



In the Matter of:

**ADMINISTRATOR, WAGE AND
HOUR DIVISION,**

PROSECUTING PARTY,

v.

EFFICIENCY3 CORPORATION,

RESPONDENT

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:

M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; Quinn Philbin, Esq.; U.S. Department of Labor, Washington, District of Columbia

For the Respondent:

Joseph A. Zaloom, *pro se*, Falls Church, Virginia

Before: Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER

The Immigration and Nationality Act permits nonimmigrants to work in the United States on what are known as H-1B visas,¹ and this case involves one of the H-1B program’s labor conditions requirements.² An Administrative Law Judge (ALJ) concluded that Efficiency3 Corporation (Efficiency3) violated the H-1B program’s required wage obligation when it failed to pay Mr. Xiaosi (Paris) Liu the required wage rate for a portion of the time he worked for Efficiency3 on an H-1B visa. Because Efficiency3 did in fact fail to pay Mr. Liu the required wage rate for those periods and because neither of the regulatory exceptions to the required wage obligation applies, we **AFFIRM** the ALJ’s Decision and Order (D. & O.).

BACKGROUND

1. Legal Background

The Immigration and Nationality Act establishes a visa program, known as the H-1B program, that allows employers in the United States to hire nonimmigrants in specialized occupations on a temporary basis.³ If an employer wants to hire an H-1B nonimmigrant, the employer must file a petition with the U.S. Citizenship and Immigration Services in the Department of Homeland Security.⁴ Before the employer can do this, however, it must first seek the approval of the United States Department of Labor by filing with the Secretary of Labor what is known as a Labor Condition Application.⁵ In that Labor Condition Application, the employer must attest, among other things, that it will pay the H-1B nonimmigrant what is referred to as the “required wage.”⁶

The “required wage” is determined by taking the greater of two amounts, the “prevailing wage” and the “actual wage.”⁷ The “prevailing wage” is “the prevailing wage level for the occupational classification in the area of employment.”⁸ The “actual wage” is determined in one

¹ 8 U.S.C. § 1182(n).

² *Id.*; 20 C.F.R. Part 655, Subparts H & I.

³ *See generally* 8 U.S.C. § 1182(n).

⁴ 20 C.F.R. § 655.700(b)(2).

⁵ 20 C.F.R. § 655.700(b)(1).

⁶ 20 C.F.R. § 655.731(a).

⁷ 8 U.S.C. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.730(d)(1); 655.731(a); 655.731(a)(3).

⁸ 8 U.S.C. § 1182(n)(1)(A)(i)(II); *see also generally* 20 C.F.R. § 655.731(a)(2).

of two ways. If the employer has employees other than the H-1B nonimmigrant “with substantially similar experience and qualifications in the specific employment in question—i.e., they have substantially the same duties and responsibilities as the H-1B nonimmigrant”—the actual wage is the amount paid to those other employees.⁹ However, if “no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer.”¹⁰

Payments only count towards an employer’s required wage obligation if (i) the payments are recorded on the employer’s payroll records “as earnings for the employee” and are “disbursed to the employee, cash in hand, free and clear”; (ii) the payments are “reported to the Internal Revenue Service (IRS) as the employee’s earnings, with appropriate withholding for the employee’s tax paid to the IRS”; (iii) both the employer and employee portions of the taxes required under the Federal Insurance Contributions Act (FICA)—i.e., what are colloquially known as Social Security and Medicare taxes—have been paid; and (iv) the payments are reported and documented so that all applicable federal, state, and local taxes are paid.¹¹

An employer is generally required to pay its H-1B nonimmigrant employees the “required wage” for the entire duration of the H-1B visa. Under what is known as the “benching provision,”¹² this requirement extends to so-called “nonproductive” time—i.e., when the employee is “not performing work”—unless the employer can show that one of two exceptions applies.¹³ The first exception temporarily suspends an employer’s obligation to pay the required wage, while the second ends that obligation altogether. Under the first exception—which we will refer to as the “employee unavailability” exception¹⁴—the employer is excused from its wage obligation if the reason the employee is not working is “due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable

⁹ 20 C.F.R. § 655.731(a)(1).

¹⁰ *Id.*

¹¹ 20 C.F.R. § 655.731(c)(2).

¹² Or perhaps, more accurately, it should be called the “no-benching provision.”

¹³ 20 C.F.R. § 655.731(c)(7) (“If the H-1B nonimmigrant is not performing work and is in a nonproductive status *due to* a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or *any other reason except as specified in paragraph (c)(7)(ii) of this section*, the employer is required to pay the salaried employee . . . at the required rate for the occupation listed on the [Labor Condition Application]” (emphasis added).).

