In the Matter of:

BISHNU S. BAIJU,	**ARB CASE NO.**	**10-094**
PROSECUTING PARTY,	**ALJ CASE NO.**	**2009-LCA-045**
v.	**DATE:**	**March 30, 2012**
FIFTH AVENUE COMMITTEE,	**RE-ISSUED:**	**April 4, 2012**
RESPONDENT.		

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Bishnu S. Baiju; *pro se*, Elmhurst, New York

For the Respondent:
Jason E. Burritt, Esq.; *Seyfarth Shaw LLP,* New York, New York

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

FINAL DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended (INA or the Act).[1] Pursuant to a complaint filed by Bishnu S. Baiju, the Department of Labor's Wage and Hour Division (WHD) initiated an investigation under the INA to determine whether Fifth

[1] 8 U.S.C.A. §§ 1101-1537 (West 1999 & Thomson Reuters Supp. 2011). The INA's implementing regulations are found at 20 C.F.R. Part 655, Subparts H and I (2011).

Avenue Committee (FAC) was in compliance with the INA's H-1B visa process. Wage and Hour issued a Determination Letter on September 16, 2009, charging FAC with a violation of the Act, and calculated back wages due Baiju in the amount of $377.28. Disagreeing with the Administrator's determination of the back wage amount, Baiju requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ). In a Decision and Order issued March 8, 2010, the presiding ALJ held that FAC was liable for the payment of back wages as determined by the Administrator, minus lawful deductions, plus prejudgment and post-judgment interest. Baiju timely appealed to the Administrative Review Board (ARB or Board). For the following reasons, we affirm the ALJ's Decision and Order, with modification.

BACKGROUND[2]

The INA permits an employer to hire non-immigrant workers in "specialty occupations" to work in the United States for prescribed periods of time.[3] These workers are commonly referred to as H-1B nonimmigrants. Specialty occupations require specialized knowledge and a degree in the relevant specialty.[4] An employer seeking to hire an H-1B worker must obtain DOL certification by filing a Labor Condition Application (LCA).[5] The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant.[6] After securing the certification, and upon approval by the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS), the Department of State issues H-1B visas to these workers.[7]

FAC hired Baiju as an accountant on a temporary basis. At the same time, Baiju also worked for Leap, Inc., also known as Brooklyn Workforce Innovations (BWI), a wholly controlled affiliate of FAC. Michelle de La Uz became the Executive Director for FAC in January 2004. In September 2006, de La Uz filed an H-1B visa petition for Baiju as well as a separate permanent labor certification application for him.

Based on its own survey, FAC determined the prevailing wage for listing on the LCA for the H-1B visa petition at $45,000.00. Nevertheless, FAC paid Baiju at an actual wage rate of

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[2] Unless otherwise indicated, the factual statements contained in the Background Statement are excerpted from the ALJ's Decision and Order (D. & O.) at pages 7-20.

[3] 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700.

[4] 8 U.S.C.A. § 1184(i)(1).

[5] 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731-733.

[6] 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 732.

[7] 20 C.F.R. § 655.705(a), (b).

several thousand dollars more than the prevailing wage listed on the LCA. In September 2006 FAC paid Baiju a cost of living increase of $2,500.00. Baiju received another cost of living increase of $2,500.00 in 2007. When Baiju's employment with FAC ended, he was making $50,500.00 per year.

As a part of the application for permanent labor certification, FAC had to request a wage determination from the State of New York. On November 9, 2006, the State issued its wage determination in conjunction with the permanent labor certification application. It listed a prevailing rate of $34.89 per hour or the equivalent of $63,500.00 per year. FAC's permanent labor certification petition was not approved while FAC employed Baiju.

On October 30, 2007, de La Uz sent an e-mail to FAC's attorney referring to the fact that FAC was not paying Baiju the hourly rate indicated by the New York wage determination. The attorney responded that FAC was not obligated to pay the prevailing wage listed on the New York wage determination until the permanent labor certification application was approved. FAC provided Baiju with a copy of the correspondence from FAC's attorney on November 8, 2007.

On February 6 or 7, 2008, Baiju complained to de La Uz and other FAC officials that he believed he was not being paid the proper prevailing wage. He had complained about this numerous times in the past.[8] On February 7, de La Uz met with Baiju, at which time she explained to Baiju that the prevailing wage listed by the State of New York would not apply until his permanent labor certification application was approved.

