

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 April 2016

Case No.: 2015-LCA-00023

In the Matter of:

SAJIDA AHAD, M.D.,
Prosecuting Party,

v.

SOUTHERN ILLINOIS UNIVERSITY SCHOOL OF MEDICINE,
Respondent.

Appearances:

Michael F. Brown, *Esq.*, DVG Law Partner LLC, Neenah, Wisconsin, and
Vonda K. Vandaveer, *Esq.*, V. K. Vandaveer, PLLC, Washington, D.C., (on brief),
For the Prosecuting Party

Thomas J. Arkell, *Esq.*, Dunn Law Firm, LLP, Bloomington, Illinois, and
Frank E. Martinez, *Esq.*, Associate General Counsel, Southern Illinois University School of
Medicine, Springfield, Illinois,
For the Respondent

Before: Morris D. Davis, Administrative Law Judge

DECISION AND ORDER

This case arose under the Immigration and Nationality Act, as amended, 8 U.S.C. §§ 1101 and 1182 (the “INA”), and the implementing regulations set forth at 20 C.F.R. Part 655, Subparts H and I.

The INA permits employers to hire nonimmigrants in “specialty occupations” to work in the United States for prescribed periods of time. 20 C.F.R. § 655.700. An employer seeking to hire such workers – commonly known as H-1B nonimmigrants – must follow regulatory procedures that involve both the Department of Labor and the Department of Homeland Security. First, the employer must obtain certification from the Department of Labor by filing a Labor Condition Application (“LCA”) with the Employment and Training Administration. The LCA stipulates, among other things, the job title, wage level and working conditions that the employer will provide the H-1B nonimmigrant. After securing an approved LCA certification, the employer submits it to the Department of Homeland Security along with the nonimmigrant’s

visa petition and requests approval of H-1B classification for the worker. If the Department of Homeland Security approves, the nonimmigrant can apply for an H-1B visa at the U.S. consular office in his or her country, or if already in the U.S. he or she can apply for a change in his or her visa status. Once the visa is granted the employer can hire the H-1B nonimmigrant. 20 C.F.R. § 655.705(a) and (b).

The INA requires an employer to offer the H-1B nonimmigrant:

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater.

8 U.S.C. § 1182(n)(1)(A)(i)(I) and (II).

I. PROCEDURAL BACKGROUND

Dr. Sajida Ahad filed an ESA Form WH-4 alleging that Southern Illinois University School of Medicine¹ (“SIUSM”) failed to pay her the higher of the actual wage or the prevailing wage. The Administrator, Wage and Hour Division, U.S. Department of Labor, issued the Administrator’s Determination on August 4, 2015, finding that Respondent committed no violation.² On August 14, 2015, Dr. Ahad submitted an appeal and a request for a hearing to the Office of Administrative Law Judges alleging that SIUSM failed to pay her the wage required by 20 C.F.R. § 655.731 during the period it employed her as an Assistant Professor with an appointment to the General Surgery Division. I held a *de novo* formal hearing on Tuesday,

¹ The Associate General Counsel for SIUSM clarified during the hearing that there are at least two separate entities involved here; the SIU School of Medicine and SIU HealthCare, (officially titled SIU Physicians & Surgeons, Inc.), that resulted in Dr. Ahad receiving two separate paychecks; one paycheck from SIUSM for her academic base salary and another paycheck from SIU HealthCare for her clinical compensation. (Transcript 172-73 (hereafter “TR” with corresponding page number)). Counsel explained that the university cannot operate a clinical practice and “SIU HealthCare, as a university-related organization, performs that function . . .” (TR 173). Neither party addressed this issue in any depth during the hearing or in their post-hearing briefs. Under 20 C.F.R. § 655.715 an “employer” is defined as “a person, firm corporation, contractor, or other association or organization . . . that files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) on behalf of the nonimmigrant. . .” A nonimmigrant worker on an H-1B visa can work for multiple employers provided that each employer files a separate petition with USCIS. 8 C.F.R. § 214.2(h)(2)(C). In the instant case, only SIUSM filed a petition on behalf of Dr. Ahad. (CX 11). There is insufficient evidence in the record to determine if SIUSM and SIU HealthCare are in fact one “organization” for the purposes of the wage obligation. As the parties failed to address the issue, I can only find that the entities are very closely intertwined (*see generally* CX 24, SIU Physicians & Surgeons, Inc., Compensation Plan) and that SIU HealthCare is a “university-related organization.” As the issue is not addressed fully, I will consider the wage obligation, if any, collectively.

² The regulation requires that the Administrator’s Determination “[s]et forth the determination of the Administrator and the reason or reasons therefor.” 20 C.F.R. § 655.815(c)(1). Here, the Determination states that an investigation was conducted and “[i]t has been determined that your firm committed no violation.” *Administrator’s Determination*, August 4, 2015. No reason or reasons were given. After reviewing this matter *de novo* I find that the evidence leads to a different determination. It would have been helpful in reviewing this matter to have had the benefit of the Administrator’s reasoning.

January 5, 2016, in Springfield, Illinois, the date and location the parties chose. All parties were present and represented by counsel. The following exhibits were received into evidence: Complainant's Exhibits ("CX") 1-21 and 23-25³ and Respondent's Exhibits ("RX") A-O. (TR 6-7). There were no objections to the exhibits being admitted, except for specific objections that were noted in deposition transcripts. (TR 7). Dr. Ahad and five other physicians testified at the hearing. I find that they were all credible witnesses. The parties were given until Friday, March 11, 2016, to submit their post-hearing briefs. SIUSM's post-hearing brief ("Resp. Br.") and Dr. Ahad's post-hearing brief ("Pros. Party Br.") were timely filed.

II. ISSUES

The principal question in this case is did SIUSM pay Dr. Ahad the "actual wage" for the specific position for which she was hired?

Answering the principal question requires resolving the following issues first:

- (1) What is the actual wage for the specific position in question?
- (2) Is the compensation paid by SIU HealthCare attributable to the satisfaction of SIUSM's wage obligation?
- (3) Was SIUSM authorized to take any deductions from Dr. Ahad's wages?
- (4) Was SIUSM excused from paying any part of its wage obligation?