¹⁴ *Gupta v. Compunnel Software Grp., Inc.*, ARB No. 12-049, ALJ No. 2011-LCA-045, slip op. at 16 (ARB May 29, 2014).

to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant).”¹⁵ Under the second exception—the “bona fide termination” exception—the employer may discharge the H-1B nonimmigrant employee and then stop paying the employee altogether.¹⁶ To effect a “bona fide termination” requires, among other things, that the employer notify the Department of Homeland Security, so that the employee’s petition can be cancelled.¹⁷

2. Factual Background

Xiaosi (Paris) Liu (Mr. Liu) and his then girlfriend Jianing (Jenny) Liu (Ms. Liu) were studying accountancy at George Washington University (G.W.) in Washington, D.C. in 2008.¹⁸ Mr. Liu and Ms. Liu are natives of China, and neither is a U.S. citizen or permanent resident.¹⁹ While they were students at G.W., they were in the United States on what are known as “F-1” student visas.²⁰ Their F-1 visas permitted them to work part-time subject to certain conditions and restrictions, the details of which are not important here.

Efficiency3 Corporation (Efficiency3) is a small private company focused on Internet-based energy and utility management systems.²¹ Its office is in Falls Church, Virginia, just outside of Washington, D.C.²² Joseph Zaloom is its President and, of importance here, in charge of the company’s payroll, hiring, and other employment-related matters.²³

¹⁵ 20 C.F.R. § 655.731(c)(7)(ii).

¹⁶ 20 C.F.R. § 655.731(c)(7)(ii) (“Payment need not be made if there has been a *bona fide* termination of the employment relationship.”).

¹⁷ 20 C.F.R. § 655.731(c)(7)(ii); *see also Baiju v. Fifth Ave. Comm.*, ARB No. 10-094, ALJ No. 2009-LCA-045, slip op. at 9 (ARB Mar. 30, 2012, Reissued Apr. 4, 2012) (“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.”).

¹⁸ Hearing Transcript (Tr.) at 193; Administrator Exhibit (AX) 18 at 2. Although the ALJ did not discuss any of the facts related to Ms. Liu and although those facts are not relevant to the ultimate legal questions in this case, we include them because they are undisputed and are central to many of Efficiency3’s arguments.

¹⁹ Tr. at 193.

²⁰ Tr. at 193; AX 18 at 2-3.

²¹ D. & O. at 3.

²² *Id.*

²³ *Id.* at 3, 6; Supplemental D. & O. (Supp. D. & O.) at 3.

Efficiency3 hired Mr. Liu and Ms. Liu to work part-time while they were students, with Mr. Zaloom as their supervisor.²⁴ Efficiency3 first hired Ms. Liu for the summer of 2008 and then in August 2008, after receiving a significant government contract necessitating more work, Efficiency3 hired Mr. Liu as well.²⁵ Both Ms. Liu and Mr. Liu worked part-time through the 2008-09 academic year, while enrolled in their final year at G.W. and while still on their F-1 visas.²⁶

Mr. Zaloom was impressed enough with their work that he decided that Efficiency3 should sponsor them for H-1B visas, so that they could work full-time for Efficiency3 after graduation.²⁷ On March 23, 2009, Efficiency3 filed Labor Condition Applications for both of them, specifying that the “prevailing wage” was \$45,094 and that it intended to pay them \$46,000.²⁸ On the same day, Efficiency3 also filed an I-129, Petition for a Nonimmigrant Worker, for each of them with the Department of Homeland Security.²⁹ The following month, Homeland Security approved Efficiency3’s petitions and authorized the company to hire Mr. Liu and Ms. Liu to work as utility cost analysts from October 1, 2009, until September 12, 2012.³⁰

Mr. Liu and Ms. Liu began working for Efficiency3 on October 1, 2009, at an annual salary of \$46,000.³¹ Because Efficiency3 paid its employees semi-monthly, this amounted to \$1,916.66 per pay period.³² For the four pay periods in October and November 2009, each of

²⁴ AX 18 at 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Tr. at 194-95; AX 18 at 3.

²⁸ D. & O. at 3.

²⁹ *Id.*

³⁰ *Id.*; AX 7. The record contains copies of the relevant H-1B documents for Mr. Liu, but not for Ms. Liu. Since Efficiency3 believes that Ms. Liu’s role in this case is important, we will assume Efficiency3’s allegations about Ms. Liu for the sole purpose of addressing its arguments on appeal.

³¹ D. & O. at 3.

