is that for underpayment of Federal income taxes, determined under 26 U.S.C. §6621(b)(3), plus three percentage points, compounded and posted quarterly. *Doyle,* slip op. at 16-18. It begins as each of the salary and other payments came due. Interest does not accrue on the $11,744.48 Ultimo paid under the Administrator's

findings, as the money was available to Mr. Huang; he chose to delay cashing the check.

The Administrator shall calculate the amount due. Presumably the Administrator calculates compound interest routinely on all back wages and fringe benefits its investigations find are due to H-1B workers, as the decisions of the Administrative Review Board require.

9. *Other Affirmative Relief*

As part of the remedy, the employer may be required to "take appropriate affirmative action to abate the violation." *Cf.*, 29 C.F.R. § 24.7(c)(1) (governing relief in cases brought under the nuclear and environmental acts). Mr. Huang moved on September 11, 2008 to compel Ultimo to furnish a work experience certificate so that he may pursue other employment in the United States. 8 U.S.C. § 1182(n)(2)(C)(v). He has moved to require Ultimo to amend its application for his H-1B visa, because he never worked in Richmond, VA, and it never was genuinely anticipated that he would. He believes the correction is necessary to demonstrate to the USCIS that he did not play fast and loose with his H-1B status. Given the extraordinarily broad authority the USCIS exercises, including the authority to revoke his H-1B status retroactively if it finds that "facts contained in the [H-1B] petition [were] not true and correct,"[37] the request is not an unreasonable one. It is also consistent with the remedy the Administrator had imposed on Ultimo for the last of the four violations the Administrator found. After determining that Ultimo "failed to obtain the LCAs for the geographical area wherein the H-1B employee worked," Ultimo was required to withdraw the LCA and submit "a new LCA with the correct information." RX8. Ultimo did not contest that finding or the remedy, and must follow through to put things right.

Lastly, Mr. Huang has moved to require Ultimo to forward to him the H-1B visa extension notice the USCIS directed to Ultimo on December 26, 2007 at its old address. That extension notice went to Ultimo in its capacity as the petitioner for Mr. Huang's H-1B visa; no copy was sent to him as the petition's beneficiary.[38]

Ultimo shall furnish the work experience certificate to Mr. Huang within 10 days, and within those 10 days it also shall amend the LCA it filed with the Department of Labor and the associated H-1B petition it filed for him at the USCIS, to show that it was intended that Mr. Huang would work in San Jose, CA initially, and that Ultimo re-assigned him to Houston, TX in June 2006.

[37] See, 8 C.F.R. § 214.2(h)(11)(iii)(A)(2).

[38] See EX1 to EX4 of Mr. Huang's *Motion to Obtain USCIS H-1B Extension Approval Notice*, which he filed on Dec. 8, 2008.

G. Payment through the Administrator

The Secretary's regulations prescribe that the Administrator shall "oversee the payment of back wages or fringe benefits to any H-1B non-immigrant who has not been paid as required." 20 C.F.R. § 655.810(a). The amounts due shall be calculated by the Administrator, and the Administrator shall disburse the unpaid salary, benefits and associated compound interest to Mr. Huang. *See also,* 20 C.F.R. § 655.810(f) (prescribing the Administrator's involvement in the distribution of unpaid wages, and presumably unpaid benefits too). These duties the regulations describe don't depend on whether the Administrator participated as a litigant in the adjudication that sets the wages and benefits to be paid. *Cf.*, 20 C.F.R. § 655.820(b)(1) (reposing discretion in the Administrator about whether to intervene when a H-1B worker is the prosecuting party).

V. Order.

It is ordered that:

1. Ultimo shall pay the Administrator, for delivery to Mr. Huang, unpaid salary for the full term of the H-1B visa that ended on September 15, 2008, at the salary rate specified on Mr. Huang's LCA of $60,000 per year for the two years and six months he should have been employed (*viz.*, $150,000), plus compound interest on the amounts as they became due biweekly, less the $11,774.48 and any associated interest Ultimo already paid when it acceded to the Administrator's findings. CX4 at 49.

2. Ultimo shall pay the Administrator, for delivery to Mr. Huang, (1) $5,880.00 as a substitute for the monthly health, dental and vision insurance benefits it owes for the full term of the H-1B visa that ended on September 15, 2008, plus compound interest on the monthly amounts of $196 as they became due each month, and (2) $3,000.00 in unpaid annual 401(k) contributions, plus associated compound interest.

3. Ultimo shall pay litigation travel costs of $1,298.44 Mr. Huang incurred to attend the trial. Compound interest accrues on this amount from the date of this Decision and Order.

4. The Administrator shall ensure that Ultimo delivers to Mr. Huang the work experience certificate described above, for his use in seeking other employment, and ensure that it amends its H-1B petition (including its underlying LCA) to show that Mr. Huang was to work in

San Jose, CA until he was re-assigned to Houston, TX in June 2006. Ultimo also shall forward to Mr. Huang the H-1B extension approval notice that the USCIS issued on December 26, 2007 to Ultimo as the petitioner for Mr. Huang's H-1B visa.

A

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).