III. FINDINGS OF FACT

Dr. Ahad's History and Tenure with SIUSM

Dr. Ahad was born and educated in Pakistan. She entered the United States on a J-1 visa in July 2001, for a five year general surgical residency program at the Mayo Clinic in Rochester, Minnesota. (RX A, p. 6, 11-12 and TR 25). Prior to her residency in the United States, Dr. Ahad completed a five year medical program at Aga Khan University in Pakistan. (TR 24). The medical program was similar to those in U.S. medical schools; a general program of study without any particular area of concentration. (TR 24). Similarly, her residency program was a general surgical residency. All of the residents followed the same set of rotations; they "rotate[d] through trauma . . . rotate[d] through transplant, through breast, through bariatric, through endocrine surgery – a little bit of everything." (TR 25). After completing ten years of general medical training – five years of medical school and five years of general surgical residency – Dr. Ahad did a two year fellowship in laparoscopic surgery at the University of Washington. (TR 26). Laparoscopic surgery involves a small incision approach to addressing "various diseases including foregut surgery, bariatric surgery, colon surgery, [and] solid organ surgery." (TR 26).

³ CX22 was removed prior to the hearing. (TR 6).

Following the completion of her education, Dr. Ahad wanted to practice medicine in the Midwest as her husband was at the time an Assistant Professor with an appointment to the General Surgery Division at SIUSM. (RX A, p. 20 and RX B, Ex. 3). Dr. Ahad contacted SIUSM and other institutions in the region to inquire about possible surgical openings. (RX A, p. 20). SIUSM responded to Dr. Ahad's inquiry and scheduled an interview for February 18, 2008. SIUSM ultimately offered her a position as an "Assistant Professor on tenure track in the Department of Surgery with an appointment to the Division of General Surgery." (CX 13 and RX A, p. 20). In May of 2008 SIUSM filed an I-129 Petition for a Nonimmigrant Worker in O-1 status on behalf of Dr. Ahad. (CX 11, p. 12). Dr. Ahad started working at SIUSM in July 2008 on an O-1 visa that was valid until July 2011. (CX 11, p. 12; RX A, p. 17).

In June 2011, SIUSM filed a LCA on behalf of Dr. Ahad with the Department of Labor (CX 11, p. 1-5; RX A, Ex. 10) and an I-129 Petition for Nonimmigrant Worker with the Department of Homeland Security. (CX 11, p. 6-24). SIUSM issued a letter in June 2011 to the U.S. Citizenship and Immigration Services stating that as an Assistant Professor of Surgery/Bariatric Surgeon at SIUSM, Dr. Ahad would be responsible for teaching students "general surgery and bariatric surgery as well as general medical care." (CX 25). The letter stated that her "annual salary [would] be \$250,000 for full-time employment and related administrative work." (CX 25). The LCA said that the wage rate was \$250,000 per year (CX 11, p. 3) as did the I-129 form. (CX 11, p. 10). The only employer listed on the forms submitted to the Department of Labor and the Department of Homeland Security was SIUSM. Dr. Ahad's H-1B visa was approved and it was valid from July 7, 2011 to July 6, 2014. (CX 10).

Dr. Ahad's duties at SIUSM were divided into three main components: teaching, research and service. (CX 17, p. 1-2). Her teaching duties accounted for about thirty percent⁴ of her time and involved the "instruction of medical students in the disciplines of general surgery and bariatric surgery as well as general medical care." (CX 17, p. 1). Ten percent of her time was to be devoted to clinical and education research, with no specification on the area of research. (CX 17, p. 5). The final sixty percent of her time was to maintain "a practice of high quality in general and bariatric surgery." (CX 17, p. 2).

Dr. Ahad focused on getting a strong laparoscopic program operational within the bariatric program. (CX 13, p. 2). A strong program never materialized. Dr. Ahad testified that there was a lack of support staff for her program. She was promised a nurse practitioner that never came to fruition, she never had a fulltime dietician and she had to share her nurse with another person, all of which attributed to her not being able to focus on the surgical aspect. (TR 77-78). SIUSM dissolved its bariatric program (called the Comprehensive Weight Management Program) in 2009 or 2010 and Dr. Ahad continued her work in conjunction with a program at St. John's Hospital. (TR 98, 188-89). She lost the bariatricians in this transition, which transferred all of the non-surgical tasks to her. (TR 77). This created additional uncompensated work. (*Id.*). Dr. Ahad said her efforts to build the program suffered a major setback when SIUSM restricted her access to Medicaid patients, which was a large portion of her practice and resulted in significant decline in the number of patients she saw.⁵ (TR 44-45). Dr. Ahad also believed that

⁴ These percentages never varied by more than five percent during Dr. Ahad's tenure at SIUSM. (CX 17).

⁵ See email from Dr. Ahad to Dr. C dated December 4, 2013. (CX 8). In a letter to the Illinois Department of Public Health on February 2, 2010, the Dean of SIUSM said 48 percent of the Department of General Surgery's patients

a lack of marketing support prevented her program from being more widely known in the community.⁶ (TR 45). Despite these setbacks, Dr. Ahad personally went to physician offices to promote the program and do outreach. (TR 45). The program at St. John's closed too when Dr. Ahad left SIUSM. (TR 220).

The bariatric program was not Dr. Ahad's sole area of practice. Her medical training prepared her to operate on "anything in the belly," and Dr. Ahad also preformed: endoscopic surgery, foregut surgery, gallbladder surgery, appendectomies, hernia surgery and for a short time took trauma call. (TR 30, 43 and 108). She took trauma call from the time when she was initially hired in 2008 until 2010 when Dr. H requested that she stop because there were a sufficient number of surgeons on the trauma rotation.⁷ (TR 30).

In 2012, Dr. H asked Dr. Ahad to take over his breast surgery practice "to supplement, not replace, her minimal invasive and bariatric surgeries." (RX G, p. 2). Dr. Ahad testified that the bariatric program was labor intensive and that it would not have been safe for her to put in the additional hours required to run the breast surgery practice too. (TR 81). Dr. Ahad testified that she routinely worked 60 to 80 hours a week. (TR 79, 81). Dr. Ahad said that in the alternative SIUSM offered for her to "kill the bariatric program" and just do breasts, but only until a replacement was hired, which eventually would have left Dr. Ahad with no clinical program to run. (TR 82).

During her tenure at SIUSM, Dr. Ahad used authorized vacation time. Dr. Ahad testified that in 2011 she took a three-day trip to Canada to renew her visa, and a two-week trip to Pakistan. (TR 83). In 2013 she took two trips to Pakistan, each lasting two weeks, and an additional two-week trip in 2014. (TR 83). Each period of time was approved by SIUSM and was within the number of vacation days she accrued through SIUSM. (TR 83-84). At the end of her tenure with SIUSM, Dr. Ahad received a payout for unused vacation time in the amount of \$7,440.47. (RX O, Ex. 2).