Other employees complained to de La Uz that Baiju was disrupting their work by raising his voice and behaving aggressively.[9] She also heard that he had approached a member of the Board of Directors about the wage dispute matter, rather than following de La Uz's instructions. When de La Uz met with Baiju on February 7, 2008, Baiju remained intractable on the issue. He indicated that he refused to work unless he was paid at the rate listed on the New York wage determination. De La Uz asked Baiju if he was refusing to perform his duties under his LCA job description, to which Baiju responded that he was unwilling to perform the duties and that he recognized that it was a breach of what he had said he was going to do. De La Uz suggested that Baiju seek employment elsewhere if he was unhappy with his wages, and informed Baiju that if he was not willing to perform his duties they would have to terminate his employment.

By letter dated February 12, 2008, FAC informed Baiju that his employment was terminated effective February 7, 2008.

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[8] Baiju also complained several times that he deserved to be paid more because he believed he was working for two separate entities; he also complained that he was due compensatory time. D. & O. at 8.

[9] The ALJ found support for de La Uz's version of the events that led to the termination of Baiju's employment. D. & O. at 20.

On March 11, 2008, FAC offered to reimburse Baiju for the cost of transportation to his country of origin. On the same day, FAC wrote to USCIS to advise that it had terminated Baiju's employment.

PROCEEDINGS BELOW

In January 2009, WHD initiated an investigation to determine whether FAC had complied with the Act with respect to Baiju. D. & O. at 2. As a result of its investigation, WHD rejected FAC's source for its reported wage determination and requested ETA to issue a wage determination. *Id.* at 12. There was no timely objection filed through the Employment Service complaint system that challenged ETA's wage determination. *Id.* at 14. WHD issued a determination letter that advised FAC that it had failed to pay wages as required and ordered FAC to pay Baiju back wages in the amount of $377.28. *Id.*

Baiju disagreed with the Administrator's determination and requested a hearing before a Department of Labor ALJ, which took place on November 17, 2009. D. & O. at 2. In her Decision and Order, the ALJ held that: (1) FAC was not required to pay Baiju in compliance with the wage determination issued by the New York State Department of Labor; (2) WHD's request for a wage determination from ETA was warranted; (3) FAC was liable to pay the back wages WHD computed minus lawful deductions but with prejudgment compound interest and post-judgment interest; and (4) FAC did not discriminate or retaliate against Baiju in violation of 20 C.F.R. § 655.805(a). D. & O. at 11-21.[10]

[10] The ALJ also addressed several issues that Baiju raised after the hearing including: (1) Baiju's motion to exclude FAC's brief; (2) Baiju's suggestion that the ALJ was prejudiced against Baiju because one of FAC's attorneys was the ALJ's husband's college roommate and had met the ALJ before; (3) Baiju's objection to FAC's late submission of documents; (4) Baiju's request for reconsideration of the ALJ's order dismissing Michelle de La Uz; and (5) Baiju's objection to the ALJ's exclusion of evidence involving hearsay. The ALJ overruled Baiju's objection about FAC's brief because she found that good cause existed to allow FAC's evidence and briefs to be admitted into the record. The ALJ denied Baiju's request that the ALJ recuse herself from presiding because her association with the attorney that Baiju objected to was too remote in time and character, because Baiju stated that he did not object to her hearing the case when he became aware of the association, and because the attorney was not a party to the case. The ALJ also overruled Baiju's objection to the late submission of documents because she found good cause to waive the time frames for the submission of evidence. The ALJ affirmed her decision to dismiss Michelle de La Uz as a Respondent in this matter. Finally, the ALJ reaffirmed her ruling excluding evidence involving hearsay. D. & O. at 3-6.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's decision pursuant to 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845.[11] Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[12] The ARB has plenary power to review an ALJ's factual and legal conclusions de novo.[13] The ARB reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard.[14]