³² *Id.*; Strictly speaking \$1,916.66 per semi-monthly pay period amounts to \$45,999.84 per year, but neither party is quibbling about this small discrepancy.

them was paid this amount.³³ For the two pay periods in December, however, Efficiency3 paid each of them \$1,840.66 per pay period, before resuming the \$1,916.66 semi-monthly payments the following month (January 2010).³⁴ Starting in October 2010, Efficiency3 gave each of them raises and began paying them \$1,974.17 per semi-monthly pay period, the equivalent of \$47,380.08 per year.³⁵ They each continued to earn this amount through the rest of 2010 and all of 2011.³⁶

On December 31, 2011, Efficiency3 lost a major government contract that provided the majority of its revenue, leaving the company with no other long-term contracts.³⁷ Mr. Zaloom told his staff that he was imposing a mandatory pay cut.³⁸ The company also had a lot less work, including of the type Mr. Liu did, and so Efficiency3 reduced Mr. Liu's salary.³⁹ From January until mid-July 2012, Efficiency3 paid Mr. Liu less than the \$1,974.17 per pay period he had been earning until then: On January 15, 2012, Mr. Liu was paid \$1,250, and on January 31, 2012, he was paid \$802; from February through June 2012, he was paid \$1,026 per semi-monthly pay period; and, on July 15, 2012, he was paid \$1,100.⁴⁰ For the next three pay periods, Efficiency3 paid Mr. Liu more than the \$1,974.17 he had been earning in 2011: on July 31, 2012, Efficiency3 paid him \$2,497.75, and for both August 2012 pay periods, he was paid \$2,000.⁴¹ Then, on September 17, 2012, the final pay period covered by the H-1B visa at issue in this case, he was paid \$775.⁴²

Efficiency3 alleges that, during this time (January to September 2012), Mr. Liu was a somewhat recalcitrant employee. According to Efficiency3, Mr. Liu both "refused to train a designated backup employee" and ignored Efficiency3's requests to provide "documentation of

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 4; Tr. at 209; AX 18 at 1.

³⁸ D. & O. at 4.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*; AX 11.

the passwords and procedures related to [his] job,”⁴³ although there is no dispute that Mr. Liu did provide this documentation eventually.⁴⁴ Moreover, on January 20, 2012, soon after being informed that he was getting a pay cut, Mr. Liu also allegedly told Mr. Zaloom that he would only work five hours per day.⁴⁵ Nonetheless, there is no dispute that, during this entire time, Mr. Liu was in Efficiency3’s offices on a full-time basis, at least eight hours per day, although there is some dispute about exactly what he did while there.⁴⁶

After the H-1B visa at issue in this case expired, Mr. Liu continued to work for Efficiency3 part-time, on a separate H-1B visa, until the end of March 2013.⁴⁷ On April 9, 2013, Efficiency3 sent a letter to the United States Citizenship and Immigration Services at the Department of Homeland Security stating that Mr. Liu had resigned effective April 1, 2013.⁴⁸

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from final decisions of ALJs in cases under the H-1B provisions of the Immigration and Nationality Act.⁴⁹ The Board has plenary power to review an ALJ’s legal conclusions de novo,⁵⁰ and our decision in this case turns solely on questions of law.

⁴³ Efficiency3 Brief (Br.) at 7; *see also* Tr. at 169, 205-07, 210-11.

⁴⁴ D. & O. at 6; Tr. at 215.

⁴⁵ Efficiency3 Exhibit (Ex.) 19.

⁴⁶ D. & O. at 4; Tr. at 11, 182-84.

⁴⁷ AX 18 at 9-10; AX 22 at 1.

⁴⁸ D. & O. at 5; AX 20.

⁴⁹ *See* 20 C.F.R. § 655.845; *see also* Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,377; 69,378 (Nov. 16, 2012).

⁵⁰ *Limanseto v. Ganze & Co.*, ARB No. 11-068, ALJ No. 2011-LCA-005, slip op. at 3 (ARB June 6, 2013).

DISCUSSION

1. Efficiency3 Violated Its Required Wage Obligation

An employer is required to pay its H-1B nonimmigrant employees the “required wage,” including for so-called “nonproductive time,” for the entire duration of the H-1B visa, unless the employer can show that one of the two exceptions to the benching provision applies.⁵¹ Efficiency3 failed to pay Mr. Liu the required wage for certain periods during the duration of his H-1B visa, and neither of the two exceptions applies.

A. Efficiency3 Failed to Pay Mr. Liu the Required Wage for Part of the Time that He Was on an H-1B Visa

Efficiency3 failed to pay Mr. Liu the required wage in December 2009 and for much of the period from January to September 2012.

First, Efficiency3 failed to pay Mr. Liu the required wage for the two semi-monthly pay periods in December 2009. The required wage in December 2009 was \$46,000 per year, or \$1,916.66 per semi-monthly pay period, because that was the higher of the “prevailing wage” and the “actual wage.” Based on the Labor Condition Application that Efficiency3 submitted to the Department of Labor, the prevailing wage was \$45,094 per year. The actual wage was \$46,000 per year because that was what Efficiency3 paid Mr. Liu from the time he began work under the H-1B visa on October 1, 2009. At that point, then, Efficiency3 was legally obligated to continue to pay Mr. Liu at least \$46,000, or \$1,916.66 per semi-monthly pay period, unless one of the exceptions applied. For the two pay periods in December 2009, Efficiency3 paid Mr. Liu \$1,840.66. These payments were thus below the required wage, and the difference is \$152.

