

**U.S. Department of Labor**

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**Issue Date: 18 June 2007**

In the Matter of

MICHAL VOJTISEK-LOM  
Complainant

and

ADMINISTRATOR, WAGE AND HOUR DIVISION,  
EMPLOYMENT STANDARDS ADMINISTRATION,  
U.S. DEPARTMENT OF LABOR  
Prosecuting Party

v.

CLEAN AIR TECHNOLOGIES  
INTERNATIONAL, INC.  
Respondent

Case No. 2006-LCA-00009

Michal Vojtisek-Lom, *Pro Se*

Susan Jacobs, Esq.  
New York, NY  
For the Prosecuting Party

Andrew Ivchenko, Esq.  
Buffalo, NY  
For the Respondent

Before: JEFFREY TURECK  
Administrative Law Judge

**DECISION AND ORDER<sup>1</sup>**

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<sup>1</sup> Citations to the record of this proceeding are abbreviated as follows: CX – Complainant’s Exhibit; RX – Respondent’s Exhibit; AX – Administrator’s Exhibit; TR – Hearing Transcript.

This matter arises under the Immigration and Nationality Act as amended (“INA”), 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) & 1182(n), and the implementing regulations at Title 20 of the Code of Federal Regulations, Part 655, Subparts H and I.<sup>2</sup> Michal Vojtisek-Lom (“complainant”), an H-1B nonimmigrant, filed complaints on May 4 and July 13, 2005 with the Regional Administrator of the Department of Labor’s Wage and Hour Division (“Administrator”) against his former employer, respondent Clean Air Technologies International, Inc. The May 4 complaint alleges that Clean Air violated the INA and regulations by: failing to pay complainant the entirety of the required wage owed to him; understating the necessary job qualifications for complainant’s position for the purpose of securing a lower prevailing wage rate; wrongfully terminating complainant after he refused to work without pay; abusing its power as complainant’s visa sponsor; requiring significant consideration as a condition for continued employment; and discriminating against him on the basis of his immigration status (TR at 190, 193).<sup>3</sup> Complainant seeks \$204,710.00 in back wages that he claimed were owed but not paid to him during his employment with Clean Air (*id.*). The July 13 complaint alleges that Clean Air retaliated against complainant by withdrawing Form I-140, the Petition for an Alien Worker Certification (“I-140 Petition”) that Clean Air had filed on complainant’s behalf (TR at 194-95).<sup>4</sup>

The Administrator investigated complainant’s allegations and determined that Clean Air violated §655.731(c) of the regulations when it failed to pay complainant a total of \$20,076.99 for 17.4 weeks<sup>5</sup> during the period from September 13, 2003 through March 19, 2005 (TR at 157; AX 10-11).<sup>6</sup> Respondent did not contest the Administrator’s determination but the Complainant did, and the matter was assigned to me for hearing and decision.

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<sup>2</sup> All of the regulations cited in this *Decision and Order* are contained in Title 20, Part 655 of the Code of Federal Regulations.

<sup>3</sup> This complaint is not in the record, but respondent stipulated that complainant’s May 4 letter contained these allegations (TR at 190-93).

<sup>4</sup> This complaint also is not in the record, but respondent stipulated that complainant’s July 13 letter contained these allegations of retaliation (TR at 194-95). Respondent also stipulated that complainant made another complaint to the Administrator through an e-mail on July 26, 2005 (TR at 197-98). In this e-mail, complainant alleged that Clean Air attempted to “circumvent” the prevailing wage requirements of the INA by requiring consideration for complainant’s future employment and that the company used the I-140 petition for “fraudulent purposes” (TR at 197). However, the latter complaint appears to duplicate the allegations contained in the complaints of May 4 and July 13.

<sup>5</sup> Despite continuing to contend that the complainant was not paid for 17.4 weeks, the *Administrator’s Post Hearing Brief*, at p.7, lists 18 full weeks and one partial week for which it is claimed that the complainant was not paid.

<sup>6</sup> The Administrator also determined that Clean Air failed to maintain documentation required by the regulations (AX 11). Respondent did not contest this violation.