DISCUSSION

The issues on appeal are outlined in the ARB's Notice of Intent to Review (May 5, 2010), and include: (1) whether the ALJ properly dismissed individually named Respondent Michelle de La Uz as a party to the case; (2) whether the ALJ properly denied the Prosecuting Party's post-hearing objection to her consideration of the case; (3) whether the ALJ properly found that the Wage and Hour Division (WHD) properly requested a wage rate from the Employment Training Administration (ETA) when it determined that the Respondent had failed to properly document the wage rate it reported on the Prosecuting Party's Labor Condition Application or should the wage rate have been determined by reference to the rate calculated by the State of New York for the Prosecuting Party's permanent resident visa; (4) if the ALJ properly found that the WHD properly relied on the ETA wage rate, whether the ALJ properly upheld the WHD's back wage calculation of $377.28 plus post-judgment interest until satisfaction of the liability; (5) whether the ALJ properly found that the Respondent effected a bona fide termination of the Prosecuting Party's employment on March 11, 2008, when the Respondent notified the Prosecuting Party and the United States Citizenship and Immigrations Services of the termination of the Prosecuting Party's employment and offered to reimburse him for the cost of transportation to his country of origin; and (6) whether the ALJ properly found that the Prosecuting Party failed to carry his burden of establishing that the Respondent discriminated or retaliated against him in violation of 20 C.F.R. § 655.805(a), which implements the H-1B program's employee protection provision.

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[11] See Secretary's Order No. 1-2010, 75 Fed. Reg. 3,924-25 (Jan. 15, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

[12] 5 U.S.C.A. § 557(b) (West 1996).

[13] *Yano Enters., Inc. v. Administrator*, ARB No. 01-050, ALJ No. 2001-LCA-001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-004, slip op. at 3 (ARB Apr. 30, 2001).

[14] *See, e.g., Mao v. Nasser*, ARB No. 06-121, ALJ No. 2005-LCA-036, slip op. at 12 (ARB Nov. 26, 2008); *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 9 (ARB Apr. 26, 2006).

We address these issues in the order in which they are identified, beginning by summarizing any objections to the ALJ's decisions and then the ALJ's decisions on the issues.

ALJ Dismissal of Michelle de La Uz as a Party

Baiju challenges the ALJ's decision to dismiss Michelle de La Uz as a party to this action. Baiju argues that de La Uz should be personally liable because she is the Executive Director and co-chair of FAC's board of directors. Comp. Br. at 11. He argues that she has full domination over the affairs of the organization. *Id.*

In a separate order dated December 23, 2009, the ALJ dismissed de La Uz as a party. D. & O. at 6. In the December 23, 2009 order, the ALJ explained that de La Uz did not act as an employer under the Act, but merely acted in her capacity as an employee of FAC. Order at 3. The ALJ additionally found that de La Uz did not have "complete domination" of FAC, which is what is generally required to pierce the corporate veil under New York law. Order at 4. After the ALJ issued the order, Baiju moved for reconsideration. The ALJ reaffirmed the dismissal in her decision, noting that while de La Uz "held a managerial position with Respondent and had authority to hire, fire, and set wage rates, she did not exercise dominion over the company so as to make her personally liable for decisions she made in her capacity as Respondent's employee." D. & O. at 6.

On this issue, the evidence of record supports the ALJ's findings, and the ALJ correctly applied the law. Under the Act, the corporate veil can be pierced when it is appropriate. In *DOL v. Kutty*[15] the ARB upheld an ALJ's decision that relied upon Tennessee law to conclude that it was appropriate to pierce the corporate veil.[16] The alleged protected activity and adverse action in this case occurred in New York, and therefore, the law of that state applies to this question.[17]

We agree with the ALJ that de La Uz's managerial role with authority to hire, fire, and set wage rates does not make her personally liable and is not sufficient to show that she exercised complete control over the corporation. Accordingly, we affirm the ALJ's dismissal of de La Uz.

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[15] *U.S. Dep't of Labor v. Kutty*, ARB No. 03-022, ALJ Nos. 2001-LCA-010 to -025 (ARB May 31, 2005).

[16] *Id.* at 17-19.

[17] *Id.* at 17 n.14. *See Carter-Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745, 746 n.1, 750 (6th Cir. 2001) (applied state common law to pierce corporate veil in claim arising under the liability provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A. § 9601 et seq. (West 1995)).

