

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
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GUOLIN SHI AND THE SOCIETY OF SHAOLIN	:
TEMPLE, INC.,	:
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Petitioners,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 19 and an Order	:
Under Article 19 of the Labor Law, both dated July 6,	:
2010,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 10-285

RESOLUTION OF DECISION

**APPEARANCES**

Jonathan Gould, Esq., for petitioner The Society of Shaolin Temple.

Kenneth Jiang, Esq., for petitioner Guolin Shi.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Larissa C. Bates of counsel), for respondent.

**WITNESSES**

Guolin Shi, Kun Lan, Hong Zhen Song, Chao Gong Song, Chao Hai Lan and Cheuk Ho Kwong, for petitioners.

Senior Labor Standards Investigator (SLSI) Grace Tai, for respondent.

**WHEREAS:**

The petition in this matter was filed with the Industrial Board of Appeals (Board) on September 3, 2010, and seeks review of two orders issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Guolin Shi and The Society of Shaolin Temple Inc. on July 6, 2010. The Commissioner filed his answer on November 10, 2010.

Upon notice to the parties a hearing was held in this matter on May 22 and 23, 2013, in New York, New York, before Anne P. Stevason, then Chairperson of the Board, and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, make statements relevant to the issues, and file legal briefs.

The order to comply with Article 19 (wage order) under review directs compliance with Article 19 and payment to the Commissioner for minimum wages due and owing to 11 Kung Fu instructors in the amount of \$324,374.57, with interest continuing thereon at the rate of 16% calculated to the date of the order, in the amount of \$128,163.49, liquidated damages in the amount of \$81,093.64, and assesses a civil penalty in the amount of \$243,280.92, for a total amount due of \$776,912.62.

The order under Article 19 (penalty order) assesses a \$1,000.00 civil penalty against the petitioners for violating 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 April 6, 2002 through November 21, 2009; a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages for the period from April 6, 2002 through November 21, 2009; and a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.8 by failing to post a required Minimum Wage Poster on or about April 6, 2002 through November 21, 2009; for a total due and owing of \$3,000.00.

The petitioners allege that the orders are invalid or unreasonable where the Kung Fu instructors were not employees under Article 19 because they fell within the exceptions of either Labor Law § 651 (5) (h) because they were employed by the Shaolin Temple, a religious institution, and the work performed was “incidental to or in return for charitable aid conferred” and not under an express contract of hire; and/or Labor Law § 651 (5) (i) which exempts students employed by religious, educational or charitable institutions from the definition of employee. The petition was amended at hearing to include the following allegations: that Guolin Shi was not an employer and should not be held individually liable; that interest should be waived or reduced based on the administrative delay in processing this case; and that credit should be given for a settlement paid to one of the named employees.

The respondent answered that the Kung Fu instructors were employees who were promised payment for their work teaching martial arts and did not fit into either exception since the martial arts school operated by the petitioners was not a religious or charitable institution, the instructors were promised compensation, and none of the employees interviewed identified themselves as students and actually taught Kung Fu for a substantial period of time.

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## I. SUMMARY OF EVIDENCE

### A. Petitioners' Evidence

#### 1. *Testimony of Petitioner Guolin Shi*

Guolin Shi testified that he is in charge of the Shaolin Temple in Flushing, New York, which he founded and incorporated in 1995 as a religious corporation. Kung Fu is an important part of the temple's religious practice and the temple provided Kung Fu lessons during the relevant time period. Most students who attended the temple's Kung Fu lessons paid tuition (\$100 to \$150 per month) and the temple used those funds to help sustain itself. The Kung Fu lessons were provided at the temple in Flushing, a satellite in Manhattan, and at a facility in Brooklyn<sup>1</sup>. The temple also offered lessons on Buddhism and other activities such as meditation. There were approximately 130 Kung Fu students during the relevant time period.

