STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
GOY LOVELL and ORIN LOVELL and CHARISMA TRAVEL, INC.,	:	
Petitioners,	:	DOCKET NO. PR 08-086
To Review Under Section 101 of the Labor Law: Orders to Comply with Article 19 of the Labor Law, both issued April 29, 2008,	:	INTERIM RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Orin Lovell, President of Charisma Travel Inc., Petitioner.

Maria L. Colavito, Counsel to the Department of Labor, Kristen L. Broden of Counsel, for Respondent, Commissioner of Labor.

WHEREAS:

Petitioners Orin Lovell and Charisma Travel, Inc. filed a Petition with the Industrial Board of Appeals (Board) challenging two Orders To Comply with Article 19 of the Labor Law issued by the Department of Labor (DOL) on April 29, 2008. The first Order (Wage Order) finds that the Petitioner failed to pay wages to two named Claimants and demands payment to the Commissioner of Labor (Commissioner) of $16,809.04 in wages due and owing ($13,440.88 due to a named claimant for the period March 8, 2004 through June 8, 2007, and $3,368.16 due to a second named claimant for the period June 5, 2005 through June 8, 2007), together with interest in the amount of $2,394.70 and a civil penalty in the amount of $16,809.04, for a total amount due and owing of $36,012.74. The second Order (Penalty Order) imposes a civil penalty in the amount of $1,500.00 of which $750.00 is for failing to keep and/or furnish true and accurate payroll records for each employee for the period February 1, 2003 through June 8, 2007 and $750.00 is for failing to give each employee a complete wage statement with every payment of wages.

The Petitioner alleges that the Orders must be vacated on two grounds: first, because one of the claimants was in the United States illegally and allegedly provided a false social security number; and secondly, because the second claimant allegedly falsely overstated her hours. Attached to the Petition is a "Notice of Determination to Claimant" which stated that one of the claimants was ineligible for unemployment insurance benefits for the period beginning November 4, 2007 because she did not submit sufficient proof of authorization to work in the United States and can not legally accept employment in the United States.

The Commissioner filed a Motion to Dismiss the Petition on July 24, 2008 which argues that the allegations in the Petition, even if true, do not set forth grounds for a finding that the Order at issue is invalid or unreasonable. The Petitioners filed their Opposition to the Commissioner's Motion on August 27, 2008, and the Commissioner's Reply was filed on August 29, 2008.

At the outset, we note that we agree with the Commissioner that all employees, regardless of immigration status, must be paid for all work actually performed. Board precedent, state and federal decisions and executive interpretations all require that we reject the objection set forth in the Petition with regard to a claimant's immigration status, and find that the Petition does not set forth grounds upon which relief can be granted with regard to the first claimant.

In *Matter of Mohammad Aldeen and Island Farm Meat Corp.*, Docket No. PR-07-093 (March 28, 2008), the Board stated:

> "In *Balbuena v. IDR Realty LLC,* 6 NY3d 338 [2006], the Court of Appeals explicitly held that federal immigration law does not bar an alien from recovering wages under the New York Labor Law (*see also Flores v. Amigon,* 223 F. Supp. 462 [E.D.N.Y. 2002] [immigration status not relevant to wage claim]; *Pineda v. Kal-Tech Constr.,* 15 Misc.3d 176 [N.Y. Cty. Sup. 2007] [immigration status does not bar right to recovery of prevailing wages for public work]). The alleged unlawful presence in the United States of the Petitioners' employees does not bar the Commissioner from recovering overtime wages on their behalf."

While the Petitioners might seek to distinguish the above cases based on their allegation that the claimant obtained her employment by presenting a false social security card, precedent makes clear that this is not material in the case of an employee's claim for wages for work already performed.