Baiju's Post-Hearing Objection re Recusal

Baiju challenges on appeal the ALJ's ruling that she hear the matter rather than recuse herself. Baiju implied in his petition for review that the ALJ protected FAC because they were "clients of her husband's friend," and that the ALJ in other ways was hasty, unfair, and biased, thus denying him a fair hearing.

The ALJ overruled any objections Baiju had to her participation in the litigation because her association with the attorney that Baiju objected to was remote in time and character, because Baiju stated that he did not object to her hearing the case when he became aware of the association, and because the attorney was not a party to the case. D. & O. at 5.

The ARB reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard, i.e., whether, in ruling as he did, the ALJ abused the discretion vested in him to preside over the proceedings.[18] The ALJ did not abuse her discretion when she decided to continue to adjudicate the case given the tenuous nature of her association with the Respondent's counsel and that Baiju did not object to the association when the ALJ offered him the opportunity to do so.

ETA Wage Rate

Concerning the merits of the ALJ's decision, Baiju challenges the ALJ's determination that FAC did not have to pay him the wage rate provided by the State of New York. Baiju argues that FAC was obligated to pay him the State of New York wage rate because his permanent labor certification application and his H-1B petition were both submitted in regards to the same position. Comp. Br. at 10, 24-25.

The ALJ found that FAC determined the prevailing wage it reported on the LCA in support of Baiju's H-1B visa petition by conducting a survey. D. & O. at 12. The ALJ further found that when WHD investigated FAC's compliance with the H-1B regulations, it concluded that the documentation supporting the survey did not meet the criteria of 20 C.F.R. § 655.731. D. & O. at 14. The ALJ found that this investigative finding (of insufficient documentation) supported WHD's request to ETA for a wage determination and noted that because Baiju did not challenge the ETA's wage determination, it was deemed to be final. See 20 C.F.R. § 655.840(c). The ALJ noted the regulation's provision that "[u]nder no circumstances shall the administrative law judge determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the prevailing wage determination." D. & O. at 14. In regards to the State of New York wage determination, the ALJ explained that it bore no relationship to Baiju's wages

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[18] *Administrator, Wage and Hour Div., USDOL v. Integrated Informatics, Inc.*, ARB No. 08-127, ALJ No. 2007-LCA-026, slip op. at 5 (ARB Jan. 31, 2011) (citing *Mao*, ARB No. 06-121, slip op. at 12; *Chelladurai*, ARB No. 03-072, slip op. at 9)..

under his H-1B visa, because it was issued in conjunction with his distinct and separate petition for permanent labor certification. D. & O. at 14.

The evidence of record supports the ALJ's findings and the ALJ correctly applied the law on the issue of the ETA wage rate. The H-1B regulations provide that "[w]here the documentation is either nonexistent or is insufficient to determine the prevailing wage . . . the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed." 20 C.F.R. § 655.731(d)(1). In this case, WHD found that the documentation to support the prevailing wage listed on Baiju's LCA was insufficient. Thus, it contacted ETA for a wage determination, as provided for in the regulations. The ALJ found that this request was warranted because WHD found the documentation lacking and none of the parties objected to the ETA's wage determination, making it final. We agree and accordingly affirm the ALJ's decision as to the appropriate wage rate.

Back Wage Calculation

Baiju also challenges the ALJ's award of back wages in the amount of $377.28. Baiju argues that FAC must pay him $185,309.29 plus interest and if not that amount, then he is at least due $6,600.00 for more than a month's salary and benefits. Comp. Br. at 17-18; see Pet. for Rev. at 13, 16.

The ALJ ordered that FAC pay Baiju back wages in the amount WHD determined – $377.28 minus lawful deductions. D. & O. at 17. The ALJ also ordered that FAC pay Baiju prejudgment compound interest and any post-judgment interest that accrues. *Id.* The ALJ accorded substantial weight to WHD's calculation of back wages due, because the calculations covered the duration of Baiju's employment with FAC. D. & O. at 16.

The evidence of record supports the ALJ's findings and she correctly applied the law. Based on the regulations, WHD properly used the ETA's wage determination to compute back wages and the ALJ properly accepted the ETA's wage determination as final. The H-1B regulations provide that when the Administrator contacts the ETA for a wage determination, the ETA "shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed." 20 C.F.R. § 655.731(d)(1). An ALJ must not determine the validity of the wage determination and "shall accept as final and accurate the wage determination obtained from ETA . . . ." 20 C.F.R. § 655.840(c). The ALJ's conclusions on this matter are affirmed.