Guolin Shi confirmed that the 11 individuals listed as Kung Fu instructors in the wage order lived at the temple during the relevant time period, and were provided room and board as well as monthly living expenses of \$600.00 to \$700.00 by the petitioners, and that all of them taught Kung Fu lessons except Suo Liu and Yu Guo Song. According to Guolin Shi, Suo Liu was 15 years old at the time and did not teach, while Yu Guo Song was expected to teach Kung Fu but never did so. Guolin Shi stated that each instructor only taught Kung Fu two hours per day, six days per week.

Guolin Shi testified that the schedule for Kung Fu classes in Flushing was Tuesday to Friday from 4:00 p.m. to 10:00 p.m.; and Saturday and Sunday from 9:00 a.m. to 7:00 p.m. The Manhattan schedule was Tuesday to Friday from 4:00 p.m. to 9:00 p.m., Saturday from 1:00 p.m. to 7:00 p.m., and Sunday from 1:00 p.m. to 5:30 p.m. The petitioners did not keep any records of the hours each instructor worked or the money that was given to the instructors.

Guolin Shi identified three H1B1 work visa applications that he signed and certified for three Kung Fu coaches, two of whom are listed on the wage orders -- Ji Mei Wang and Yu Guo Song. The visa applications were submitted to the federal government to bring the instructors to the United States from China. The applications indicate that the individuals would be working as Kung Fu coaches and be paid \$7.00 per hour or \$280.00 per week and that it is not a part-time position. Guolin Shi admitted to signing the applications, but stated that someone else filled them out. The intention in filling out the application for Ji Mei Wang was to have him come to the United States to help teach Kung Fu classes. Guolin Shi testified that he did not understand what an H1B1 visa was when he signed the applications.

#### 2. *Testimony of Kun Lan*

Kun Lan testified that Guolin Shi arranged to bring him to the United States from China as a cultural exchange to perform Kung Fu. The petitioners provided him with room and board, and spending money. Kun Lan testified that he recalled speaking to a DOL investigator and that his statements to her were true. Kun Lan did not teach Kung Fu until 2006. From 2004 to 2006,

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<sup>1</sup> Guolin Shi credibly testified that none of the individuals listed in the order taught Kung Fu at the Brooklyn location and there is no evidence in the record to rebut his testimony.

he studied English and Buddhism. He testified that the petitioners gave him \$700.00 to \$800.00 per month. He further testified that some of his students paid tuition to the temple.

### *3. Testimony of Hong Zhen Song*

Hong Zhen Song testified that he is a Buddhist monk. Guolin Shi brought him to the United States from China in 2005 for the purpose of promoting Buddhism and practicing Shaolin Kung Fu. Hong Zhen Song lived at the temple from 2005 to 2009 and taught Kung Fu to young people.

### *4. Testimony of Chao Gong Song*

Chao Gong Song testified that Guolin Shi brought him from China to the United States in 2007 where he studied Buddhism and taught Kung Fu as a “kind of cultural exchange.” Chao Gong Song taught at the Manhattan location for approximately one year.

### *5. Testimony of Chao Hai Lan*

Chao Hai Lan came to the United States from China in 2004 for a cultural exchange. He lived in the Shaolin Temple for four or five years. He testified that he taught Kung Fu at the Manhattan location, and had no expectation that the petitioners would pay him for this work.

## **B. Respondent’s Investigation**

Senior Labor Standards Investigator (SLSI) Grace Tai testified that DOL initiated a joint investigation of the petitioners with the United States Department of Labor (USDOL) after anonymous letters were received alleging the petitioners were mistreating monks at the Shaolin Temple in Flushing, New York. Two investigators from DOL and two investigators from USDOL visited the temple on February 28, 2006<sup>2</sup> and March 9, 2007 and interviewed Xiao Ju Zhang, Suo Liu, Shi Yan Zhang, and petitioner Guolin Shi. The interviews were written in Chinese on USDOL “Employee Personal Interview Statement” forms with a certified translation provided to the Board. The statements are not signed or sworn, and do not indicate who conducted the interviews or filled out the forms. SLSI Tai was not present during the interviews, and never spoke to any of the individuals who provided statements to USDOL.