Second, Efficiency3 failed to pay Mr. Liu the required wage for much of the period from January to September 2012. For that period, the required wage was \$47,380.08 per year (or \$1,974.17 per semi-monthly pay period): because Mr. Liu’s “actual wage” had risen to that amount starting in October 2010, his “required wage” did likewise. Starting with the January 15, 2012 paycheck, however, Efficiency3 stopped paying Mr. Liu \$1,974.17 per pay period, instead paying him at a variety of rates, most of which were substantially lower than \$1,974.17. The sum total of wages that Efficiency3 paid to Mr. Liu from January to September 2012 amounted to \$13,451.38 less than the amount it should have paid him under the required wage rate of \$1,974.17 per pay period.⁵²

⁵¹ See *supra* at 3.

⁵² For several pay periods during that time, Efficiency3 in fact paid Mr. Liu *more* than \$1,974.17 per pay period. See *supra* text accompanying note 41. The \$13,451.38 figure includes credits to Efficiency3 for the amounts above \$1,974.17 per pay period that it paid to Mr. Liu.

The underpayment from these two periods thus totals \$13,603.38.

B. Neither of the Two Regulatory Exceptions Applies

Neither of the two regulatory exceptions to the benching provision applies, and Efficiency3 does not seriously contend otherwise. It does make various arguments, some of which attempt to shoehorn its factual allegations into the language of the legal standards, but none of them speak to the law's two available exceptions.

First, the “employee unavailability” exception to the benching provision does not apply. To the extent that Mr. Liu wasn't working during the relevant time period, the reason was not due to conditions “unrelated to employment.” Nor was the reason due to conditions that took him “away from his[] duties at his[] voluntary request” or due to conditions that rendered him “unable to work.”⁵³

Efficiency3 argues that Mr. Liu was not “ready and willing” to work because he would not perform certain tasks (e.g., train his replacement or provide passwords and “documentation” to Mr. Zaloom).⁵⁴ In essence, Efficiency3 argues that because Mr. Liu was a recalcitrant—perhaps even insubordinate—employee, it should be permitted to dock his pay. But, employee insubordination does not exempt an employer from its required wage obligation.⁵⁵

Efficiency3 provides no legal basis for its view that discrete acts of insubordination or workplace conflicts satisfy the “employee unavailability” exception. For one, “ready and willing” is not the legal standard, at least not in the way in which Efficiency3 seems to view it. The ALJ took the phrase “ready and willing” from the testimony of the Wage and Hour Division investigator during the hearing,⁵⁶ and in its brief, Efficiency3 picks up on this language. It is

⁵³ 20 C.F.R. § 655.731(c)(7)(ii).

⁵⁴ Notwithstanding this argument, Mr. Zaloom testified that Mr. Liu did in fact eventually provide the passwords and documentation he needed. D. & O. at 6; Tr. at 215.

⁵⁵ Efficiency3 also refers to Mr. Liu allegedly engaging in a “breach of contract” scheme because of his alleged unwillingness to turn over passwords and “documentation.” Efficiency3 Br. at 3, 20. For support, Efficiency3 cites to a “Proprietary Information, Inventions and Non-Solicitation Agreement,” apparently signed by Mr. Liu and suggesting that Mr. Liu acknowledged that any employment-related “information” or “inventions” belong to Efficiency3. See Efficiency3 Ex. 24. If Efficiency3 believed that Mr. Liu's failure to turn over passwords or “documentation” breached that contract, Efficiency3 could have brought a civil action against him for breach of contract. But any alleged breach of contract is irrelevant to this proceeding.

⁵⁶ In her Decision, the ALJ said “counsel for the Administrator” articulated the “ready and willing” standard, D. & O. at 2, but it actually came from the testimony of the Wage and Hour

true that an H-1B nonimmigrant being “ready and willing” to work might be relevant to the “employee unavailability” exception. For example, it may be that if an H-1B nonimmigrant *is* “ready and willing” to work, that would suffice to show that the employee is not, as the regulation articulates it, away from his duties “at his[] voluntary request.”⁵⁷ But just because an H-1B nonimmigrant is not “ready and willing” to do each and every task assigned by his supervisor, that does not mean that the “employee unavailability” exception is satisfied. It doesn’t necessarily mean, for example, that the employee is in a “period of nonproductive status due to conditions unrelated to employment” In fact, it is not even clear that a failure of an employee to perform specific tasks renders him in a “nonproductive status” at all. Thus, while Mr. Liu’s alleged insubordination might have demonstrated that Mr. Liu was not “ready and willing” to work in some abstract sense of those words—or, at least, it may be relevant to whether he was “ready and willing” to do all the tasks Efficiency3 required of him—it simply does not speak to the relevant question, whether Mr. Liu was in a “nonproductive” status, and if so, whether that was because of “conditions unrelated to employment which [took him] away from his[] duties at his[] voluntary request and convenience . . . or render[ed] [him] unable to work”⁵⁸