Bona Fide Termination

Baiju also challenges on appeal the ALJ's decision that FAC effected a bona fide termination on February 7, 2008. Baiju argues that FAC did not effect a bona fide termination because FAC did not present him with revocation letters from USCIS and did not provide post

office tracking information. Pet. for Rev. at 2, 4, 16. He maintained that the evidence supporting bona fide termination is fraudulent. Pet. for Rev. at 2. He also stated that FAC did not tender him transportation to Nepal. Pet. for Rev. at 16.

The ALJ found that FAC terminated Baiju's employment on February 7, 2008. D. & O. at 15. The ALJ also found that on March 11, 2008, FAC affirmed Baiju's discharge, offered to reimburse Baiju for the cost of his transportation to his country of origin, and notified USCIS that FAC terminated Baiju's employment. D. & O. at 15. The ALJ found that FAC fulfilled the regulatory requirements for effecting a bona fide termination of Baiju's employment and found no substance to Baiju's allegations that the USCIS letter was not valid or was fraudulent. D. & O. at 15.

The evidence of record supports the ALJ's findings and the ALJ correctly applied the law. The ALJ properly concluded that FAC complied with all of the requirements for a bona fide termination of an H-1B employment effective March 11, 2008. The H-1B regulations provide that an employer must effect a bona fide termination of the employment relationship to relieve itself of its obligation to pay the required wage.[19] To effect a bona fide termination, an employer must (1) give notice of the termination to the H-1B worker, (2) give notice to the Department of Homeland Security (USCIS), and (3) under certain circumstances, provide the H-1B non-immigrant with payment for transportation home.[20] FAC gave Baiju notice of the termination on February 7, 2008. FAC gave notice to USCIS on March 11, 2008, that it had terminated Baiju's employment.[21] Finally, FAC offered return transportation to Baiju. D. & O. at 15. Although Baiju apparently did not accept the offer of the cost of return transportation to his home country, this does not affect the fact that FAC made the offer of payment of the cost of return transportation to complete the bona fide termination.

Retaliation Claim

Finally, Baiju challenges the ALJ's determination that FAC did not retaliate against him in violation of the INA. Baiju argues that FAC retaliated against him for asking when he was going to be paid the higher of the actual or prevailing wage by filing arbitrary misconduct

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[19] 20 C.F.R. § 655.731(c)(7)(ii).

[20] *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 3 (ARB Mar. 30, 2007).

[21] Baiju appears to argue that for there to be a bona fide termination, USCIS must revoke approval of the H-1B visa after the employer notifies it that the employment relationship was terminated. Comp. Br. at 3-14. However, notice to USCIS is all that is required to fulfill the notice requirement for effecting a bona fide termination; there is no requirement that USCIS cancel the LCA for a termination to be bona fide. 20 C.F.R. § 655.731(c)(7)(ii); see *Gupta*, ARB No. 05-008, slip op. at 5-6; *Amtel Group of Florida, Inc., v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op. at 11 (ARB Sept. 29, 2006).

charges, threatening him, and harassing him. Comp. Br. at 12. He states that FAC's termination letter contained an arbitrary misconduct charge because he did not do Leap Inc., work. Comp. Br. at 13. He also said they reported that Baiju engaged in misconduct to the New York State Department of Labor Unemployment Benefits Board. A New York DOL ALJ found that Baiju "did not refuse to continue working for the employer herein, and that claimant's expression of his salary and work assignment concerns did not rise to the level of misconduct." Comp. Br. at 14.

The ALJ found that Baiju established a prima facie case of retaliation for purported protected activity because he showed that he complained to officials at FAC that he believed he was not being paid the proper prevailing wage. D. & O. at 18-19. He found that temporal proximity raised the inference of causation. D. & O. at 19. However, the ALJ concluded that it was not reasonable for Baiju to believe that he was entitled to the prevailing wage that he insisted, and continues to insist, was due because FAC explained to Baiju that the State of New York wage determination related to his permanent labor certification application, not to his H-1B work. *Id.* Baiju raised the issue several times, and FAC told him that the New York wage determination rate of pay would not go into effect until the certification was granted. D. & O. at 19. The ALJ found that despite the content of Baiju's complaint on February 6, 2008, Baiju's subjective opinions on the applicable wage rate were not objectively reasonable, and that he therefore did not engage in protected activity. *Id.* at 20.