Xiao Ju Zhang’s statement, dated February 28, 2006, states that he is the abbot at the Shaolin Temple and a member of the Board of Directors along with several other individuals including Kun Lan and petitioner Guolin Shi. The statement further provides that aside from himself, there are five other Kung Fu instructors – Guolin Shi, Heng Zhen, Hong Zhen Song, Kun Lan, and Chao Hai Lan. Additionally, Xiao Ju Zhang’s statement lists Kun Lan’s teaching schedule as a maximum of two hours per day (4:00 p.m. to 6:00 p.m. after Heng Zheng left; and only 5:00 p.m. to 6:00 p.m. before then) but does not state which days Kun Lan worked. Schedules for other individuals listed in the wage order are not described in Xiao Ju Zhang’s statement.

Suo Liu’s statement, dated March 9, 2007, indicates that he came to the United States with his master (who is not named in the statement) on June 2, 2004 and lived at the temple until

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<sup>2</sup> Based on the totality record, we believe this should be 2007, not 2006.

January 19, 2006. He stated that Fuli Zhu and Cheng Bao Zhang were his colleagues, and that during his time living in the temple he did performances. The statement also mentions that Baomin Wang was an instructor who returned to China in 2005. Suo Liu's statement provides that the Kung Fu class schedule was 8:00 a.m. to 7:00 p.m. on Saturday and Sunday, and 4:00 p.m. to 10:00 p.m. Tuesday to Friday. The statement does not say whether Suo Liu taught Kung Fu, does not give the schedule for any specific instructor, and does not state how many hours he, himself, worked in a day or a week.

Shi Yan Zhang's statement, dated March 9, 2007, indicates that he is a master. The statement lists the names and relationships of various individuals associated with the temple, and explains that petitioner Guolin Shi invited them to the United States to perform and teach Kung Fu. According to Shi Yan Zhang's statement, Kung Fu lessons were from 4:00 p.m. to 9:00 p.m., and the instructors were free to leave the temple at other times, but needed permission from Guolin Shi to take a day off. Shi Yan Zhang's statement also says that "[i]n Shaolin Temple, Monday is off. Tuesday to Friday 4pm to 10pm, Saturday and Sunday 9am-10pm, everyone has to stay in the temple. During that time, if anybody asks for leave, Guo Lin has to approve it. If Guo Lin said no, the person has to stay in the temple." The statement also says that the temple did not say they would pay the members of the "performance group," but the agreement between the petitioners and the Kung Fu instructors is to provide them meals and lodging, and at least \$1,500 a month. Finally, the statement indicates there were six Kung Fu instructors and seven performers. The performers are not monks. The Kung Fu instructors took turns "watching" the branch temple in Manhattan.

Petitioner Guolin Shi also provided a statement to USDOL on March 9, 2007. His statement indicates that some of the Kung Fu instructors were Buddhist monks with monk identification cards issued by the Chinese government. The statement specifically identifies Xiao Ju Zhang and Hong Zhen Song as monks. According to Guolin Shi's statement, Kung Fu lessons were Tuesday to Friday from 4:00 p.m. to 10:00 p.m., and weekends 9:00 a.m. to 7:00 p.m. Each class is one hour. The statement also specifically mentions that Suo Liu and Yan Zhang did not teach Kung Fu. Finally, Guolin Shi's statement indicates that the temple provided the instructors with lodging, meals, and clothing, but did not pay wages to them.

On November 17, 2009, SLSI Tai visited the temple in Flushing along with two other investigators. She interviewed Kun Lan and Hong Zhen Song<sup>3</sup>, the only two individuals present at the temple at the time. SLSI Tai's written interview notes state that they both taught Kung Fu from 9:00 a.m. to 7:00 p.m. Saturday and Sunday, and from 4:00 p.m. to 9:00 p.m. Tuesday to Friday, with one hour of rest after lunch. Her notes further indicate that the petitioners provided two free meals per day plus lodging and \$1,000.00 a month as living expenses (\$600.00 in the beginning). Kun Lan's interview sheet shows that he started working for the petitioners in November 2004. Hong Zhen Song started in October 2005. They both stated they were paid by Guolin Shi, and Hong Zhen Song said that he was hired by Guolin Shi. SLSI Tai subsequently visited the temple and observed Kun Lan and Hong Zhen Song teaching a Kung Fu class to approximately 15 children.