On February 27, 2006, respondent moved for summary decision on the ground that the issue of back wages was not in dispute. On March 17, 2006, I denied respondent's motion for summary decision and allowed the Administrator to appear in this matter as the Prosecuting Party (*Order* dated March 17, 2006). A formal hearing was held on June 19, 2006 in Albany, New York and on June 21-23, 2006 in Buffalo, New York. Complainant appeared *pro se*. Complainant's Exhibits 1-8, 10-14, 16-21, 23-25, 27-28, 30-31, 37-41, and 43-44 were admitted into evidence. The Administrator and Respondent appeared through counsel. Administrator's Exhibits 1-12 and Respondent's Exhibits 1 (Annexes B-C, E-F, H-I), 2-7, 9, 11-13, 17-23, 25-29, 31, 38-41, 48, 49 (Annexes A, C-D, F-G, I-J), 51-53 were admitted into evidence. The record closed at the hearing, and the parties timely submitted their post-hearing briefs.

Based on the evidence contained in the record of this proceeding, I find that the complainant is entitled to back wages totaling \$46,955.37.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### *A. Governing Framework*

The INA defines the various classes of nonimmigrant aliens who may enter the United States for particular purposes and periods of time. 8 U.S.C. §1101(a)(15). One class of aliens, commonly referred to as H-1B nonimmigrants, may enter the United States on a temporary basis to work in "specialty" occupations. *Id.* §§1101(a)(15)(H)(i)(b) & 1184(i)(1). To employ an H-1B nonimmigrant, an employer must file a labor condition application ("LCA") with the Department of Labor ("DOL"). 8 U.S.C. § 1182(n)(1). DOL must certify an LCA unless the information contained therein is incomplete or obviously inaccurate. §655.740. After DOL has certified an LCA, the employer may petition the Department of State for an H-1B visa, which is issued to the nonimmigrant upon approval of the employer's petition by the Immigration and Naturalization Service ("INS," now the United States Citizenship and Immigration Service or "USCIS"). §655.705(a)-(b). Upon the approval of the visa, the employer may employ the nonimmigrant as an H-1B employee.

The LCA sets forth the working conditions and wage rate for the H-1B employee. §§655.731 & 655.732. The INA and regulations provide that the employer must attest in the LCA that it will offer to the H-1B employee during his period of authorized employment the "required wage," which is the greater of the actual wage paid by the employer to others with similar experience and qualifications ("actual wage") or the prevailing wage level for the occupational classification in the area of employment ("prevailing wage"). 8 U.S.C. §§1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. §§655.730(d)(1); 655.731(a). As long as the H-1B employee is performing work and in a productive status for the employer, the employer's obligation to pay the required wage continues throughout the period of authorized employment, unless there has been a "bona fide" termination of the employment relationship. 8 U.S.C. §1182(n)(1)(A); 20 C.F.R. §655.731(c)(7)(ii).

The INA and regulations also prohibit an employer from: filing an LCA which misrepresents a material fact; failing to accurately specify on the LCA the occupational classification in which the H-1B employee will be employed; discriminating against an H-1B

employee who engages in “protected conduct;” and failing to comply “in any other manner” with the provisions at 20 C.F.R., subparts I and H. §655.805(a)(1), (6), (13), (16). The Administrator is empowered to receive complaints and conduct investigations to determine whether an employer of an H-1B nonimmigrant has violated the INA and regulations by failing to pay the nonimmigrant the required wage or by committing any of the other violations listed at §655.805(a). §§655.800, 655.801, 655.805, 655.806. The remedies for violation of the INA and regulations include payment of back wages to H-1B employees who were underpaid, civil penalties, and other administrative remedies as deemed appropriate by DOL. §655.810.

### *B. Background*

Complainant is a 33 year-old national of the Czech Republic (TR at 303-04). The son of a medical doctor and an atomic physicist, complainant became involved in scientific and engineering pursuits at an early age (*id.*). He assisted his parents with their research, and he participated in various mathematics, physics and chemistry competitions, eventually winning the national physics competition in Czechoslovakia in 1990 (TR at 304). Complainant attended Warren Wilson College in North Carolina on a full scholarship, supplementing his academic pursuits with employment in the college’s computer and physics labs (TR at 306; *see also* CX 1). He graduated in 1995 with a bachelor’s degree in mathematics, computer science, economics and business administration (TR at 305).