More importantly, the evidence is clear—indeed, Efficiency3’s President Mr. Zaloom testified to this effect—that the reason for any time period during which Mr. Liu was in fact not working full-time had nothing to do with whether Mr. Liu was “ready and willing” to work: it was that Efficiency3 lost a major government contract.⁵⁹ That is the quintessential example of a failure to pay the required wage due to conditions *related* to employment. If, as Efficiency3 alleges, Mr. Liu failed to perform his job responsibilities, that does not constitute being taken “away from [the employee’s] duties at his/her voluntary request and convenience” or being “render[ed] unable to work,” within the meaning of the “employee unavailability” exception. The examples given in the regulation—“touring the U.S.,” “caring for ill relative,” “maternity leave” and “automobile accident which temporarily incapacitates the nonimmigrant”—make clear that the employee has to be away from work altogether. Here, the evidence is undisputed

Investigator at the hearing (during both direct and redirect examination by the Administrator’s counsel). Tr. at 43, 88, 90-92.

⁵⁷ 20 C.F.R. § 655.731(c)(7)(ii).

⁵⁸ *Id.*

⁵⁹ D. & O. at 5 (citing Tr. at 179-180); Efficiency3 Br. at 2, 18; Efficiency3 Ex. 6 at 7-8 (in a letter from Mr. Zaloom to the Wage and Hour investigator, stating that, after the loss of the government contract at the end of 2011, “there simply was not enough work to keep either Mr. Liu or Ms. Liu employed on a full-time basis—not only that, there was no longer any need for their superior accounting and technical qualifications either”).

that Mr. Liu came to work every workday during this period and was in the office for at least eight hours per day.⁶⁰

The “employee unavailability” exception thus simply does not apply when the employee comes to work every day but fails to do his assigned job tasks. Efficiency3 was Mr. Liu’s employer, and Mr. Zaloom was the President of Efficiency3 and Mr. Liu’s supervisor. It was Mr. Zaloom’s responsibility, as Mr. Liu’s boss, to make sure he performed his job tasks. If Mr. Liu refused to do his job properly, there may well be things Efficiency3, as the employer, could have done—for example, fire him.⁶¹ What Efficiency3 could not do is pay Mr. Liu less than the required wage: doing so violates the H-1B visa provisions of the Immigration and Nationality Act and the Labor Department regulations implementing that Act.

Second, Efficiency3 has failed to satisfy the “bona fide termination” exception to the benching provision. To effect a “bona fide termination” requires, among other things, that the employer notify the Department of Homeland Security, so that the employee’s petition can be cancelled.⁶² For the periods under question (December 2009 and January to September 2012), Efficiency3 continued to employ Mr. Liu. Indeed, Mr. Liu continued to work part-time for Efficiency3 until the end of March 2013, months after the H-1B visa at issue here expired, and remained on Efficiency3’s payroll that entire time.⁶³ It was only then that Efficiency3 notified

⁶⁰ D. & O. at 4; Tr. at 111, 184.

⁶¹ See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110; 80,171 (Dec. 20, 2000) (“[I]f an employer finds need to discipline an H-1B nonimmigrant, it must find a method other than loss of pay, or it may terminate the employment relationship.”); *cf. id.* at 80,170 (noting that one of the sponsors of the benching provision stated that the provision “does not prohibit an employer ‘from terminating an H-1B worker’s employment on account of lack of work or for any other reason’”); *id.* (noting that “the employer, at any time, may terminate the employment of the worker, notify INS, and pay the worker’s return transportation, thereby ceasing its obligations to pay for non-productive time under the H-1B program”).

⁶² See *supra* note 17. Mr. Zaloom knew that he needed to contact the Department of Homeland Security to effectuate a *bona fide* termination of Mr. Liu. See Tr. at 170.

⁶³ *Cf.* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110; 80,171 (Dec. 20, 2000) (noting that “under no circumstances would the Department [of Labor] consider it to be a *bona fide* termination if the employer rehires the worker if or when work later becomes available unless the H-1B worker has been working under an H-1B petition with another employer, the H-1B petition has been canceled and the worker has returned to the home country and been rehired by the employer, or the nonimmigrant is validly in the United States pursuant to a change of status”).

Homeland Security that, effective April 1, 2013, Mr. Liu had resigned.⁶⁴ Efficiency3 thus did not effect a “bona fide termination of the employment relationship” until well after the periods in dispute in this case.