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<sup>3</sup> SLSI actually testified that she spoke to Yu Guo Song, but based on the records in evidence, we believe she meant Hong Zhen Song.

SLSI Tai testified that she determined the minimum wage underpayments in the wage order based on the USDOL statements, the interviews she conducted, and the Manhattan class schedule. Shi Yan Zhang's statement provided the basis for much of her determination. She further testified that she calculated the underpayments for Chao Hai Lan and Chao Gong Sun based on the Manhattan class schedule and, for Chao Hai Lan's "previous years," she used Shi Yan Zhang's statement. She also testified that the hours of work for "about six" of the individuals listed in the wage order came from Shi Yan Zhang's statement. She never personally spoke with Shi Yan Zhang and did not corroborate his statement.

## II. ANALYSIS

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39):

### A. Burden of Proof

The petitioners' burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306 [1]; Labor Law §§ 101, 103; 12 NYCRR 65.30).

### B. "Employer" Status under the Minimum Wage Act

The petitioners amended their petition at hearing to include a claim that petitioner Guolin Shi is not individually liable as an employer. "Employer" as used in Article 19 of the Labor Law means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]). "Employed" means "suffered or permitted to work" (Labor Law § 2 [7]).

The federal Fair Labor Standards Act, like the New York Labor Law defines "employ" to include "suffer or permit to work" (29 USC § 203 [g]), and "the test for determining whether an entity or person is an 'employer' under the New York Labor Law is the same. . . for analyzing employer status under the Fair Labor Standards Act" (*Chu Chung v The New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 319 n6 [SDNY 2003]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), the Second Circuit Court of Appeals stated that the test used for determining employer status by explaining that:

"Because the statute defines employer in such broad terms, it offers little guidance on whether a given individual is or is not an employer. In answering that question, 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 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" (internal quotations

and citations omitted). When applying this test, “no one of the four factors standing alone is dispositive. Instead the ‘economic reality’ test encompasses the totality of the circumstances, no one of which is exclusive.” (*Id.* [internal citations omitted]).

The record shows that several individuals who provided statements to both USDOL and DOL indicated that Guolin Shi controlled the individuals who worked at the temple by hiring them or otherwise arranging for them to come from China to work at the temple such as by preparing their visa applications, directly paying them, and giving approval for requests to leave the temple during working hours. The petitioners did not provide any credible evidence to contradict these statements. Additionally, Guolin Shi testified that he founded and incorporated the Shaolin Temple and signed visa applications for several of the Kung Fu instructors in order to bring them to the United States to work at the temple. We find that these factors support the respondent’s determination that petitioner Guolin Shi was an employer under Article 19 and that he controlled the working conditions of the Kung Fu instructors. Accordingly, Guolin Shi is individually liable as an employer under Article 19 of the Labor Law.

### C. “Employee” Status under the Minimum Wage Act

Article 19 of the Labor Law entitled “Minimum Wage Act” provides that every employer shall pay to each of its employees for each hour worked the minimum wage (Labor Law § 652), and includes several exemptions from coverage (Labor Law § 651).

Petitioners argue that the orders under review are unreasonable and invalid due to the fact that the eleven Kung Fu instructors found to be owed wages are exempt from the definition of employee under Labor Law §§ 651 (5) (h) and (i), and therefore, the Minimum Wage Act does not apply.

Labor Law § 651 (5), in pertinent part, defines “Employee” as follows:

“‘Employee’ includes any individual employed or permitted to work by an employer in any occupation, but shall not include any individual who is employed or permitted to work:

“ . . .

“(h) in or for such a religious or charitable institution, which work is incidental to or in return for charitable aid conferred upon such individual and not under any express contract of hire;

“(i) in or for such a religious, educational or charitable institution if such individual is a student. . . .”