Out of a desire to work on a research project involving the evaluation of vehicles powered by compressed natural gas, complainant applied and was admitted to the master’s program in energy resources at the University of Pittsburgh in 1996 (TR at 306-07). When the emissions testing laboratory needed for the project became unavailable, complainant invented a device which he termed the Portable Emissions Monitoring System (“PEMS”) (TR at 307-08). The PEMS, which measures pollutants emitted in the exhaust of vehicles and other equipment with combustion engines, was small enough to be carried by one person and could be installed on the vehicle or engine to be tested while it is being used, allowing for the collection of emissions data without the need for a traditional laboratory and stationary dynamometer (TR at 50, 82-84, 272-73, 308, 373-75; CX 3; RX 40). Complainant developed a methodology for use in PEMS testing, and he presented the results of his tests at conferences from 1997 through 1999 (TR at 308-11; CX 1, 38).

Respondent Clean Air is a corporation originally in the business of marketing environmental products (TR at 602). In February of 1999, David Miller, Clean Air’s president,<sup>7</sup> met with complainant and his faculty mentor at the University of Pittsburgh (TR at 311-13, 605-06). Although complainant doubted that there would be large commercial demand for the PEMS, Mr. Miller offered Clean Air’s services in manufacturing and selling the device (TR at 442, 608, 610-11). On May 22, 1999, complainant and Clean Air executed a royalty agreement (“1999 agreement”) (TR at 109, 272, 443 611, 613, 620; *see also* RX 13). Under the 1999 agreement,

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<sup>7</sup>In testimony worthy of *Catch-22*, Mr. Miller stated that he goes by the title “Vice-President” even though he is, and has been at all times with which this case is concerned, Clean Air’s President. *See* TR at 691-93.

complainant assigned to Clean Air all rights in the PEMS in exchange for payments and royalties derived from its sale (TR at 443-46; RX 13). According to his testimony, under the 1999 agreement, complainant had some obligations to assist Clean Air in commercializing the PEMS (TR at 446).

Prior to complainant's graduation from his master's program, Clean Air made him an offer of employment, which he accepted (TR at 273, 619-23). Clean Air filed an LCA with DOL on November 4, 1999 ("1999 LCA") (RX 49, Annex A). The 1999 LCA set forth a prevailing wage for complainant's full-time position as a "Mechanical/Design Engineer" of \$36,744.00 per year (*id.*). Clean Air's petition for an H-1B visa was approved by the INS, which issued a February 25, 2000 notice stating that complainant's H-1B visa was valid from February 24, 2000 until December 30, 2002 (AX 2).<sup>8</sup> Complainant received his master's degree from the University of Pittsburgh on April 29, 2000 (RX 7).

In understanding the employment relationship between complainant and Clean Air, it is important to point out that the complainant is an unusual person. The best way I can describe him is to say he is a free spirit. It goes without saying that he is extremely intelligent and inventive. But beyond that, he has a thirst for knowledge for its own sake, and he cares much more about doing the things that he is interested in, whether it is expanding his scientific knowledge or going whitewater rafting, than he is in making money or following someone else's agenda. Moreover, he prefers to fit his work around his personal agenda rather than fit his personal agenda around his work. Complainant warned Mr. Miller that he would not be a "typical" or "good" employee, that he wanted the ability to travel for his own purposes and work for Clean Air at hours of his own choosing (TR at 314-15, 638). Complainant testified that he made it very clear to Mr. Miller that a condition of his employment would be the ability to pursue his own academic and personal research projects (TR at 314-15). Complainant was also able to set his own hours, sometimes working on projects for Clean Air late into the night and early morning, yet he was able to work more than 40 hours a week on average for Clean Air (TR at 379, 635-37). The record demonstrates that Clean Air acquiesced to complainant's requests and unusual work schedule (TR at 314, 638). Further, although Clean Air's vacation policy allowed for two weeks of paid vacation per year, Mr. Miller testified that there was "an understanding" that complainant could have eight weeks off to pursue his personal and research interests, although the parties were not clear whether these weeks off from work would be paid or unpaid (TR at 636-37, 686). But complainant was not overly concerned whether those days were to be paid or unpaid, as long as he had the time to pursue his myriad other interests.