SIUSM paid Dr. Ahad a total of \$592,466.24 while she was in H-1B status. Dr. Ahad's earnings statements show that each month SIUSM paid her 1/12th of her annual academic base salary of \$124,999.97 at a rate of \$10,416.66 per month, totaling \$338,789.60.⁸ SIU HealthCare paid Dr. Ahad a total of \$253,676.64 in clinical compensation over the same period.⁹

were either Medicaid or medically indigent patients. (CX 23, p. 5). In a performance evaluation dated July 9, 2010, the former chairman of the Division of General Surgery noted that Medicaid patients accounted for 25 percent of Dr. Ahad's "payer mix." (CX 15, p. 12).

⁶ Dr. C, the Chair of the SIUSM Division of General Surgery, testified, "I think she and I both had a sentiment that for her skills there was not the degree of support and promotion that we would have desired." (TR 107).

⁷ I conferred with counsel for both parties on reasonable steps that could be taken to protect the confidentiality of financial information related to physicians who were not parties to the litigation. We agreed that in lieu of using their full names, the non-party physicians discussed in the hearing, either through testimony or documentary evidence, would be referred to by a single letter designation instead. On February 4, 2016, I issued an Order Concerning Designation of Non-Parties assigning each non-party physician a corresponding letter designation.

⁸ (RX O, Ex. 2 and CX 14). SIUSM prorated Dr. Ahad's monthly salary based upon the number of days she worked using a standard five day workweek. (CX 14). As an example, Dr. Ahad resigned on Friday, March 21, 2014 and SIUSM paid her \$7,440.47.15 for working a partial month. (TR 28; RX O, Ex. 2, p. 1). There were 21 workdays in March 2014 and Dr. Ahad worked 15 of those days, which is .7143 percent of the month. The amount she was paid for working the partial month – \$7,440.47 – equals .7143 percent (15/21st) of her monthly academic base salary of

**Southern Illinois University School of Medicine and
Southern Illinois University HealthCare**

General Surgery Division

The Department of Surgery had four surgical divisions: Division of Plastic Surgery, Division of Orthopedic Surgery, Division of Urologists and Division of General Surgery. Dr. Ahad and the other surgeons in the Division of General Surgery went through extensive medical training that ranged from 11 to 13 years.¹⁰ As part of their training, each surgeon completed a general surgical residency program with rotations in the various types of general surgery. This general training prepared the surgeons to operate anywhere in the abdomen. (TR 108 and 120).

The parties focused their attention at the hearing on trauma and critical care within the Division of General Surgery. While a few surgeons concentrated primarily on trauma and critical care, every surgeon in the General Surgery Division had the opportunity to be placed on the trauma call rotation and take trauma call. (TR 208). SIUSM's policy was to ask every single new hire if he or she wanted to be on the trauma call schedule. (TR 208). The doctors on the trauma call schedule covered evenings from 5:00 p.m. to 7:00 a.m., on weekends from 7:00 a.m. to 7:00 a.m. the next day, or for a 24 hour period over holidays. (RX E, p. 11). These surgeons operated as needed and then turned patients over to the "trauma team" the next morning. (RX D, p. 80). The "trauma team" would be responsible "for rounding on them and taking care of them for the rest of their stay . . ." (DX 28, p. 80). The evidence demonstrated that each of the general surgeons was capable of handling trauma care.

Physicians in the General Surgery Division specialized in their individual subspecialties, but they were not limited by their subspecialties from doing other types of surgeries. Dr. K specialized in colorectal surgery, in addition to taking general surgery and trauma call. (TR 178). Dr. B practiced several different surgical subspecialties, including breast, transplant and general surgery. (RX E, p. 10). Surgeons could also change their subspecialty. For instance, Dr. D was the director of the bariatric program prior to Dr. Ahad and was then the director of the trauma program. (TR 202). Dr. E initially focused on trauma and general surgeries, but later transitioned into doing hernia repairs. (TR 239).

In addition to their surgical work, all of the surgeons also served as professors at SIUSM. Each surgeon had duties similar to those of Dr. Ahad. (*See generally* CX 17). Each one had a teaching component, a research component and a service component. (*Id.*).

\$10,416.66. Likewise, for July 2011, SIUSM paid Dr. Ahad \$8,432.53 for working a partial month in H-1B status (21 total workdays in the month divided by 17 days worked in H-1B status times her month salary of \$10,416.66).

⁹ (RX A, Ex. 15, Bates #000002). Neither party offered evidence of the monthly breakdown of Dr. Ahad's clinical earnings in 2011. In the absence of other evidence, I have divided her clinical compensation of \$89,987.84 for the year equally by 12 months for a monthly average of \$7,498.99. For the partial month of July 2011, I prorated her clinical compensation the same way that SIUSM prorated her academic base payment (17 weekdays worked in H-1B status divided by 21 total weekdays times her month average of \$7,498.99) as explained in the previous note.

¹⁰ For example Dr. A's medical training lasted 11 years, while Drs. B and E's training totaled 13 years each. (TR 122, 147-48 and 229-30).

Pay Structure

Physicians that were assistant professors with an appointment to the General Surgery Division received their compensation in two separate parts: (1) academic base compensation paid by the university and (2) clinical compensation paid by SIU HealthCare. The two separate payments were necessary because SIUSM, a public educational institution, was not allowed to run a fee generating clinical practice. (TR 173). The academic base was paid monthly. (CX 13). Clinical compensation was also paid monthly, but it varied in amount. (See CX 4). Surgeons that were members of the trauma and critical care team received an additional \$30,000 to \$50,000 per year in academic base salary because they were required to take a certain number of trauma calls each month.¹¹ (TR 186). Surgeons who took trauma call but were not officially part of the “trauma team” were paid a stipend of approximately \$3,000 to \$5,000 a month, or \$36,000 to \$60,000 a year. (TR 160).

Clinical compensation was based strictly on a surgeon’s fee-generating productivity. Productivity was determined by the amount of Relative Value Units (RVUs) recorded in the period. (CX 24, p. 3). RVUs were based upon CPT codes.¹² (RX B, p. 18). A surgeon’s RVUs were multiplied by a market factor that resulted in his or her actual clinical compensation. (TR 132). During the first two years of employment, SIU HealthCare guaranteed the clinical compensation a surgeon received. (RX D, p. 21). The guarantee was to give the surgeon time to establish his or her practice. (RX D, p. 21). However, when the surgeon came off the guarantee SIU HealthCare would balance out the amount of RVUs generated versus what the surgeon had been paid. (RX D, p. 21). If the surgeon had not generated enough RVUs to cover the amount of guaranteed clinical compensation that he or she had received, money was deducted to pay back the deficit over time. (RX D, p. 21).

General surgery RVUs were generated for the initial evaluation and for conducting the operation, while in trauma RVUs were generated for all facets of care, including post-treatment rounds. (RX D, p. 79). The record is unclear on how much revenue specific RVUs generated and what types of procedures generated higher or lower RVUs. Dr. B testified that he assumed general surgery and trauma surgery RVUs were comparable, but critical and trauma surgeries might generate higher RVUs than general and breast surgeries. (RX E, p. 43). The record does not shed any light on which surgical subspecialty had the greatest revenue generating potential.

¹¹ The additional base appears to have been part of the academic base paid by SIUSM. Dr. E testified that when he left the trauma and critical care team there was talk of lowering his academic base from \$175,000. (TR 236). Dr. A testified that compensation for being on call as part of the trauma service was incorporated into his academic base pay, although he did not know how it was apportioned. (TR 141). The SIU HealthCare Compensation Plan does talk about a clinical base; however, if a surgeon receives a base from SIUSM that is in excess of \$114,000 he or she does not receive a clinical base from SIU HealthCare. (CX 24, p. 7). Therefore, I find that the additional compensation for being a member of the trauma and critical care team was paid in the SIUSM academic base salary.

¹² I take official notice pursuant to 29 C.F.R. § 18.84 that “CPT” refers to “Current Procedural Terminology,” the American Medical Association’s copyrighted medical nomenclature used to report medical procedures and services under public and private health insurance programs.

According to SIUSM's principal business officer, the school used AAMC industry data as a guideline in making wage determinations when it hired new physicians.¹³ (RX O, p. 4 and 24). When Dr. Ahad started work at SIUSM her salary was based on the AAMC Faculty Salary Survey Report for the category General Surgery. (RX L). The 2008 AAMC Faculty Salary Survey Report listed the median salary for a general surgery assistant professor as \$243,000 and the average as \$261,500. (RX O, Ex. 3, Bates #RTP000083). In 2011 when SIUSM submitted the LCA and Dr. Ahad began working in H1-B status the AAMC survey showed the median had increased to \$276,000 and the average to \$296,300. (*Id.* at Bates #RTP000127-128).

IV. DISCUSSION AND ANALYSIS

(1) WHAT IS THE ACTUAL WAGE FOR THE SPECIFIC EMPLOYMENT IN QUESTION?

SIUSM certified in the LCA that it would pay the higher of the actual wage or the prevailing wage.¹⁴ The actual wage is the "wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question." 20 C.F.R. § 655.731(a)(1). To determine if an individual has similar experience and qualifications the regulations provide the following factors to consider: "[e]xpereince, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors." *Id.* The specific employment in question is determined by assessing whether employees have "substantially the same duties and responsibilities as the H-1B nonimmigrant." 20 C.F.R. § 655.731(a)(1). 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." *Id.*

Dr. Ahad argues that Drs. E, I, K, B and A¹⁵ are comparator surgeons that have similar experience and qualifications. (Pros. Party Br. at 2). SIUSM argues that the wage they paid Dr. Ahad was the actual wage as there were no other surgeons that were primarily bariatric surgeons, and the comparators "worked in other medical specialties and were trained in their specific specialty through a particularized fellowship." (Resp. Br. at 16). SIUSM points to the AAMC Faculty Salary Survey Report and argues that "[t]he AAMC tables demonstrate that physicians are paid different salaries based on their specialties." (*Id.* at 16-17).

¹³ I take official notice pursuant to 29 C.F.R. § 18.84 that "AAMC" refers to the Association of American Medical Colleges whose headquarters is located adjacent to the Office of Administrative Law Judges in Washington, D.C.

¹⁴ The LCA listed the prevailing wage as \$130,780 and neither party disputes that SIUSM paid Dr. Ahad a wage equal to or greater than that sum. (CX 11).

¹⁵ Dr. Ahad argues that only Drs. E, I, K, B and A are comparators despite the fact that several other surgeons are referenced in the record. (Pros. Party Br. at 2). Clinical compensation data for physicians in the general surgery division was provided; however there is no evidence in the record showing the educational backgrounds of Drs. C, D, F, G, H, J, L, M, N, O, P, Q, R, S, U, V, W and X. Accordingly, I have excluded them from the assessment. (RX A, Ex. 15). Dr. Y's educational background is similar to Dr. Ahad's, but Dr. Y is an Assistant Professor of Clinical Surgery and the record does not describe his duties and responsibilities. I have excluded Dr. Y from the assessment. (CX 2, p. 23 and RX O, p. 28). The record contains substantial information regarding Dr. T; however, it was clear that SIUSM modified salaries to bring other surgeons up to par with Dr. T and this occurred after Dr. Ahad resigned. Since Dr. T's tenure did not overlap with Dr. Ahad's, I have not factored him into the assessment.

I have considered the documentary evidence that the parties submitted as well as the testimony of the physicians that testified before me at the hearing and I find that each of the physicians listed below had similar education, experience and qualifications to Dr. Ahad. All but one surgeon came to SIUSM immediately upon completion of medical training, the same as Dr. Ahad.¹⁶ Dr. B, the only comparator that had previous professional experience, worked just two years post-education prior to joining the SIUSM faculty. (CX 2, p. 16). The following chart illustrates the education and training of Dr. Ahad and each of the comparator surgeons:

Doctor	Medical School	Residency	Specialized	Total Medical Training
Dr. Ahad	Five years at Aga Khan University in Pakistan. (TR 24).	Five year general residency at the Mayo Clinic. (TR 24).	Two year fellowship in laparoscopic surgery. (TR 26).	12 years
Dr. A	Five years at Trinity College in Ireland. (TR 122).	Five year general residency at the Mayo Clinic. (TR 122).	One year fellowship in trauma and critical care. (TR 123).	11 years
Dr. B	Four years at New York Medical College. (TR 146-47).	Seven year general residency at the Mayo Clinic. (TR 147).	Two year fellowship in transplantation and abdominal transplant surgery. (TR 148).	13 years
Dr. E	Six years at Ege University in Turkey. (TR 229).	Six year general residency at SIU. (TR 229).	One year fellowship in critical care. (TR 230).	13 years
Dr. I	Attended University of Southern California Keck School of Medicine. (CX 2, p. 10).	A general surgical residency. (CX 2, p. 10).	Fellowship in: Complex General Surgery Oncology; Clinical Medical Ethics; and Medical Education. (CX 2, p. 10).	Not specified
Dr. K	Five years at Khan University in Pakistan. (RX B, Ex. 2).	Six year general residency at the Mayo Clinic. (RX B, Ex. 2).	A one year surgical and a one year research fellowship in colon and rectal surgery. (RX B, p. 12, 22-24).	13 years

All of the physicians completed medical school, followed by a general surgical residency where they rotated through many different subspecialties of general surgery, including: orthopedics, plastic surgery, urology, endocrine surgery, bariatric surgery, liver surgery, hepatobiliary, transplant, pediatric, vascular surgery and colorectal. (TR 122-23, 147). In each

¹⁶ Dr. I came to SIUSM in 2013 directly after finishing her fellowship. (CX 2:12). Dr. E came to SIUSM in 2009 following his fellowship. (CX 2, p. 4 and RX O, Ex. 2, p. 2). Dr. A started working at SIUSM in 2008 and it was his first professional job. (TR 124). Dr. K finished his training in 2006 and started at SIUSM that same year. (RX B, p. 13-14).

case, the years of training was followed by a period of additional training in a specific subspecialty of general surgery.

SIUSM argues that it is this final one-year or two-year fellowship period that dictated the actual wage as demonstrated by the AAMC tables. (Resp. Br. at 14). However, four of the five comparators received the exact same academic base salary despite completing different fellowships and having different specialties. (RX O, Ex. 2). Drs. E and A were trauma/critical care surgeons. (TR 180, 232). The AAMC table shows that in 2013 the average salary of a trauma/critical care surgeon at the rank of assistant professor was \$323,100. (RX O, Ex. 3, Bates #RTP000144). Dr. B was a transplant surgeon. (TR 180). The average salary in 2013 for a transplant surgeon at the rank of assistant professor was \$300,900. (RX O, Ex. 3, Bates #RTP000144). Dr. I was an oncology surgeon. (TR 181). The average salary in 2013 for an oncology surgeon at the rank of assistant professor was \$270,000. (RX O, Ex. 3, Bates #000143).¹⁷ According to the AAMC data for 2013, the average assistant professor in trauma/critical care surgery earned 20 percent more than his or her counterpart in oncology surgery. Therefore, while the AAMC data may have served as a basis of discussion for salary negotiations and it establishes that on a national basis assistant professors with different surgical specialties have different average earnings, I find that here it warrants little weight in assessing comparability of the physicians.

Furthermore, SIUSM clearly established that the clinical compensation component was based solely on the RVUs each physician generated, not on the AAMC tables. The record does not establish if certain subspecialties generated more RVUs than others. Dr. K testified that some procedures had a higher RVU value based upon the AMA designated CPT, but he did not specify which ones were worth more or less. (RX B, p. 18). Dr. B testified that to the best of his knowledge, the dollar value of an RVU was the same for all types of surgeries, but the number of RVUs a surgery generated depended on its CPT code. (TR 164-65).

Each of the comparators had similar job responsibilities and performed similar functions. Each one was an Assistant Professor with an appointment to General Surgery Division. (CX 16). Each one had a subspecialty that he or she focused on, but that focus did not preclude him or her from working in another subspecialty or preclude him or her from working in areas that were not directly related to his or her fellowship training. As an example, Dr. H asked Dr. Ahad to supplement her regular practice with breast surgeries, an area in which Dr. Ahad was not fellowship trained. (RX G, p. 2). Every surgeon had the opportunity to take trauma call, regardless of his or her specific fellowship training. (TR 208). In addition to trauma and crucial care, in which he was fellowship trained, Dr. A also did general surgery and testified that he could take care of anything in the abdomen. (TR 120-21, 125-26). Dr. E did his fellowship in critical care, but focused mainly on hernia repairs. (TR 229, 239). Dr. K did his fellowship in colon and rectal surgery, but also did general surgery and took trauma call. (RX B, p. 21). Dr. I's fellowship was in complex general surgery oncology, but she also performed breast surgeries, pancreas surgeries and hepatobiliary surgeries. (CX 2, p. 10). Dr. Ahad testified that other surgeons, specifically transplant and trauma surgeons, had "expertly" handled complications from bariatric surgeries. (TR 108). Dr. B testified that he performed laparoscopic surgeries and

¹⁷ For purposes of the AAMC table, Dr. Ahad was classified as a general surgeon. (RX G). The average salary in 2013 for a general surgeon at the rank of assistant professor was \$305,500. (RX O, Ex. 3, Bates #000142-143).

taught medical students how to perform laparoscopic procedures. (TR 166). Drs. A, B and I, like Dr. Ahad, all did laparoscopic procedures. (TR 217). The weight of the evidence establishes that all of the surgeons performed a variety of different surgeries.

Each surgeon had similar job responsibilities and was an Assistant Professor with an appointment to the Division of General Surgery. (CX 16). Like Dr. Ahad, each surgeon was required to spend a portion of his or her time doing teaching, research and service. (CX 16). Though each one focused his or her specific service duties on one or more subspecialties in general surgery, they all could and often did perform surgeries outside their specific subspecialty areas.

I find that Drs. A, B, E, I and K have similar experience, qualifications, education, job responsibilities and specialized knowledge, in addition to having substantially the same duties and responsibilities, as Dr. Ahad. Each surgeon went through extensive education: medical school, residency and a specialized fellowship. Each did a general surgery residency that qualified him or her to operate anywhere in the abdomen. Though, all of the surgeons gained specialized knowledge in specific areas of surgery, they were not limited to their areas.

Based on the forgoing reasons, I find that the specific employment in question is an Assistant Professor with an appointment to the Division of General Surgery. Based on the record Drs. A, B, E, I and K were all employed in the specific employment and had similar experience and qualifications. The following chart summarizes the actual clinical compensation paid to these surgeons while Dr. Ahad was in H-1B status:

Clinical Compensation¹⁸

Doctor	2011	2012	2013	2014
Dr. A	\$146,199.43	\$152,415.50	\$169,581.98	\$145,418.86
Dr. B	N/A ¹⁹	\$147,819.92	\$193,820.98	\$182,284.44
Dr. E	\$142,203.14	\$113,835.73	\$95,700.26	\$112,970.14
Dr. I	N/A	N/A	N/A	\$116,646.04
Dr. K	\$196,189.22	\$179,006.77	N/A	N/A
Clinical Compensation	\$161,530.60	\$148,269.48	\$153,034.41	\$139,329.87

Accordingly, I find that the actual wage for clinical compensation component during Dr. Ahad's H-1B employment was \$411,020.27.²⁰ Dr. Ahad received \$253,676.64 in clinical

¹⁸ When establishing the actual wage, the employer is prohibited from averaging the wage rate it pays to all of its employees in the occupation. The language of the implementing regulations does not extend the limitation to Administrative Law Judges. 20 C.F.R. § 655.715.

¹⁹ I used only full years of employment in calculating the actual wage.

²⁰ For 2011 the actual monthly wage was \$13,460.88 or 1/12th of the annual salary. Dr. Ahad worked five months in H-1B status and one partial month, July, equaling an actual wage of \$78,201.30 ((\$13,460.88 times five months) plus (17 weekdays days worked divided by 21 total weekdays days for July 2011 times \$13,460.88). For 2014 the actual monthly wage was \$11,610.82 or 1/12th of the annual salary. Dr. Ahad work two full months in H-1B status and one partial month, March, equaling an actual wage of \$31,515.08 ((\$11,610.82 times two months) plus (15 weekdays worked divided by 21 total weekdays times \$11,610.82).

compensation from SIU HealthCare while she was in H-1B status leaving a deficit of \$157,343.63.

The academic base, unlike the clinical compensation, remained the same and ranged from \$72,550 to \$175,000. SIUSM implicitly argues that there was an additional \$30,000 to \$50,000 added to the base of general surgeons on the trauma team and therefore it is not attributable to Dr. Ahad. Drs. C and D both testified that this approximation seemed reasonable. (TR 186 and 205). However, surgeons who were not on the trauma team but took trauma call were paid a monthly stipend of approximately \$3,000 to \$5,000 per month or \$36,000 to \$60,000 a year. (TR 160). Dr. Ahad, in her November 30, 2015 deposition, testified that she took trauma call until Dr. H asked her and three others to stop because they had a sufficient number of surgeons on the trauma call rotation. (RX A, p. 35). She testified similarly at the hearing in January 2016. (TR 30-32). SIUSM did not produce persuasive evidence to counter her testimony. Dr. A testified in his deposition, “[n]o, I don’t think she took trauma call at all.” (RX D, p. 43). At the hearing Dr. A again seemed uncertain, “I don’t remember, no.” (TR 136). Dr. C testified that Dr. Ahad did not take trauma call; however, he was not employed at SIUSM until 2010, almost two years after Dr. Ahad started working there. (TR 176-77). Dr. D, when asked about Dr. Ahad taking trauma call, testified “[t]o the best of my recollection, she did not. Although if she did, it was for a brief period of time. I don’t recall.” (TR 203). As the quoted language shows, these surgeons were equivocal in their testimonies. Further, SIUSM failed to have Dr. H counter Dr. Ahad’s statement that he asked her to stop taking trauma call. In his December 18, 2015 declaration, which occurred after Dr. Ahad’s deposition testimony, he does not refer to trauma call at all. (RX G). With no clear evidence to counter Dr. Ahad’s statement, I find that she did take trauma call until she was asked by Dr. H to stop doing so in 2010. This request impacted her ability to earn the additional \$30,000 to \$60,000 annually the surgeons who were on the trauma team or took trauma call earned.

Therefore, I find the actual wage for the academic base to be \$154,510²¹ a year, or \$418,791.12²² for an Assistant Professor during Dr. Ahad’s H-1B employment period. Dr. Ahad received just \$338,789.60 from SIUSM while she was in H-1B status. In sum, Dr. Ahad experienced a deficit of \$237,345.15 – \$80,001.52 in her academic base pay and \$157,343.63 in her clinical compensation – and did not receive the actual wage for her position.

(2) ARE THE WAGES PAID BY SIU HEALTHCARE ATTRIBUTABLE TO THE SATISFACTION OF SIUSM’S WAGE OBLIGATION?

Dr. Ahad argues that because the wages paid by SIU HealthCare were “conditional, unpredictable and contingent on numerous factors and events” they are not attributable to the wages under 20 C.F.R. § 655.731(c)(2)(v). (Pros. Party Br. at 33, 37). To bolster her argument, Dr. Ahad cites *Administrator v. Aleutian Capital Partners, LLC*, 2014-LCA-00005 (July 9,

²¹ Four employees grossed \$175,000 and one grossed \$72,550 annually. (RX O, Ex. 2).

²² One-twelfth of the annual salary equals \$12,875.83. For 2011, the total is \$74,802.44. Dr. Ahad worked five full months in 2011, plus a partial month in July (17 workdays worked divided by 21 total working days times the monthly of \$12,875.83 equaling \$10,423.29). Dr. Ahad worked two full years, 2012 and 2013, at the annual rate of \$154,510. In 2014, the total was \$34,968.68. Dr. Ahad worked two full months in 2014 in addition to the partial month of March (15 workdays worked divided by 21 total workdays times the monthly salary of \$12,875.83 equaling \$9,197.02).

2014), stating that the Administrative Law Judge, (“ALJ”), found the “employer’s (wildly-varying) monthly compensation to the employee did not count toward the required wage per 20 C.F.R. § 655.731(c)(2)(v).” Dr. Ahad has misread both the regulation and *Aleutian*.

The Regulation at 20 C.F.R. §651.731(c)(2)(v) states:

“Cash wages paid,” for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:

.

Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer’s annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as “earnings” with appropriate taxes and FICA contributions withheld and paid).

The regulation makes clear that *future* wages conditioned or contingent on some event do not qualify to satisfy the wage obligation; however, the very next line states that once the wages have been paid they are wages as long as they are in the employer’s payroll records as earnings. 20 C.F.R. § 644.731(c)(2)(i). Here, though the wages were contingent on Dr. Ahad’s RVUs, they were not future wages as they had been paid.

Further, in *Aleutian* the ALJ did not find that contingent payments could never be wages. The H-1B employee in *Aleutian* was salaried creating an obligation upon the employer to pay him one-twelfth of his annual salary each month, which the employer failed to do. *Aleutian Capital Partners, supra* (citing 20 C.F.R. § 655.731(c)(4)). For the wage obligation the ALJ found only that the employer could not credit “overpayments occurring in other months against its obligation to pay the prorated wage monthly,” and that it owed back wages “for those months in which [the employee] received less than one-twelfth of the required wage.” *Aleutian Capital Partners, supra*. In *Aleutian* it was not the contingency of the wages, but rather that the employee did not receive one-twelfth of the required wage each month.

Here, it is clear that Dr. Ahad’s contingent wages were not future wages because they had been paid. I find that the wages SIU HealthCare paid are attributable to SIUSM’s wage obligation.

(3) WAS SIUSM AUTHORIZED TO TAKE A DEDUCTION FROM THE REQUIRED WAGE OBLIGATION?

The H-1B implementing regulations provide that there are certain authorized deductions that can reduce the wage below the prevailing or actual wage:

“Authorized Deductions,” for purposes of the employer’s satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (i.e., paragraph (c)(9)(i), (ii), or (iii)) –

(i) Deduction which is required by law (e.g., income tax; FICA); or

(ii) Deduction which is . . . reasonable and customary in the occupation and/or area of employment . . . ; or

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee’s mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

(B) Is for a matter principally for the benefit of the employee . . . ;

(C) Is not a recoupment of the employer’s business expense . . . ;

(D) Is an amount that does not exceed the fair market value or the actual cost . . . ; and

(E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act . . .