Additionally, although not specifically raised by the petitioner, Labor Law § 651 (5) also exempts individuals employed “as a member of a religious order . . .” (Labor Law § 651 [5] [g]). These exemptions are to be narrowly construed so as to afford the maximum protection possible under the law (*Settlement Home Care v Industrial Board of Appeals*, 151 AD2d 580, 581-82 [2d Dept 1989]).

The Commissioner determined that the 11 Kung Fu instructors listed in the wage order were employees under the Labor Law. However, based on the un-rebutted testimony of

petitioner Guolin Shi that Yu Guo Song, Baomin Wang, Ji Mei Wang, and Xiao Cui Zhang were Buddhist monks living in the temple, studying Buddhism and teaching Kung Fu (except Yu Guo Song who was a monk but did not teach according to Guolin Shi's testimony), we find that those individuals are not covered by Article 19 of the Labor Law because they were employed by the petitioners as members of a religious order (Labor Law § 651 [5] [g]; *see also e.g.* 12 NYCRR 142-3.12 [c] [8]; 12 NYCRR 143.1 [h]). Additionally, Hong Zhen Song testified that he is a Buddhist monk, he resided at the Shaolin Temple in Flushing during the relevant time period promoting Buddhism and displayed and taught Shaolin Kung Fu. Based on his un-rebutted testimony, he is likewise excluded from the Minimum Wage Act since he was employed by the petitioners as a member of a religious order (*Id.*). Accordingly, the wage order is modified to remove Yu Guo Song, Baomin Wang, Ji Mei Wang<sup>4</sup>, Xiao Cui Zhang, and Hong Zhen Song.

The petitioners have not met their burden of proof to establish that any of the remaining Kung Fu instructors listed were exempt, and even testified that some of the employees were not monks during the relevant time period. The specific exemptions cited by the petitioners are not applicable. Labor Law § 651 (5) (h) applies only to individuals employed in a religious or charitable organization when the work is incidental to or in return for charitable aid provided to the individual and not under an express contract of hire. While the petitioners have established that there was no express contract of hire between the temple and at least some of the individuals listed in the wage order, they have not proven that the work was incidental to or in return for charitable aid required. In order to demonstrate this, they would have needed to show that the individuals listed in the wage order taught Kung Fu in order to discharge an obligation to the petitioners for charity given to the instructors (*see e.g.* 12 NYCRR 142-3.12 [c] [10]; 12 NYCRR 143.1 [j]). The petitioners did not demonstrate that the work performed by the Kung Fu instructors was to satisfy an obligation for charity they received since the record shows that most Kung Fu students paid tuition to the temple and the instructors were compensated for their work by living expenses, meals, and lodging. (*see* Labor Law § 651 [7] [including allowances for lodging and meals in the definition of "wage"]). Moreover, the visa applications in evidence show that the petitioners brought the instructors to the United States to teach Kung Fu for an hourly rate of pay. Furthermore, the petitioners did not prove that the instructors had undertaken an obligation to teach in exchange for room and board. The exemption for students working for a religious or charitable institution is also not applicable (Labor Law § 651 [5] [i]). There is no evidence in the record proving that any of the Kung Fu instructors were students enrolled in and regularly attending a program at an institute of learning (*see e.g.* 12 NYCRR 142-3.12 [c] [11]; 12 NYCRR 143.1 [k]). Accordingly, all of the individuals listed in the wage order except Yu Guo Song, Baomin Wang, Ji Mei Wang, Xiao Cui Zhang, and Hong Zhen Song were employees during the relevant time period.<sup>5</sup>

#### D. Wage Order

Labor Law § 661 requires every employer to keep true and accurate records of the hours worked and wages paid to each employee and to make them available to the Commissioner for inspection upon request (*see also* 12 NYCRR 142-2.6). It is undisputed that the petitioners failed to maintain sufficient records although such records were required for all the individuals

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<sup>4</sup> The petition was amended at hearing to allege a settlement with Ji Mei Wang's estate included the unpaid wages, however, we do not reach that issue because, as discussed, we find that he was exempt from the Minimum Wage Act.