On May 1, 2000, complainant received his first paycheck from Clean Air, covering the previous month (RX 49, Annexes C-D). On May 4, 2000, complainant and Clean Air executed a second royalty agreement ("2000 agreement"), which granted complainant payments and royalties for the PEMS that he had previously assigned to the company (TR at 620; RX 13). Under the terms of the 2000 agreement, complainant was not required to become an employee of

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<sup>8</sup> This is not a typographical error in this decision. The *Petition for a Nonimmigrant Worker* (AX 2) states that it was valid one day prior to its approval.

the company (RX 13; TR at 622-23, 634). Further, complainant and Clean Air never executed a written employment agreement (TR at 622-23).

Complainant worked on a wide variety of projects as an H-1B employee for Clean Air. Complainant testified that he worked as the principal scientist responsible for “all technical and engineering and scientific aspects,” in the development and testing of the PEMS (TR at 375-76). He was responsible for maintenance and repair of PEMS devices, training and education for PEMS customers, software programming, training of other employees, presenting and promoting the PEMS device at various conferences and symposia, and working with his colleagues, in a wide number of capacities, on contracts between Clean Air and various governmental entities (TR at 277-92, 294-99, 318, 337, 354-64, 375-80, 382-403, 472-74; CX 5, 10-13, 18-21, 23-24, 30, 38; RX 29). Complainant also worked collaboratively with other Clean Air employees to develop and package the PEMS into a marketable product (TR at 649-50, 651-52). Complainant’s travel for Clean Air or personal projects kept him out of Clean Air’s offices on many occasions (TR at 378-80). Complainant had the freedom to work on projects and attend conferences that might benefit the company (TR at 338-39). Complainant testified that he would let Mr. Miller or other members of Clean Air’s management know where he was going and what he would be working on (TR at 340, 380). According to complainant, the company usually was not interested in the “technical details” of the projects on which he was working and acquiesced to complainant’s practice of suggesting and then subsequently attending to a beneficial project (TR at 380). Complainant testified that Clean Air simply wanted his efforts to produce a marketable PEMS (*id.*). Mr. Miller testified that although the company documented the number of hours complainant spent on projects “early on,” the practice was abandoned (TR at 637; *see also* TR at 364).

As a startup company engaged in the development of a newly-invented product, Clean Air did not always have a steady stream of capital available to pay all of its expenses. Mr. Miller, who initially funded Clean Air with money culled from family and friends, testified that during the early months of the company’s existence, complainant was the only employee drawing a salary (TR at 604, 635, 642). The company had little cash during its early days, and Mr. Miller testified that he had to seek financial backing from an investor, leading to a working environment that was filled with pressure (TR at 640-46; *see also* CX 25). Further, throughout the course of complainant’s employment with Clean Air, there were periods of time during which he was not issued a paycheck (TR at 522). Clean Air’s fiscal manager, John Wulf, testified that the company did not always have money readily available to allocate to payroll expenses (*id.*). Accordingly, there were times when complainant was not paid his salary in accordance with Clean Air’s “normal” pay schedule or not paid at all (TR at 550). When complainant was not paid in accordance with the company’s pay schedule, multiple paychecks were sometimes issued to him during a subsequent pay period to make up for past periods of non-payment (TR at 522, 527).

Complainant testified that he repeatedly complained to Mr. Miller and other members of Clean Air’s management about the company’s failure to pay him (TR at 275-76). Complainant explained to Mr. Miller that his ability to remain in the United States as an H-1B employee depended on his receipt of a “steady stream of paychecks,” and that he felt that a problem might arise with his immigration status were Clean Air not to pay him in a timely manner (TR at 276-77). Mr. Miller responded to complainant’s concerns by promising to pay him when the

company had money available (TR at 277). Complainant testified that Mr. Miller urged him to work without pay until the company could procure more investors so it could pay complainant the back wages it owed to him (TR at 277, 381).