20 C.F.R. § 655.731(c)(9).

First, SIUSM argues that it is authorized to deduct wages under 20 C.F.R. § 655.731(c)(9)(ii) because an “employer is permitted to make a deduction that is “reasonable and customary in the occupation or area of employment.” (Resp. Br. at 22). SIUSM states that it is typical in a multispecialty group medical practice to enter into an agreement that is similar to the SIU HealthCare agreement. (Resp. Br. at 21). SIUSM, however, failed to offer any evidence of what is “reasonable and customary” compensation for an assistant professor that has an appointment to a division of general surgery. SIUSM offered evidence only on what was customary at SIUSM, not what was the customary practice throughout the medical school community. Without evidence to support its premise, I decline to consider this argument.

Second, SIUSM argues, “Dr. Ahad signed a Compensation Agreement with [SIU HealthCare] that allowed for the deductions.” (Resp. Br. at 21). Here, it is not that SIUSM deducted wages from Dr. Ahad’s paycheck; it did not pay her because she did not generate enough RVUs. Regardless, this argument must fail. While it is true that Dr. Ahad signed a compensation agreement, the regulations require more than just a signed agreement to allow for a deduction. Under 20 C.F.R. § 655.731(c)(9)(iii), in order for SIUSM to make an authorized

deduction based on a written authorization it must, *inter alia*, be principally for the benefit for the employee. Here, the compensation agreement was not principally for the benefit of Dr. Ahad. The compensation agreement allowed SIU HealthCare to pay Dr. Ahad only when she generated revenue for the entity and not for other duties such as providing postoperative care for bariatric patients and the time Dr. Ahad spent marketing the program to doctors in the local area. (TR 45 and 51).

SIUSM claims that Dr. Ahad “chose not to be productive.” (Resp. Br. at 2 and 24). That claim ignores the undisputed evidence that beginning in about March or April 2011 her ability to take Medicaid patients, which was a significant portion of her patient base, was restricted. There was no evidence that any other physician in the General Surgery Division was restricted from taking Medicaid patients.²³ SIUSM’s claim also ignores the undisputed evidence that Dr. Ahad’s program suffered from a lack of staffing and promotional support. (TR 78). The head of the General Surgery Division, Dr. C, testified at the hearing as follows:

Q: Was there any sense that St. John’s was not doing its part in regards to marketing or outreach or promotion?²⁴

A: I think [Dr. Ahad] and I both had a sentiment that for her skills there was not the degree of support and promotion that we would have desired.

Q: And for that particular issue, not SIU’s fault, not Dr. Ahad’s fault, but perhaps St. John’s could have done more in terms of marketing and outreach?

A: I would have liked that and I am sure she would have as well.

Q: But that issue did affect her productivity – reduce her productivity to the extent she lost on the opportunity for more patients that could have been marketed to?

A: I think it certainly could have been a factor.

(TR 197-98).

While SIUSM claims that Dr. Ahad chose not to be productive, the evidence shows that it was SIUSM, SIU HealthCare and St. John’s Hospital that made its own choices that proved to be detrimental to Dr. Ahad enhancing her compensable productivity. SIUSM’s position is akin to taking away a significant portion of a person’s calories and then arguing that it was his or her choice to lose weight.

²³ Dr. B testified that to the best of his knowledge he had never been restricted from accepting Medicare or Medicaid patients. (TR 167).

²⁴ The bariatric program that Dr. Ahad ran was physically located at St. John’s Hospital, which is not part of Southern Illinois University. The bariatric program was a “shared effort between SIU Department of Surgery and St. John’s Hospital.” (TR 187).

Third, SIUSM argues that 20 C.F.R. § 655.731(a)(1) allows for periodic adjustments as long as the adjustments are provided to similarly employed H-1B nonimmigrants. (Resp. Br. at 23). The regulation does provide for pay adjustments during the LCA period. The regulation provides examples of “adjustments” that are allowed, such as “cost of living increases or other periodic adjustments, or the employee moves to a more advanced level in the same occupation.” 20 C.F.R. § 655.731(a)(1). The examples in the regulation address only pay increases and do not mention pay decreases or adjustments made based on a commission-based pay structure. I decline to read the regulation so broadly as to include a commission based structure. *U.S. Dept. of Labor v. Quikcat.com, Inc.*, ALJ 2003-LCA-00019 (ALJ June 9, 2005) (finding § 655.731(a)(1) only permits increases in pay, not decreases).

For the foregoing reasons, I find that, in the instant case, the regulations do not allow for SIUSM to take deductions from the actual wage due to Dr. Ahad.

(4) WAS SIUSM EXCUSED FROM PAYING PART OF ITS WAGE OBLIGATION?

The H-1B implementing regulations provide that once the H-1B employer’s obligation to pay the wages begins, the date the nonimmigrant “enters into employment,” the employer must continue to pay wages unless the employer can prove by a preponderance of the evidence the presence of any of the circumstances specified at 20 C.F.R. § 655.731(c)(7)(ii) where the wages guaranteed in the H-1B petition need not be paid. *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008; ALJ No. 2004-LCA-39 (ARB Mar. 30, 2007). Section 655.731(c)(7)(ii) states, in relevant part, that the Employer is relieved of its payment obligation if the H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment, (e.g. vacation and maternity leave), provided that such periods are not covered by the employer’s benefits plan.

SIUSM argues that it is excused from paying Dr. Ahad the actual wage because her productivity suffered due to her maternity leave, her vacations and her failure to meet the productivity requirements of the compensation agreement. (Resp. Br. at 18). It also argues that Dr. Ahad’s compensation would have increased through temporally taking on responsibility for the breast practice or taking trauma call. (*Id.*). I will address each argument in turn.

Dr. Ahad took one maternity leave while she was in H-1B status from June 15, 2011, to August 10, 2011. (TR 78). Dr. Ahad worked right up until her child was born on June 15, 2011, and she returned to work eight weeks later on August 10, 2011. (*Id.*). In sum, she was out for a total of 56 days. There is no dispute that she was paid her entire academic base by SIUSM and nothing by SIU HealthCare during this period. (RX O, Ex. 2, p. 1 and TR 113). SIU HealthCare did have a maternity leave policy; the first 30 days were unpaid and from day 31 to day 90 an employee was paid at 100 percent up to six weeks for a vaginal delivery or eight weeks for a cesarean. (RX O, p. 46-47). Dr. Ahad testified that this benefit was taken away from her as part of approving her maternity leave. (TR 113). SIUSM bears the burden of proof by a preponderance of the evidence that they are not obligated to pay her during her unproductive status. *Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008; ALJ No. 2004-LCA-39 (ARB Mar. 30, 2007). Here, SIUSM only addressed that Dr. Ahad was in nonproductive status due to her maternity leave; it never addressed why her maternity leave benefits were taken away when