Efficiency3 argues that Mr. Liu effectively resigned sometime during the January to September 2012 period. Trying to frame its argument through the lens of the language of the exception, Efficiency3 says that Mr. Liu “self-terminated.” Mr. Liu did no such thing. He continued to be a bona fide employee of Efficiency3. As with its argument that Mr. Liu was not “ready and willing” to work, Efficiency3’s argument that Mr. Liu “self-terminated” misunderstands what it means to resign—or, as more precisely required here, to constitute a “bona fide termination”—within the meaning of the law.

Efficiency3’s argument is based on the same factual allegations as its argument about the “employee unavailability” exception: it argues that Mr. Liu effectively resigned because he “ignor[ed] the company’s requests that [he] train a designated backup employee” and “with[held] critical documentation, passwords, and procedures without which the company could not have continued its operations.”⁶⁵ The problem with this argument is that any alleged failure on Mr. Liu’s part to perform his job tasks simply does not constitute a “bona fide termination” within the meaning of the regulations. Mr. Liu was on Efficiency3’s payroll. Even if he was not doing his job in the way his employer demanded, that does not mean he resigned or was terminated. Even if Efficiency3 found Mr. Liu’s job performance substandard, the onus would then have been on Efficiency3 to sanction him in some legal way, including perhaps by firing him. It had no authority to pay him less than the legally mandated required wage.⁶⁶

2. Efficiency3’s Other Arguments

The crucial problem with all of Efficiency3’s other arguments on appeal is that none of them speak to either of the two exceptions to the benching provision. In essence, the thrust of Efficiency3’s claims is that this proceeding should encompass numerous questions that are in fact irrelevant to whether Efficiency3 paid Mr. Liu the required wage for the entire duration of Mr. Liu’s H-1B status and whether either of the two exceptions in the law applies.

A. Efficiency3’s Arguments about Alleged Wrongdoing

Most of Efficiency3’s arguments appear to be appeals to a sense that Efficiency3 has been a victim here—of actions by both Mr. Liu and the Wage and Hour Division—and that it

⁶⁴ AX 20.

⁶⁵ Efficiency3 Br. at 2.

⁶⁶ *See supra* note 61.

would thus be unfair to apply this clearly applicable law to Efficiency3.⁶⁷ The core problem with these arguments is that the law clearly applies and any alleged wrongdoings Efficiency3 has suffered—even if there were such wrongdoings—are not *legally* relevant to Efficiency3’s liability under the Immigration and Nationality Act and applicable Labor Department regulations, and are thus outside the purview of this proceeding.⁶⁸

Efficiency3 claims to be the victim of both Mr. Liu and the Wage and Hour Division. His principal claims are that Mr. Liu (together with Ms. Liu) defrauded the company and that the Wage and Hour Division—and, in particular, its investigator, Mr. Christopher Silva—railroaded the company.

The crux of Efficiency3’s claim that it was the victim of Mr. Liu’s machinations is its claim that Mr. Liu and Ms. Liu conspired to defraud the company.⁶⁹ Efficiency3 claims that a “substantial part of Mr. Liu’s salary was transferred to Ms. . . . Liu’s salary, his then live-in fiancée, at his specific request and on his behalf.”⁷⁰ As best we can tell, the alleged fraud went something like this: After Efficiency3 lost its big contract at the end of 2011, Mr. Zaloom required all of Efficiency3’s employees to take a pay cut. Mr. Liu and Ms. Liu, who at the time were each making \$47,380.08 per year, agreed to a pay cut so that they would each be making only approximately \$36,000 per year. In reluctantly agreeing to the pay cut, however, they made clear that they would only work five hours per day, rather than their previous full-time of eight hours per day. The idea, presumably, would be that they would actually be paid a slightly higher hourly wage but that they would just be working less. More importantly—and here is where the alleged fraud begins to take shape—they would spend the rest of their time looking for a new

⁶⁷ Efficiency3 also argues that the ALJ was unfair to him. Efficiency3 Br. at 29 (arguing that the ALJ “exonerate[d] [the investigator] of wrong-doing while that investigator is still being investigated by the DOL Inspector General”); *id.* (arguing that the ALJ “overlook[ed] blatant perjury by an H-1B worker in order to secure a specific outcome”); *id.* at 13 (arguing that the ALJ decided the case before his post-hearing brief was due, “prejudicially rush[ing] to issue a Decision and Order in favor of the DOL Administrator.”). Because our decision in this case is based solely on legal questions and our review of those questions is *de novo* (and thus independent of what the ALJ concluded), these arguments are also irrelevant here.

⁶⁸ See Supp. D. & O. at 2-3.

⁶⁹ See Efficiency3 Br. at 2 (“Mr. Xiaosi Liu and Ms. Jianing Liu . . . colluded in a sophisticated fraud and breach of contract scheme against Efficiency3 in order to prevent the company from laying them off or modifying their H-1B status, until they found long-term full time employment elsewhere in the United States.”); *id.* at 27 (“This case goes beyond a wage and hour issue and is essentially a document and benefit fraud case involving not one, but two, H-1B workers”); see also *id.* at 30 (referring to “blackmail”).

⁷⁰ Efficiency3 Br. at 1-2.

job, so they could remain in the United States. Moreover, they would use Efficiency3's offices, computers, and other resources in their job searches. It is unclear why Mr. Zaloom agreed to this—after all, he could have terminated them, or, at least, sought to switch them to part-time H-1B visas—but in Efficiency3's telling of the story, it was because he wished them well and it would have been a significant hassle and expense for Efficiency3 to cancel their H-1B visas or apply for part-time H-1B visas. In any event, from Efficiency3's perspective, the company was effectively paying them a higher hourly rate than before, even though it felt compelled to pay them a lower total salary given Efficiency3's financial difficulties at the time.

According to Efficiency3, the alleged fraud goes further though. Somehow, Mr. Liu and Ms. Liu (who were apparently living together and were by this point engaged to be married) managed to arrange things so that Ms. Liu would continue to get the salary she had always been getting, \$47,380.08, “in order not to jeopardize her H-1B status,”⁷¹ while Mr. Liu's salary would be reduced to \$24,634. That way, the two of them would together earn approximately \$72,000, and so, in effect, Efficiency3 would be paying each of them half of that, or approximately \$36,000. Efficiency3 does not state explicitly why it agreed to finagle with its payroll in this unusual manner, but argues that Mr. Liu (and perhaps also Ms. Liu) had such extraordinary knowledge and information about Efficiency3 that they were able to coerce Mr. Zaloom (and thus Efficiency3) into agreeing to this arrangement. Efficiency3's acknowledgement that it agreed “not to jeopardize” Ms. Liu's H-1B status, though, strongly suggests that Efficiency3 understood well that it was not allowed to reduce either of their salaries without running afoul of the law.

Even if we assume this is what happened, though, all it shows is that Efficiency3 did in fact violate the law. If, as Efficiency3 says, Ms. Liu was also on an H-1B visa and had been previously paid \$47,380.08 per year, that amount would have been her required wage too. The benching provision would prohibit Efficiency3 from reducing the wages of *either* Mr. Liu *or* Ms. Liu. So, even if we were to attribute part of Ms. Liu's salary to Mr. Liu and treat them each as having been paid approximately \$36,000 per year from January to September 2012, Efficiency3 would have violated the law as to *both* of them.

The bigger problem with this argument, though, is that the law simply does not permit Efficiency3 to pay Ms. Liu instead of Mr. Liu. The law is clear that the only wages that count for purposes of the employer's required wage obligation are those that are “paid to the *employee*, cash in hand, free and clear.”⁷² Moreover, unless the payments are recorded on the employer's payroll for, and reported to various taxing authorities as the income of, the employee, they don't count either.⁷³ Quite simply, any money that Efficiency3 gave to *Ms. Liu*, whatever the reason,

⁷¹ Efficiency3 Ex. 6, at 6.

⁷² 20 C.F.R. § 655.731(c)(1) (emphasis added).

⁷³ 20 C.F.R. § 655.731(c)(2); *see supra* at 2-3.

cannot count as wages paid to *Mr. Liu* for purposes of satisfying Efficiency3’s legal obligation to pay *Mr. Liu* the required wage.

Efficiency3’s only other argument—that the Wage and Hour investigator made “serious errors” in his investigation—is similarly unavailing. The crux of this argument is based on the investigator’s alleged failure to investigate *Ms. Liu*—and, in particular, the investigator’s alleged failure to consider Efficiency3’s claim that *Ms. Liu*’s salary should have counted as *Mr. Liu*’s.⁷⁴ Since any arrangement to pay *Mr. Liu* through *Ms. Liu* would fail to satisfy Efficiency3’s required wage obligation—and, we emphasize, the obligation to comply with the law’s required wage and payroll obligations is the employer’s, not the employee’s—the investigator’s alleged failure to investigate *Ms. Liu* and the alleged fraud is irrelevant to Efficiency3’s liability here.

Efficiency3 does make other allegations against the Wage and Hour investigator, allegations about bias and prejudging the facts,⁷⁵ but none of them changes the fact that Efficiency3 failed to pay *Mr. Liu* the required wage and to satisfy either of the two exceptions to the required wage obligation. Whatever the investigator did, it doesn’t change the fact that Efficiency3 violated its required wage obligation under the Immigration and Nationality Act and applicable Department of Labor regulations.⁷⁶

⁷⁴ See Efficiency3 Br. at 2 (“The Wage and Hour Division . . . improperly failed to consider evidence that Efficiency3 presented that linked the two individuals’ coerced payroll manipulations and exposed their visa fraud scheme.”).

⁷⁵ See Supp. D. & O. at 2 (quoting an Efficiency3 submission as saying that “*Mr. Christopher Silva* failed to follow due process, failed to conduct due diligence, suppressed evidence, and rushed to judgment without considering[] any of the evidence provided by Efficiency3” (emphases in original)); see also Efficiency3 Br. at 29 (arguing that the Wage and Hour Division launched its investigation “based on the flimsiest of reasons”); *id.* (arguing that the Wage and Hour investigator “pick[ed] and [chose] which evidence to pursue and which evidence to exclude from the case file”); Efficiency3 Reply Br. at 4-5 (arguing that the Wage and Hour Division “conducted an unmistakably corrupt and illegal investigation of Efficiency3 from the start” (emphases in original)).

⁷⁶ Efficiency3 claims to have filed a complaint against *Mr. Silva* with the Department of Labor’s Office of Inspector General. See Efficiency3 Br. at 21; Efficiency3 Reply Br. at 7. We make no determination about anything related to that complaint. Cf. Supp. D. & O. at 2 (“*Mr. Zaloom* has been repeatedly advised that he is free to present his allegations to the appropriate investigating authorities. This Court is not one of them.”). Key here is that, irrespective of what *Mr. Silva* did or did not do in his investigation, the undisputed facts are that Efficiency3 failed to pay *Mr. Liu* the “required wage” and that neither of the two exceptions to his required wage obligation applies.

B. Changing Economic Conditions

Though none of Efficiency3's arguments speak to the two exceptions found in the regulation, one of Efficiency3's arguments does seem to go to the core of why Efficiency3 reduced Mr. Liu's wages. Efficiency3 argues that, according to a provision in a Wage and Hour Division Field Operations Handbook, employers may reduce an H-1B nonimmigrant's wages because of "[c]hanging economic conditions."⁷⁷ The loss of its large contract, Efficiency3 argues, was a "changing economic condition" and should therefore have permitted the company to reduce Mr. Liu's wages pursuant to this Handbook provision. In response, the Administrator says that the relevant Handbook provision applies only when an employer has a "wage system" encompassing other employees with similar experience and qualifications performing the same type of work as the H-1B worker and thus does not apply here because no one other than Mr. Liu performed his specific job tasks.⁷⁸ The Administrator also argues that the Handbook requires an employer with such a "wage system" to record the actual wage change in a so-called "public access file" that all employers of H-1B nonimmigrants are required to keep. Since, the Administrator argues, Efficiency3 did not do this, it is not entitled to reduce Mr. Liu's wages because of changing economic conditions.⁷⁹ In reply, Efficiency3 says that Mr. Liu's "backup" performed the same type of work as Mr. Liu and that, in any event, Ms. Liu did as well.⁸⁰ Therefore, Efficiency3 reasons, the Handbook provision should apply. Efficiency3 makes no response, though, to the Administrator's argument that the "wage system" changes had to be recorded in a "public access file."

We make no determination about the Handbook provision's applicability to this case or about the Department of Labor's authority to apply provisions in the Handbook in general. The relevant portion of the Handbook (apparently, Chapter 71) does not appear to be available to the public, and we have not been able to find a copy in any publicly available sources. Moreover, the Handbook was not placed into the record of this case below, and neither party supplied it to us. The parties' references to this Handbook certainly do imply that it might be relevant to this

⁷⁷ See Efficiency3 Br. at 27.

⁷⁸ Administrator (Admin.) Br. at 13-14; *see also* 655.731(a)(1) ("Where the employer's pay system or scale provides for adjustments during the period of the LCA—e.g., cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation—such adjustments shall be provided to similarly employed H-1B nonimmigrants (unless the prevailing wage is higher than the actual wage).").

⁷⁹ Admin. Br. at 14-15.

⁸⁰ Efficiency3 Reply Br. at 2-3.

case. But without access to the full document, we cannot possibly interpret it, or even determine whether we can treat it as legally binding.⁸¹

CONCLUSION

In sum, then, Efficiency3 failed to pay Mr. Xiaosi (Paris) Liu, an H-1B nonimmigrant employee, the required wage in December 2009 and for much of the period from January to September 2012. Efficiency3 thus owes Mr. Liu \$13,603.38 in back pay, plus accrued interest.⁸²

SO ORDERED.

ANUJ C. DESAI
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

⁸¹ We do find it somewhat troubling that the Administrator may be regulating the behavior of employers in a major visa program such as the H-1B program based on a document that is not available to those being regulated.

⁸² 20 C.F.R. § 655.810(a); *see also, e.g., Baiju*, ARB No. 10-094, slip op. at 11 (affirming an ALJ award of accrued interest).