In 2002, Clean Air filed a second LCA with DOL (“2002 LCA”) (AX 1). The 2002 LCA set forth a prevailing wage for complainant’s full-time position as an “Environmental Engineer” of \$37,211.00 per year (*id.*). Complainant’s rate of pay was listed as \$40,000.00 per year (*id.*). Clean Air’s petition for an H-1B visa and extension of stay were approved by the INS, and complainant was authorized to work as an H-1B employee for Clean Air from December 31, 2002 through December 31, 2005 (AX 3). Complainant continued to work in his varied roles at Clean Air during the years covered by the 2002 LCA (*see* TR at 275-92, 379-406, 472-74). Although complainant was classified as a “Mechanical/Design” and “Environmental” engineer on both LCAs, complainant testified that he was the most “senior” employee who oversaw Clean Air’s projects, and the record reflects that Clean Air represented to its customers and a government agency that complainant was the company’s “Senior Research Scientist” (CX 10, 13, 30; TR at 457).

Throughout 2002, Mr. Miller and complainant had discussions concerning money complainant believed the company owed him (TR at 381). Complainant and Mr. Miller agreed that complainant’s salary under the 1999 LCA was “too low,” and, in February, 2003, complainant’s salary was raised to \$60,000.00 per year (TR at 381, 674; RX 1, Annexes B-C). Complainant also demanded that Mr. Miller perform some kind of accounting of the money complainant believed the company owed him (TR at 381). Mr. Miller, who admitted that he was not a good bookkeeper, stated that he was unclear as to the amount Clean Air owed complainant, but he signed the notarized letter admitted into evidence as Complainant’s Exhibit 6 (TR at 668-72; CX 6). Mr. Miller stated that the sums listed in the letter represented “one big gigantic number that [Clean Air] owe[d complainant]” and that he signed the document out of a fear that complainant would leave the company (TR at 671-74).<sup>9</sup>

In addition to disagreements regarding wages and royalties, Complainant and Mr. Miller had disagreements concerning the company’s name, complainant’s job title, ownership rights to computer software needed to run the PEMS, and the amount of time complainant was physically present in Clean Air’s offices (TR at 648, 667-73). Additionally, complainant and Clean Air’s management had disagreements concerning complainant’s ability to take time off from work, pursue personal projects, and work at home (RX 22-23, 25). Complainant was frequently out of the office, and Mr. Miller stated that he was “constantly confused” as to whether complainant was actually performing work on behalf of Clean Air during his absences or whether complainant was utilizing vacation time (TR at 684-85; *see* RX 22). Mr. Miller testified that while his professional relationship with complainant was enjoyable during its first few years, complainant was not a “team player” and usually took sole credit for the company’s successes while refusing to take responsibility for customer problems (TR at 646-47, 652). He testified that

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<sup>9</sup> The letter provides that complainant is owed wages totaling over \$100,000.00 and royalties totaling over \$128,000.00 (CX 6). The letter also states that complainant’s salary in 2003 would be \$75,992.73 (*id.*). Complainant was never paid at that rate by Clean Air.

complainant employed a “regular strategy” of not performing work on a project or being unavailable when Mr. Miller would not do what complainant requested (TR at 669). Mr. Miller also testified that complainant was egocentric and “made it real clear that he was going to shanghai the company” (TR at 680; RX 17). Complainant testified similarly that by 2005, his relationship with Mr. Miller had become strained (TR at 474-75).

At 5:58 a.m. on March 16, 2005, complainant sent an e-mail to his friend and co-worker, Josh Wilson, and Clean Air’s Director of Operations, Mary Julian, discussing his work schedule for the past week and the next two weeks (*cf.* TR at 652). He indicated that he probably would be taking two weeks of unpaid vacation since others in the company had had to take unpaid leave. He added that “I cannot afford to work without pay.” CX 27. Mr. Miller, who testified that he had become frustrated over the continued disagreements and arguments he had with complainant, informed complainant at 11:36 a.m. that same morning via e-mail that “effective immediately, you are no longer employed by Clean Air Technologies International, Inc.” (*id.*; *see also* TR at 688, 691). Although the complainant suggests that the temporal proximity of the two e-mails indicates that Mr. Miller fired him in response to his e-mail to Mr. Wilson and Ms. Julian, there is no evidence in the record regarding whether Mr. Miller knew about the e-mail sent by the complainant earlier that morning when he fired him. Nor is there any direct evidence that Miller fired the complainant in response to it.

Subsequent to informing complainant of his termination, Clean Air attempted to negotiate a settlement with him that would allow him to return to work (TR at 689-90). In late June, 2005, Clean Air’s general counsel, Andrew Ivchenko, informed counsel for complainant that the company was interested in “exploring a settlement” with complainant (CX 28). As of July 5, 2005, Clean Air had not informed the USCIS of complainant’s termination and had not withdrawn the I-140 petition<sup>10</sup> the company had submitted on complainant’s behalf (*id.*). Citing “ser[i]ous ramifications” to Clean Air were it to have withdrawn the petition, Mr. Ivchenko urged the attorney representing complainant at that time to discuss the matter with complainant (*id.*). On July 15, 2005, Mr. Ivchenko sent complainant an e-mail asking him for a “constructive response” to Clean Air’s effort to settle with him (CX 28). Attached to the e-mail was a draft of a letter to the USCIS stating that as of March 16, 2005, complainant was no longer employed by Clean Air and withdrawing the I-140 Petition that the company had filed on complainant’s behalf (*id.*). Mr. Ivchenko represented in the e-mail that Clean Air would send this letter to the USCIS if complainant did not timely provide a “constructive” response to the company’s efforts to settle with him (*id.*). By letter dated July 29, 2005, Mr. Miller informed the USCIS that complainant had been terminated and that Clean Air was withdrawing the I-140 petition because it no longer wished to employ complainant (RX 41). Mr. Miller testified that he waited so long to inform the USCIS of complainant’s termination because he had hoped that complainant would “come to his senses” and return to the company (TR at 688).

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<sup>10</sup> An I-140 petition is filed by an employer wishing to sponsor an alien worker to work in the United States on a permanent basis. *See* 8 C.F.R. §204.5. In 2004, Clean Air had submitted an I-140 petition on complainant’s behalf which represented that the company was offering complainant full-time, permanent employment as an “Environmental Design and Software Engineer” at a wage of \$1,200.00 per week (RX 31).

Complainant filed his complaints with the Administrator on May 4 and July 13, 2005. After its investigation, the Administrator determined that Clean Air violated 20 C.F.R. §655.731 by failing to pay complainant all the required wage owed to him during periods covered by the 2002 LCA (TR at 157-66; AX 11). The Administrator determined further that the company owed complainant \$20,076.99 in back wages for 17.4 weeks during the period from September 14, 2003 until March 19, 2005 during which complainant was working for the company but was not paid (AX 10; TR at 166).

Martin Murray, the wage and hour (“W&H”) investigator assigned to investigate complainant’s allegations, testified that W&H usually went back no more than two years in its investigations, but in this case, he examined payroll and financial records going back to the period prior to May, 2003 in an effort to investigate complainant’s allegation that Clean Air failed to pay him the required wage during periods prior to May, 2003 (TR at 213-16). Mr. Murray stated, however, that the pre-May 2003 evidence “became more difficult to follow, cloudier and murkier and more difficult to discern as far as when [complainant] was actually performing work and when he wasn’t” (TR at 216). On account of this “murky” evidence, Mr. Murray limited his investigation of complainant’s wage allegations to the two years preceding the filing of complainant’s initial complaint on May 4, 2005 (*id.*).

Additionally, the Administrator found no evidence that Clean Air misclassified complainant’s job positions on the LCAs or acted fraudulently in obtaining the prevailing wage rates for those positions (TR at 219-20, 227). With respect to complainant’s allegation that Clean Air retaliated against him by illegally discharging him, Mr. Murray testified that the complaint was filed after complainant’s employment was terminated and that the Administrator charged Clean Air with no violation for “retaliation or reprisal or illegal discharge” (TR at 232). With respect to complainant’s allegation that Clean Air retaliated against him by withdrawing the I-140 petition, the Administrator could find no “substantiation” of complainant’s allegation, and Clean Air was not charged with any “retaliation related” violation (*id.*). Mr. Murray did not testify concerning the extent of the investigation, if any, into complainant’s allegation that Clean Air required consideration from complainant as a condition of his future employment with the company.

### *C. Issues*

In his pre-hearing statement, complainant raises four issues, which essentially mirror the allegations he made in his complaints from May 4 and July 13, 2005. He alleges that Clean Air violated the INA and regulations by: (1) failing to pay him all of the required wages owed to him from 2000 through 2005; (2) willfully understating the qualifications needed for complainant’s job so that the company could secure a prevailing wage quote; (3) retaliating against him for engaging in protected activity; and (4) requiring consideration from complainant as a condition of his continued employment with the company.

### *D. Discussion*

While all three parties agree that Clean Air did not pay complainant all of the salary it owed him, they disagree over the time periods for which back wages ought to be calculated and

the total amount due. Complainant alleges that he is owed \$204,710.00, in back wages for his productive work at Clean Air from the year 2000 until 2005. Based on the results of the Administrator's investigation, the Prosecuting Party contends that complainant is owed \$20,076.99 for 17.4 weeks during the time period from September 14, 2003 until March 16, 2005, when complainant received no pay from Clean Air but was in productive working status for the company. Clean Air contends that complainant is owed only \$14,307.74 in back wages, for about 11.4 weeks during the period from September 12, 2003 until March 16, 2005. It further contends that complainant's allegation that he was not paid all of the wages owed to him during the time period covered by the 1999 LCA is time-barred.

### *1. Timeliness of Claims*

The regulations require that an aggrieved party file a complaint with the Administrator alleging a violation of §655.805(a) "not later than 12 months after the *latest* date on which the alleged violation(s) were committed." §655.806(a)(5) (emphasis added). In his May 4, 2005 complaint, complainant alleged that Clean Air failed to pay him all of the required wages owed to him from 2000 through 2005. Complainant is clearly an aggrieved party (*see* §655.715). Further, in alleging that Clean Air failed to pay him all of the required wages throughout the course of his employment, complainant has alleged that Clean Air committed a violation of §655.805(a). Finally, complainant was authorized to work as an H-1B employee for Clean Air from February 24, 2000 until December 31, 2005 (AX 2-3). Clean Air was responsible for paying complainant the required wage during this entire period of authorized employment unless, *inter alia*, it effected a *bona fide* termination prior to the expiration of the 2002 LCA. *See* §655.731(c)(7)(ii); *see also Administrator, Wage and Hour Div. v. Law Offices of Anil Shaw*, 2003-LCA-00020, at 3 (ALJ May 19, 2004) (stating that the date of an H-1B nonimmigrant's termination would provide a "clear date of cessation" for any back wage violation). Complainant's termination from Clean Air occurred in 2005. Accordingly, the May 4, 2005 complaint, which alleges that the company failed to pay complainant the entirety of the required wage from 2000 through 2005, was timely filed.

### *2. Time Period for the Calculation of Back Wages*

Based on the Administrative Review Board's ("ARB") holding in *U.S. Dep't of Labor v. Alden Management Services, Inc.*, ARB Case Nos. 00-020 & 00-021, ALJ No. 1996-ARN-3 (Aug. 30, 2002), and over Clean Air's objection, I ruled at the hearing that complainant could present evidence that Clean Air failed to pay him the required wage during the entirety of his tenure as an H-1B employee for respondent (TR at 201-02). In *Alden Management*, the ARB examined the applicable time period governing the calculation of back wages owed to nonimmigrant nurses under the Immigration Nursing Relief Act of 1989 ("INRA"). As the INRA did not contain express language limiting the period for back pay recovery, the ARB held that the maximum number of years that a nonimmigrant nurse could be admitted to the United States (*i.e.*, six years) constituted the maximum period of years for which back pay could be recovered. Applying the approach of *Alden Management* to the instant case, I note that the INA, like the INRA, contains no express language limiting the period for back pay recovery for an H-1B nonimmigrant. Further, under the INA, an H-1B nonimmigrant may be admitted to the United States for a period not to exceed six years. 8 U.S.C. §1184(g)(4). Complainant's H-1B visas were

valid for over five years, from February 24, 2000 until December 31, 2005 (RX 49, Annex A; AX 3). This period constitutes the maximum period for back pay recovery in this case, and, therefore, complainant was entitled to present evidence that Clean Air failed to pay him the required wage during this time.