<sup>5</sup> We note that petitioner Guolin Shi admitted all the individuals listed in the wage order worked at the temple.



listed in the wage order except for Yu Guo Song, Baomin Wang, Ji Mei Wang, Xiao Cui Zhang, and Hong Zhen Song, who, as discussed above, are exempt. For the reasons set forth below, the wage order is modified.

In the absence of sufficient payroll records, petitioners bear the burden of proving that the disputed wages were paid (Labor Law § 196-a; *Angello v Natl. Fin. Corp.*, 1 AD3d 850, 851 [3d Dept 2003]; *Garcia v Heady*, 46 AD3d 1088 [3d Dept 2007]). As the Appellate Division stated in *Matter of Mid Hudson Pam Corp v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989], “[w]hen an employer fails to keep accurate records as required by statute, the commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner’s calculation to the employer” (see also *Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571 [1<sup>st</sup> Dept 2013], *cert denied* 2013 NY Slip Op 76385 [2013]). Therefore, the petitioners have the burden of showing that the minimum wage order is invalid or unreasonable by a preponderance of the evidence of the specific hours that the employees worked and that they were paid for those hours, or other evidence that shows the Commissioner’s findings to be invalid or unreasonable (*Matter of Ram Hotels, Inc.* Board Docket No. PR 08-078 [October 11, 2011]). Where incomplete or unreliable wage and hour records are available, DOL is “entitled[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate” (*Hy-Tech Coatings v New York State Dept. of Labor*, 226 AD2d 378, [1<sup>st</sup> Dept 1996], citing *Mid-Hudson Pam Corp.*; see also *Matter of Bae v Industrial Board of Appeals*, 104 AD3d 571); however, this approximation must have a rational basis (*Matter of Schepanski v Roberts*, 133 AD2d 757, 758 [2d Dept 1987]; *Matter of Kong Ming Lee et al.*, Board Docket No. PR 10-293 at p. 16 [April 10, 2014]). For the reasons set forth below, we find that the approximation of the hours worked and wages owed made by the Commissioner was without a rational basis with respect to all employees but Chao Gong Sun and Chao Hai Lan, and we therefore modify the wage order to reflect the evidence presented at hearing.

SLSI Tai testified that she used the interviews she conducted and recorded on November 17, 2009 (Kun Lan; Hong Zhen Song) and the USDOL “Employee Personal Interview Statements” taken on February 28, 2006 and March 9, 2007 to determine the minimum wages owed by the petitioners to the 11 Kung Fu instructors listed in the wage order. She explained at hearing that the determination of the hours the instructors worked is:

“. . . a little complicated. The first period – the prior periods. I’m talking about the period prior to 2007 going back to 2004 – 2002. Those hours were mainly based on a statement taken by Shi Yan Zhang . . . According to the statements, he was referred as the other Master and a team leader . . . His statement was taken by the U.S. D.O.L. investigators back in 2007. He stated that very clearly that everyone who worked for Shaolin Temple had to work long hours. They had to work from 9:00 p.m. [sic] to 10:00 p.m. on Saturdays and Sundays . . . everybody who came who worked for the Shaolin Temple had to work long hours, a spread of about 12 hours a day except for Mondays when Shaolin Temple is closed on Mondays . . . I computed based on Mr. Zhang’s statement . . . so for the latter part after he obtained his green card which he told me himself that he obtained his green card in June of 2007, after this period, computed based on his hours that he told me on the interview

form and also Mr. Song who spoke to me personally. The other two who taught in the Manhattan facility, their hours were – since they never got back to me I had no chance to talk to them individually or in person, I based the hours on the Manhattan class schedule.”