The ALJ went on to find that FAC articulated a legitimate reason for terminating Baiju's employment, which consisted of Baiju's refusal to accept that he was not entitled to the rate of wages that the State of New York had issued. D. & O. at 20. The ALJ also found that de La Uz's description of the events leading to the termination were credible and that at the hearing and in general, Baiju seemed reluctant to follow instructions or accept ALJ rulings that were opposite his position. *Id.*

The ALJ next found that Baiju failed to prove that FAC's legitimate reasons for termination were a pretext for discrimination. D. & O. at 21. Baiju had complained many times over a long period that he was entitled to be paid at the State of New York rate and no adverse action was taken against him until February 7, 2008. *Id.* The ALJ believed de La Uz's explanation that she discharged Baiju because he failed to follow instructions, and he refused to perform assigned work. *Id.* The ALJ also found it significant that FAC continued to sponsor Baiju's permanent labor visa in spite of his demands for more money and that de La Uz expected that she would pay Baiju the rate of the State of New York wage determination after the application was approved. *Id.*

Additionally, the ALJ discussed the finding of a New York ALJ that Baiju was discharged because he complained about his rate of pay. D. & O. at 21. The ALJ specifically made that finding because the employer did not produce any first hand testimony about Baiju's employment termination. *Id.* The ALJ noted that in contrast to the proceedings before the New York ALJ, in the proceeding before her, both of the parties produced testimony about the termination. *Id.* The ALJ concluded based on that and the difference in the weight of the

evidence concerning the prevailing wage between the two proceedings, that the determination by the New York ALJ had little probative or persuasive value to her adjudication. *Id.*

Therefore, the ALJ concluded that the preponderance of the evidence supported a finding that FAC did not discharge Baiju in retaliation for protected activity. D. & O. at 21.

The evidence of record supports the ALJ's findings of fact, but we disagree with the ALJ on her application of the law regarding protected activity. Unlike the ALJ, we find that Baiju engaged in protected activity. Employers of H-1B workers may not discriminate against the H-1B worker because he or she complains about suspected violations of H-1B program requirements. Baiju complained that FAC was not paying him what he was entitled to be paid under the H-1B program. Therefore he engaged in protected activity. We find that Baiju's belief that he was entitled to more money was reasonable given that WHD did find a violation upon investigation, even though he was not entitled to the wage listed on the New York wage determination.

Our finding of protected activity does not change the result in this case however, because we agree with the ALJ that Baiju failed to show that FAC took adverse action against Baiju because of his protected activity. The ALJ ultimately concluded that de La Uz terminated Baiju's employment for her stated reason that he failed to follow instructions and he failed to perform work. D. & O. at 21. The ALJ also concluded that the preponderance of the evidence supported a finding that FAC did not discharge Baiju because he engaged in protected activity. *Id.* We agree. While Baiju's complaints about his pay rate to FAC and to WHD were protected, his refusal to work was not. Baiju had complained many times about his pay rate, and FAC had continued to employ him and to pursue the permanent labor application, which if approved, would have required FAC to pay Baiju the demanded amount. FAC was willing to pay this amount once the permanent labor application was approved. We affirm the ALJ's decision that FAC did not terminate Baiju's employment because he engaged in protected activity.

CONCLUSION

For the foregoing reasons, we conclude that (1) the ALJ properly dismissed Michelle de La Uz as a party; (2) the ALJ properly denied Baiju's post-hearing objection to her consideration of the case; (3) the ALJ properly found that WHD properly requested a wage rate from ETA; (4) the ALJ properly upheld WHD's back wage calculation minus withholdings and plus interest; (5) the ALJ properly found that FAC effected a bona fide termination of Baiju's employment on March 11, 2008; and (6) although Baiju engaged in protected activity, the ALJ properly found that Baiju failed to carry his burden of establishing that FAC discriminated against him or retaliated against him because he engaged in protected activity.

ORDER

The ALJ's Decision and Order is **AFFIRMED,** and Baiju's complaint is **DISMISSED**.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge