STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
LI JING (T/A JINGLI US LLC) AND JINGLI US LLC,	:	
Petitioners,	:	DOCKET NO. PR 14-293
To Review Under Section 101 of the Labor Law: An Order to Comply with Article 6 and an Order Under Article 19 of the Labor Law, both dated October 23, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Li Jing, petitioner pro se, and for JingLi US LLC.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Jake Ebers of counsel), for respondent.

WITNESSES

Li Jing, for petitioners.

Jeremy Kuttruff, Senior Labor Standards Investigator, for respondent.

WHEREAS:

On November 17, 2014, petitioners Li Jing (T/A JingLi US LLC) and JingLi US LLC filed a petition with the Industrial Board of Appeals (Board) seeking review of two orders issued against them by the Commissioner of Labor (Commissioner) on October 23, 2014. The Commissioner filed her answer on January 14, 2015. Petitioners amended their petition on February 20, 2015.

Upon notice to the parties, a hearing was held on March 10, 2015 in New York, New York before Board member and designated hearing officer J. Christopher Meagher, Esq. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The first order (wage order) demands that petitioners comply with Article 6 of the Labor Law and pay the Commissioner $1,531.43 in unpaid wages due and owing to claimant employee Yu Liu for the period from November 10, 2012 to December 20, 2012, interest at the rate of 16% calculated to the date of the order in the amount of $451.12, liquidated damages in the amount of $382.86, and a civil penalty in the amount of $1,531.43. The total amount due is $3,896.84.

The second order (penalty order) under Article 19 of the Labor Law assesses petitioners a civil penalty of $500.00 for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish the Commissioner true and accurate payroll records for each employee for the period from November 10, 2012 to December 20, 2012.

As clarified at hearing, the amended petition alleges that: (1) the orders should be annulled because claimant was never employed by petitioners; (2) and petitioner Li Jing is not personally responsible for the wages, interest, liquidated damages, and civil penalties listed in the orders.

SUMMARY OF EVIDENCE

Testimony of petitioner Li Jing

Petitioner Li Jing testified that she is an owner and operator of petitioner JingLi US LLC, a company that develops educational videos and internet-media for Chinese individuals residing in the United States and in China who wish to pursue economic opportunities in the United States. Petitioner came to the United States from China as a student, completed her education, and worked for NBC and CBS News as a producer and on-line reporter. She started the company in 2012 to help others learn job and entrepreneurial skills to help them succeed.

Petitioner testified that she met claimant Yu Liu in 2012 at an event where petitioner was interviewing a Chinese entertainer for one of the company's educational videos. Claimant contacted her a few days later looking for a job and seeking learning experience in the media field. Petitioner told her the company did not need another employee at the time and could not hire her because she lacked prior experience. However, petitioner agreed that she could come to the company's office to observe video and production techniques as a learning exercise. The parties scheduled dates in November and December 2012 where claimant came to the office and observed petitioner and others demonstrate how to operate a video camera, perform interview techniques, and discuss relevant job skills. As claimant had just moved to New York City and was facing economic hardships at the time, petitioner gave her $102.00 to help her out and cover the subway and taxi expenses to attend the sessions.

Petitioner submitted a calendar she made showing the dates in November and December 2012 when claimant was scheduled to come to the office as an "observer." Petitioner testified that claimant came to the office just four times, was always late, and stayed a couple hours each time. She had access to the company's computers to check on routine matters while she was there if she needed to. After discovering that claimant had improperly used the computers to send out personal job resumes, however, and had damaged a camera and other equipment, petitioner advised her not to come anymore. Petitioner asserted that she never hired claimant or promised to pay her salary or wages and that claimant never performed any work for the company.

Petitioner testified that the company hired employees from time to time and identified several employees who worked in the office in 2012 on production "projects." Together with other people who helped run the company, petitioner had authority to hire the employees, schedule their hours, and decide how much they would be paid. As evidence that the company properly paid them, she submitted 1099 tax forms showing the compensation they were paid in 2012.

On cross-examination, petitioner was presented with a letter that was included in a chain of documents submitted to the Department of Labor (DOL) on behalf of claimant prior to the filing of her written claim. The letter was allegedly signed by petitioner on the company's letterhead and stated that claimant was employed "in our company." Petitioner denied that she authored or signed the letter and testified that it was fabricated by claimant.

DOL's Investigation

On January 28, 2013, DOL received a written claim for unpaid wages filed on behalf of claimant Yu Liu stating that she had been employed by petitioner as a "CEO Assistant & Marketing Associate" during the period from November 12, 2012 to December 20, 2012. The claim form stated that she had been promised a stipend of $204.00 per month, had worked a total of 225.3 hours but received only $102.00 for her work, and at minimum wage of $7.25 per hour was owed $1,531.42 in unpaid wages for the period of her claim. The claim was filed by mail and was dated and signed on January 23, 2013.

On January 30 and March 27, 2013, DOL issued petitioner collection letters to the address listed for the business on the claim form advising her of the details and requesting that she remit payment or submit reasons why the wages were not owed, including payroll records and any other information substantiating her reasons. The letters were returned as undeliverable.

On April 17, 2013, Senior Labor Standards Investigator Jeremy Kuttruff sent petitioner a letter to an updated address advising her that the claim had been referred for orders to comply because she had failed to respond to DOL's earlier correspondence and had failed to remit payment or submit daily and weekly records of the hours worked by the claimant, along with payroll records showing that she was paid for those hours. Kuttruff advised petitioner that she should remit payment or submit the records by May 1, 2014 to avoid issuance of the orders, including additional interest, liquidated damages, and penalties.

Petitioner responded on May 19, 2014, stating that she had not received the earlier correspondence because the company had moved. Petitioner maintained that claimant had come to the company only to learn media skills, was never employed, and had damaged company equipment costing over $2,000.00.

Kuttruff replied by letter of May 22, 2014, advising petitioner that the reasons stated in her response were insufficient to refute the claim. In the absence of records substantiating the hours worked and wages paid, Kuttruff stated that DOL would issue final orders directing her to pay $1,531.43 in unpaid wages, plus interest, liquidated damages, and civil penalties, unless payment was received by June 5, 2014. Petitioner did not remit payment and the orders were issued on October 23, 2014.

Kuttruff further testified that DOL had received an earlier letter from claimant prior to the claim being filed, enclosing the document on petitioner's letterhead described above and alleged email correspondence between the parties. As the letter disclosed possible Labor Law violations but lacked sufficient information to proceed, DOL advised her that before it could pursue the matter further she needed to file a written claim for unpaid wages, a copy of which was enclosed. The written claim was filed shortly thereafter. Kuttruff stated that the information was not maintained in DOL's investigative file but in a separate file for correspondence that precipitated the investigation.

DOL did not submit evidence showing that any investigator interviewed or spoke with the claimant during the course of the investigation or substantiated that she had signed the claim form or earlier letter.

GOVERNING LAW

Petitioners' Burden of Proof

Petitioners' burden of proof in this case was to establish by a preponderance of evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law § 101 [1]; 12 NYCRR 65.30; *Matter of Ram Hotels, Inc.*, PR 08-078 at 24 [October 11, 2011]).

Unpaid Training Programs

The definition of "employee" in Article 6 of the Labor Law includes any "person employed for hire by an employer in any employment" (Labor Law § 190 [2]). With certain exceptions not relevant to this case, "employee" is defined in Article 19 of the Labor Law as "any individual employed or permitted to work . . . in any occupation" (Labor Law § 651 [5]). "Employed" under both Articles means "permitted or suffered to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act (FLSA), like the New York Labor Law, defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]). Since the statutes define employees in nearly identical terms, the Labor Law is construed in the same fashion as the FLSA in determining whether persons receiving unpaid training at the premises of an employer are employees (*Glatt v Fox Searchlight Pictures, Inc.*, 811 F3d 528, 534 [2d Cir 2016]).

In 1947, the Supreme Court held in *Walling v Portland Terminal*, 330 US 148, 152 [1947] that the words "suffer and permit to work" do not make persons employees, "who without any express or implied compensation agreement, might work for their own advantage on the premises of another." The court articulated several factors that it considered in determining that railroad brakemen trainees were not employees within the meaning of the FLSA: (1) the trainees did not displace any regular employees and after observing routine activities gradually worked under the close supervision of existing staff; (2) the training was for the benefit of the trainees; (3) the employer that provided the training derived no immediate advantage from the trainees' activities, and on some occasions, was actually impeded by it; (4) the employer and trainees understood that they were not entitled to wages for their time spent in the course; (5) the trainees were not necessarily entitled to a job at the conclusion of the program, and; (6) the course was

similar to that which would be offered by a vocational school (*Id.* at 149-153; *see* USDOL, Wage & Hour Div., Field Operations Handbook, Ch. 10, ¶ 10b11 (October 20, 1993), *available at* www.dol.gov/whd/FOH-Ch.10.pdf [enumerating the six criteria drawn from *Walling* as informal guidance and stating that a trainee or student-trainee is not an employee only if all the criteria are met]).

The Second Circuit has recently held that the factors set forth by the Court in *Walling* are non-exhaustive, with no one factor being dispositive, and may be weighed with other relevant evidence in appropriate cases (*see Glatt*, 811 F3d at 537-38 [adding additional factors in the context of "intern" programs provided by an employer that are related to formal education programs at an educational institution]).

Definition of Employer

"Employer" as used in Articles 6 and 19 of the Labor Law means "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law §§ 190 [3] and 651 [6]).

Since the Labor Law and the FLSA define "employ" in identical terms, it is also well settled that the test for determining whether an entity or a person is an employer under the Labor Law is the same test for analyzing employer status under the FLSA (*Matter of Maria Lasso and Jamie Correa Sr. and Exceed Contracting Corp.*, PR 10-182 at 6 [April 29, 2013], *aff'd. sub nom, Matter of Exceed Contracting Corp. v Industrial Board of Appeals*, 126 AD3d 575 [1st Dept 2015]; *Chung v New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Security Services, Ltd.*, 172 F3d 132, 139 [2d Cir 1999], the Second Circuit articulated the test for determining employer status:

> "the overarching concern is whether the alleged employer possessed the power to control the workers in question . . . with an eye to the 'economic reality' presented by the facts of each case . . . Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."

When applying this test "no one of the four factors standing alone is dispositive. Instead, the 'economic reality' test encompasses the totality of circumstances, no one of which is exclusive" (*id*).

FINDINGS

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR 65.39).

Petitioners Met Their Burden to Establish That Claimant Was Not an Employee

Petitioner's un-rebutted testimony establishes that claimant was not "employed" by petitioners under the balance of factors set forth in *Walling*.

Petitioner testified that after meeting claimant at an event where she was doing an interview for one of the company's educational videos, claimant contacted her seeking employment or learning experience in the media field. Petitioner advised her that the company could not hire her as an employee but she was welcome to come to its office and observe video and production techniques as a learning exercise. The parties set up a schedule where claimant came to the office on four occasions and observed petitioner and her colleagues demonstrate how to operate a video camera, perform interviews techniques, and discuss relevant job skills. Petitioner did not promise claimant any wages for the training sessions and claimant never performed any work for the company. While petitioner gave her $102.00 to cover subway and taxi expenses to attend the sessions, she did so as charitable help because claimant had just moved to New York City and was facing economic hardships at the time. After claimant misused the company's computers and damaged one of its cameras, petitioner terminated the arrangement.

Petitioners' evidence met their burden of proof and established that claimant did not displace any regular employees during the training program; the program was for claimant's benefit and the company derived no immediate advantage from it; and she was not entitled to wages for her time in the program or a job with the company when it was concluded. There was no evidence submitted concerning the similarity of the training offered by petitioners to that provided by a vocational school, but the balance of factors clearly weighs in favor of finding that claimant was not an employee under the criteria set forth by the Supreme Court.

The burden having shifted, DOL failed to rebut petitioners' evidence with credible proof establishing that claimant was "employed" by petitioners during the period of the claim. Claimant did not testify at hearing and the claim form and earlier letter triggering the investigation are hearsay that was never substantiated by an investigator during the course of the investigation (*see Matter of Joseph Baglio*, PR 11-394 at 8 [December 8, 2015] [reliance on unsubstantiated questionnaires returned in the mail to calculate wages for employees who did not testify at hearing unreasonable]; *Matter of Geiger*, PR 10-303 at 8-9 [January 16, 2014] [reliance on questionnaire returned in the mail without sufficient foundation unreasonable]). The Commissioner's effort to impeach petitioner's testimony with an alleged letter written on the company's letterhead stating that claimant was an employee was unavailing, as petitioner denied she authored or signed the letter. The letter is therefore unsubstantiated hearsay and we give it no weight.

Based on petitioners' uncontroverted evidence, we find that claimant was not "employed" by petitioners during the period of the claim and revoke the wage order accordingly.

The Penalty Order Is Affirmed

Article 19 of the Labor Law requires employers to maintain accurate payroll records that include, among other things, their employees' daily and weekly hours worked, wage rate, gross wages, deductions from gross wages, and net wages paid (Labor Law § 661; 12 NYCRR 142-

2.6). Employers are required to keep such records open to inspection by the Commissioner or a designated representative at the place of employment and maintain them for no less than six years (*id.*).

Labor Law § 218 (1) provides that when the Commissioner determines that an employer has violated a provision of Article 19, he must issue an order directing compliance therewith, which shall describe particularly the nature of the violation, and include "an appropriate civil penalty." Where the violation involves "a reason other than the employer's failure to pay wages," the amount of the penalty shall not exceed $1,000.00 for a first violation, $2,000.00 for a second violation, and $3,000.00 for a third or subsequent violation. In applying her discretion as to the amount of the penalty, the statute directs the Commissioner to give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements."

The penalty order in this case assessed petitioners a $500.00 civil penalty for violation of Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for *each* employee for the period from November 10, 2012 to December 20, 2012. While petitioner successfully proved that claimant was not an employee during that time period, she nonetheless acknowledged that at least three other individuals were employed during 2012 and submitted 1099 tax forms showing they were paid compensation for their work. Petitioner failed to produce records of the daily and weekly hours worked by these employees, however, and the 1099 forms do not contain a weekly record of the employees' wage rates, gross wages, deductions from gross wages, and net wages paid. Petitioners thereby failed to "maintain" accurate payroll records in compliance with the Labor Law for *each* employee for the time period covered by the order.

Petitioner asserted that she is not personally responsible for the civil penalty assessed in the order but admitted at hearing that she had authority to hire employees, schedule their hours, and decide how much they would be paid. She also submitted tax records in her possession that demonstrate she maintains employment records. We find as a "matter of economic reality" that she was an employer under the Labor Law and as such is responsible for the civil penalty assessed in the penalty order.

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The wage order is revoked; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, otherwise dismissed.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in Albany, New York, on
July 13, 2016.