Therefore, the respondent’s determination was based largely on the statement provided to the USDOL by Shi Yang Zhang. Shi Yang Zhang did not testify at the hearing. Moreover, his statement was not signed, sworn, or corroborated, nor did the investigator who took the statement place his or her name on the statement or testify at the hearing, and the statement itself is not clear. We find based on our review of Shi Yang Zhang’s statement that it does not provide sufficiently detailed information about any specific individual’s work schedule to form a rational basis for the respondent’s determination of the hours worked by any of the instructors. The other statements provided to USDOL (Xiao Ju Zhang and Suo Liu<sup>6</sup>) are similar in that they only provide the general schedule of Kung Fu classes without providing information sufficient to reasonably approximate how many hours each instructor worked. Suo Liu’s own statement does not even clearly state whether he was a Kung Fu instructor and if so how many hours he worked per day or week. Even the statement of Xiao Ju Zhang, which is the most specific, only indicates the four instructors he named taught Kung Fu lessons for a maximum of 24 hours a week (Four hours per day if they each taught classes six days a week, although the days per week each worked is not specified in the statement). For these reasons, we find that the USDOL interview forms do not provide a rational basis to support the respondent’s determination. Since these forms were the only information in the record upon which the hours worked by Suo Liu, Cheng Bao Zhang, and Fuli Zhu appear to have been based, the wage order is modified to remove them. Additionally, we note that petitioner Guolin Shi credibly testified that Suo Liu did not teach Kung Fu and that this testimony was not rebutted.

SLSI Tai also interviewed two Kung Fu instructors –Kun Lan and Hong Zhen Song – herself. As discussed above, the wage order is modified with respect to Hong Zhen Song, because he was a Buddhist monk during the relevant time period and thus exempt from the protections of Article 19 of the Labor Law. We also find that the respondent’s determination that Kun Lan is owed wages is not supported by his statement to SLSI Tai and his testimony at hearing.

The interview sheet for Kun Lan states that he started working for the petitioners on or about November 1, 2004, that he worked 38 hours per week, that the petitioners paid him \$1,000.00 a month (\$250.00/week) except that they paid him \$600.00 a month when he first started (\$150.00/week), and that he never worked overtime or a shift that exceeded ten hours in a day<sup>7</sup>. Additionally, the interview sheet indicates that he received two meals per day and lodging at the Shaolin Temple in Flushing, which he confirmed at the hearing. However, Kun Lan testified that he worked fewer hours than recorded in the interview sheet and did not teach Kung Fu from 2004 to 2006.

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<sup>6</sup> Petitioner Guolin Shi also provided a statement to USDOL which was also too general and unclear to support the respondent’s findings.

<sup>7</sup> Respondent found that petitioners owed Kun Lan two “spread shift” payments at an additional hour’s pay at minimum wage because his spread of hours exceeded 10 hours on Saturdays and Sundays, but the interview sheet indicates he worked from 9:00 a.m. to 7:00 p.m. on Saturdays and Sundays which is exactly 10 hours, and therefore does not *exceed* 10 hours as required by 12 NYCRR 142-2.4 (a).

Therefore, we find based on the best available evidence -- the statement and testimony of Kun Lan -- that starting in 2006 he taught Kung Fu from 9:00 a.m. to 7:00 p.m. on Saturdays and Sundays with an hour rest time after lunch, and 4:00 p.m. to 9:00 p.m. Tuesday through Friday, for a maximum total of 38 hours per week. We further find, as indicated on the interview sheet, that the petitioners gave him \$1,000.00 a month during the time period he was teaching, and provided him two free meals per work day and lodging. As outlined in the chart below, we find that the petitioners do not owe wages to Kun Lan and modify the wage order consistent with our decision:

Dates	Hours per week	Wages Paid per Week	State Minimum Wage <sup>8</sup>	Wages Earned @ SMW	Lodging Allowance per Day <sup>9</sup>	Meal Allowance per Meal <sup>10</sup>	Total Allowances per Week	Wages Earned less Allowances	Wages Owed per Week
1/1/2006 – 12/31/2006	38	\$250.00	\$6.75	\$256.50	\$2.90	\$2.30	\$45.00	\$211.50	\$0.00
1/1/2007 – 7/23/2009	38	\$250.00	\$7.15	\$271.70	\$3.05	\$2.45	\$47.70	\$224.00	\$0.00
7/24/2009 – 11/21/2009	38	\$250.00	\$7.25	\$275.50	\$3.10	\$2.50	\$48.60	\$226.90	\$0.00
<b>Total Owed</b>									<b>\$0.00</b>