SIU HealthCare approved her maternity leave. Accordingly, I find that Dr. Ahad is entitled to her clinical compensation from day 31 to day 56 of maternity leave;²⁵ however, Employer is relieved of its payment obligation from day one of her maternity leave to day 30, or \$13,460.88.²⁶

Vacation, like maternity leave, is a nonproductive status that can relieve an employer from payment unless it is covered under the employer's benefits plan. 20 C.F.R. § 655.731(c)(7)(ii). Dr. Ahad testified that in 2011 she took a three-day trip to Canada to renew her visa, and a two-week trip to Pakistan. (TR 83). In 2013 she took two trips to Pakistan, each for two weeks, and an additional two-week trip in 2014. (TR 83). Each trip was approved by SIUSM and was covered under the vacation days she had earned through SIUSM. (TR 83-84). At the end of her tenure at SIUSM, Dr. Ahad received a payout of \$7,440.47 for her unused vacation days attributable to her academic base. (RX O, Ex. 2, p. 1). Surgeons only accrued vacation leave through SIUSM and not through SIU HealthCare. (TR 92). SIUSM has clearly proven that clinical compensation is based solely on RVUs and if there are no RVUs generated then there is no clinical compensation. However, SIUSM failed to offer any evidence that Dr. Ahad took more vacations than other surgeons who generated more RVUs. SIUSM questioned Dr. Ahad's vacations extensively, but it failed to ask any of the other witnesses about their use of vacation time and how that differed from Dr. Ahad. Dr. C testified that Dr. Ahad did not take more vacations than other doctors. (TR 194). Accordingly, I find that SIUSM failed to prove by a preponderance of the evidence that it is excused from compensating Dr. Ahad during her nonproductive vacation time because it did not establish that her use of vacation time was different than other surgeons.

Finally, SIUSM implicitly argues that, even if the compensation agreement is not a deduction, Dr. Ahad signing the agreement authorized SIUSM not to pay the actual wage because the necessary RVUs were not generated, and additional RVUs could have been generated had she taken over the breast surgery practice or taken trauma call. (Resp. Br. at 22). Neither party disputes that Dr. Ahad was qualified to take over the breast surgery practice; however, Dr. H stated the breast practice was only to supplement, not replace, Dr. Ahad's minimally invasive and bariatric surgeries. (RX G). Dr. Ahad was already working 60 to 80 hours a week. (TR 79 and 81). Dr. Ahad testified that she was also solicited to "kill" her bariatric program and just do breast surgeries until a replacement was found. (TR 82). She testified that once a replacement was found she would have been left with no practice to lead. (*Id.*). It would not have been prudent for Dr. Ahad to abandon the practice she worked to build up without some assurance of where she would be placed once a permanent breast surgeon came aboard. Therefore, I find that for Dr. Ahad to supplement her existing practice or take over the breast surgery practice was impractical.

SIUSM brought Dr. Ahad to its faculty, in part, to get a strong laparoscopic program operational within the existing bariatric program. (CX 13). However, SIUSM made it impossible, regardless of the number of hours she worked, to generate the RVUs needed to put

²⁵ Here, the record does not state whether Dr. Ahad had a vaginal or cesarean delivery, as it is the Employer's burden to prove it is relieved of its payment obligation, I find that Dr. Ahad was entitled to the full eight weeks of maternity leave.

²⁶ This amount reflects actual monthly clinical compensation for 2011.

her on par with her colleagues who specialized in other areas. Dr. Ahad's June 2013 performance review discussed this shortfall at length. (CX 15). The review stated that her outreach to physicians in the area brought in some referrals and that "with the help of some marketing effort from St. John's, and her continued efforts" there would be increased RVUs. (CX 15, p. 2). SIUSM also noted in the review that the main reason Dr. Ahad did not reach her benchmark RVUs was the inability to see Medicare patients, which "could be a very steady stream of patients that she is currently having to turn away because of the center of excellence designation issue." Here, it was not that Dr. Ahad was not being productive, working 60 to 80 hours per week, it was that she was not performing enough procedures that generated revenue under the RVU program.²⁷

Furthermore, SIUSM has not cited a single case in their post-hearing brief, nor did I find any, nor did they convincingly point to any part of the INA or its implementing regulations that authorizes them to offset their actual wage obligation based on a private contract. I decline to find that SIUSM is authorized to contract away their attestation to USCIS that they would pay Dr. Ahad the higher of either the prevailing wage or actual wage.

CONCLUSION

For the reasons that I have set forth above and pursuant to the authority that I am granted by 20 C.F.R. § 655.840(b), the Administrator's Determination dated August 4, 2015, is reversed. I find that a violation of the H-1B provisions of the INA did occur.

The regulations authorize the imposition of appropriate remedies for violations of the statute or the regulations, including the payment of back wages to the H-1B nonimmigrant worker, debarment of the employer from future employment under the program, and the imposition of civil money penalties. 20 C.F.R. §§ 655.810 and 655.855. In this case, I find that Respondent did not act in bad faith, but instead erred in the application of the H-1B wage requirements. While Dr. Ahad is entitled to be made whole for the error in computing the compensation to which she was entitled, it would not be in the interest of justice to take additional remedial action except as set forth in the Order below.

ORDER

For the foregoing reasons the Administrator's Determination is **REVERSED**. Respondent Southern Illinois University School of Medicine is **HEREBY ORDERED** to pay Dr. Sajida Ahad the sum of **\$223,884.27** consisting of \$80,001.52 for the underpayment of academic base compensation and \$143,882.75 for underpayment of clinical compensation, plus prejudgment compound interest on the back pay owed and post-judgment interest until

²⁷ 20 C.F.R. § 655.731(c)(7)(ii) states: "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 the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week (40 hours or such other number of hours as the employer can demonstrate to be full-time employment for hourly employees, or the full amount of the weekly salary for salaried employees) at the required wage for the occupation listed on the LCA." See *Puri v. Univ. of Alabama Birmingham Huntsville*, ARB Case No. 13-022 (Sep. 17, 2014).

satisfaction in full.²⁸ The Administrator of the Wage and Hour Division, U.S. Department of Labor, shall make such calculations with respect to back pay and interest necessary to carry out this order.

SO ORDERED.

MORRIS D. DAVIS
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

²⁸ *Administrator, Wage and Hour Div., USDOL v. Help Foundation of Omaha, Inc.*, ARB No. 07-008, ALJ No. 2005-LCA-37 (ARB Dec. 31, 2008); *Amtel Group of Florida, Inc. v. Yongmahapakorn (Rung)*, ARB No. 04-087, ALJ No. 2004-LCA-006, slip op at 12-13 (ARB Sept. 29, 2006).

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.