In *Pineda v. Kel-Tech Construction, Inc., supra*, the defendant moved to dismiss the wage claims of seven plaintiffs who allegedly presented falsified social security numbers in order to be hired in spite of their status as undocumented immigrants. The court found that while the federal Immigration Reform and Control Act (IRCA) makes such conduct illegal fraud, including imposing penalties on the workers who commit it and requiring their termination from employment, statutes entitling even undocumented workers to fair treatment for the time in which they remain employed serve to protect legal workers, "because, without the IRCA and the labor laws, employers could easily offer undocumented

workers less protection and lower wages than legal workers and thus take these jobs away from legal workers" (*Id.* at 184). "New York courts do not therefore dismiss causes of actions for wages earned by undocumented workers simply because the labor contracts are illegal for, to do so, would 'directly contravene the public policy of the State of New York and of the United States government'" (*Id.* at 185 [quoting *Garcia v. Pasquareto*, 11 Misc3d 1, 3 (App Term, 2d Dept 2004)]). The court found that *Balbuena v. IDR Realty LLC, supra; Majlinger v. Cassino Constr. Corp.*, 25 AD3d 14, 24-25 92d Dept 2005), *affd sub nom, Balbuena v. IDR Realty, supra*; and *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 US 137 (2002) indicate "that undocumented workers, no matter what type of documents they proffered or did not proffer at the time of employment, may still collect the prevailing wage... for work they have performed" (*Id.* at 187) (emphasis supplied).

The Second Department of the Appellate Division reached the same conclusion in the recent case of *Jara v. Strong Steel Door, Inc.*, 2009 NY App Div LEXIS 205, 871 NYS2d 363 (2d Dept. 2009), where the plaintiff "had provided false documentation, a fact which he does not dispute," when asked for documentation of his eligibility to work in the United States. When the employer, on that basis, moved to dismiss his claim for payment of the prevailing wage for work done on the employer's public work contracts, the court found that while the plaintiff had violated federal immigration law, this was not a basis to deny him payment for work which, in itself, was not illegal, nor did the equitable doctrine of unclean hands preclude a wage award after the employer had already "received bargained-for labor" (*see* 2009 NY App Div LEXIS 205, ** 1 and 4).

While cases such as *Balbuena* and *Hoffman* have addressed the question of whether and under what circumstances an undocumented employee who has been physically injured or fired for an illegal reason can be awarded prospective damages for work which the employee did not perform, the present case, like *Pineda* and *Jara*, involves the question of payment for work which the employee has already performed, and from which the employer has benefited. (*see, e.g., Gomez v. Falco*, 6 Misc3d 5, 6 [2d Dept 2004] [distinguishing "back pay awards to undocumented workers for periods of unemployment, following, e.g., wrongful termination for union activity, (which) are barred by federal immigration law," from "payment due and owing for work actually performed"]; *Flores v. Amigon*, 233 F Supp2d 462, 464 [E.D.N.Y. 2002]; *Zheng Liu v. Donna Karan Int'l*, 207 FSupp2d 191 [S.D.N.Y. 2002]; *Amoah v. Mallah Mgt. Co.*, 57 AD3d 29, 34 [3d Dept 2008] [plaintiff who presented a fraudulent social security card is nonetheless entitled to workers' compensation benefits which "constitute a form of consideration for services already rendered by the employee," in contrast to "wages that the employees would have earned had he not been illegally terminated"]). In these cases, the courts held that undocumented workers are entitled to be paid for work already performed and that the employer would be unjustly enriched if it received the benefit of the labor without having to pay the worker.

For the reasons set forth above, we grant the Commissioner's Motion and dismiss the Petition insofar as it alleges that the Order is unreasonable or invalid because one of the claimants was allegedly in the United States illegally and provided a false social security number.

The Petition also challenges the claim of a second claimant on the basis that she allegedly falsely overstated her hours. Because this allegation requires findings of fact, the

Petitioner's claim will be processed in accordance with the Board's Rules of Procedure and Practice.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Motion to Dismiss is granted, in part, and the Petition is dismissed insofar as it alleges that the Order to Comply issued April 29, 2008 is unreasonable or invalid due to claimant's immigration status. Otherwise, the Petition shall be processed in accordance with the Board's Rules of Procedure and Practice.

2. The Commissioner of Labor's Answer to the Petition shall be filed with the Board within 35 days of the date of this Interim Order.

Anne P. Stevason, Chairman

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 25, 2009.