Chao Gong Sun and Chao Hai Lan testified that they taught Kung Fu at a Manhattan branch of the Shaolin Temple. SLSI Tai testified that she determined the hours they worked based on a printed schedule of the lessons at the Manhattan location and information she had obtained from Hong Zhen Song and Kun Lan that there were only two instructors working in Manhattan. Chao Gong Sun and Chao Hai Lan did not provide any testimony that contradicted or otherwise rebutted the respondent's determination of the hours they worked and wages due. Therefore, we affirm the wage order's finding that the petitioners are liable for \$9,263.85 in wages to Chao Gong Sun, and \$62,776.12 in wages to Chao Hai Lan, for a total amount due and owing of \$72,039.97.

### *1. Interest*

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment." Banking Law section 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum." The petitioners argue that interest should be suspended due to alleged administrative delay in the respondent's investigation of this matter and the time from the filing of the petition with the Board to the date the case was heard. The petitioners did not establish that the length of time DOL took in completing the investigation of the petitioners constituted an unreasonable administrative delay, and the record shows that the hearing in this matter was originally scheduled for December 19, 2012, and was adjourned three times: once at the request of the

<sup>8</sup> The basic minimum hourly wage rates are set forth at 12 NYCRR 142-2.1 (a).

<sup>9</sup> The lodging allowances are set forth at 12 NYCRR 142-2.5 (a) (ii). In this matter, we calculated one allowance per day of work, or six per week.

<sup>10</sup> The meal allowances are set forth at 12 NYCRR 142-2.5 (a) (i). In this matter, we calculated at two meals per work day, or 12 per week.

parties, once at the request of the respondent, and once at the request of the petitioners. The petitioners cannot seriously argue that interest should be suspended due to administrative delay at the Board when they requested two adjournments.

## 2. *Civil Penalty*

Labor Law § 218 requires the Commissioner to assess a civil penalty in cases where he finds that an employer has violated a provision of Article 19. The wage order assesses a 75% civil penalty. The petitioners presented no evidence to demonstrate that the penalty was unreasonable. Therefore, the civil penalty of 75% is affirmed, but reduced consistent with our decision.

## 3. *Liquidated Damages*

At the time the orders were issued, Labor Law § 663 provided for 25% liquidated damages in addition to the underpayments found due unless the employer proves a good faith basis to believe that the underpayment was in compliance with the law (Labor Law § 663 [2] [2010]). We find that the record shows that the petitioners had a good faith, but erroneous, belief that the Kung Fu instructors we found to be employees were exempt from coverage under Article 19 of the Labor Law. This good faith belief is further demonstrated by our finding that some of the individuals listed in the wage order were exempt. Accordingly, we modify the wage order to reduce the liquidated damages to \$0.00.


## **E. Penalty Order**

The penalty order assesses a \$1,000.00 civil penalty against the petitioners for violating 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 April 6, 2002 through November 21, 2009; a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to give each employee a complete wage statement with every payment of wages for the period from April 6, 2002 through November 21, 2009; and a \$1,000.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.8 by failing to post the Minimum Wage Poster on or about April 6, 2002 through November 21, 2009; for a total due and owing of \$3,000.00. There is no dispute that the petitioners failed to maintain required records, did not provide wage statements with each payment of wages, and did not post the required minimum wage poster. Having found that some of the individuals listed in the wage order were employees, the petitioners were required to comply with these requirements, and we affirm the penalty order.

**NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:**


1. The wage order is modified consistent with this decision to reduce the wages due and owing to \$72,039.97 with interest recalculated on the new principal, and the civil penalty reduced to \$54,029.98, and liquidated damages reduced to \$0.00; and
2. The penalty order is affirmed; and
3. The petition for review be, and the same hereby is, granted in part and denied in part.

  
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Vilda Vera Mayuga, Chairperson

  
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J. Christopher Meagher, Member

  
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LaMarr J. Jackson, Member

  
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Michael A. Arcuri, Member

  
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Frances P. Abriola, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at Albany, New York, on  
August 7, 2014.