### 3. Back Wages Owed to Complainant

While complainant may have other rights or remedies arising from the 1999 and 2000 royalty agreements, the March 5, 2003 notarized letter (CX 6) and any verbal or other understandings with Mr. Miller which may have constituted enforceable contracts or agreements, the only issue before me is the amount of back wages owed to complainant under the H-1B provisions of the INA and implementing regulations. *See Amtel Group of Florida, Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-00006, at 9-10 (ARB Sept. 29, 2006). Employers must pay the required wage to their H-1B employees beginning on the date on which the employee “enters into employment” with the employer. §655.731(c)(6).<sup>11</sup> An H-1B employee “enters into employment” when he first makes himself “available for work” or “otherwise comes under the control of the employer.” §655.731(c)(6)(i). The required wage must be paid to the H-1B employee “cash in hand, free and clear, when due” in accordance with the provisions at §655.731(c)(1)-(2). Salaried employees are to be paid in prorated installments due “no less than monthly.” §655.731(c)(4). Further, “[if] the H-1B employee is not performing work and is in a nonproductive status due to a decision by the employer ... or any other reason except as specified in paragraph [§655.731(c)(7)(ii)]”, the employer still is required to pay the employee the required wage. §655.731(c)(7)(i). Under §655.731(c)(7)(ii), the employer is not obligated to pay the required wage during any period of time during which the H-1B employee “experiences a period of nonproductive status due to conditions unrelated to employment which take the non-immigrant away from his ... duties at his ... voluntary request and convenience or render the non-immigrant unable to work.” However, if the employer’s own benefit plan requires payment during this period of nonproductive status, then the employer must pay the required wage to the H-1B employee. *Id.* Upon a *bona fide* termination of the employment relationship, the employer’s obligation to pay the required wage ends. §655.731(c)(7)(ii). In such an event, the employer must notify the USCIS that the employment relationship has ended so that the nonimmigrant’s visa petition may be cancelled. 8 C.F.R. §214.2(h)(11). The employer is also obligated to provide the employee with payment for transportation home under certain circumstances. 8 C.F.R. §214.2(h)(4)(iii)(E).

As a preliminary matter regarding the back wages owed to the complainant, determining the back wages due is particularly difficult in this case. Respondent’s payroll records are

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<sup>11</sup> I note that under the regulations in effect at the time that Clean Air filed the 1999 LCA, the company had an obligation to pay complainant the “full wage ... beginning no later than the first day the H-1B nonimmigrant is in the United States and continuing throughout the nonimmigrant's period of employment.” §655.731(c)(5)(i)(1999). But that regulation assumed the nonimmigrant was not brought to the U.S. until the LCA was approved. Here, complainant had already been in the United States for many years prior to the LCA application, and obviously the respondent bears no responsibility to pay wages to the complainant prior to the date the LCA took effect.

inaccurate, contradictory or non-existent, paychecks were issued sporadically – sometimes months after a pay period ended - rather than regularly, and there are several periods for which employees never got paid. Further, the payrolls which are in evidence do not always identify the pay periods for which payments were being made. In addition to some actual monthly or bi-weekly payrolls, the record contains “summaries” of the wages Clean Air paid to complainant and the corresponding time periods to which the company contends these wages were applicable (See RX 1, Annexes B, E, H; RX 49, Annexes C, F, I). Clean Air’s current fiscal manager, John Wulf, who did not start working for Clean Air until November, 2004,<sup>12</sup> testified that he constructed these summaries months or even years after the fact, after receiving notice from Mr. Murray that complainant had filed a complaint for back wages (TR at 520-24). As discussed, there were many periods when Clean Air failed to pay complainant his salary. Although the company belatedly issued paychecks for some of these periods, it failed to document which subsequent paycheck applied to which past pay period. Accordingly, in constructing the summaries, Mr. Wulf had to make assumptions as to which check covered which pay period, and he testified that he applied subsequent paychecks to the oldest outstanding pay period or periods (TR at 522-23, 527, 546-48). The summaries also reflect the periods that Clean Air contends complainant was in a nonproductive status due to conditions unrelated to his employment (TR at 523). Unfortunately, on some occasions the summaries are inconsistent with the payroll records. They also may not accurately reflect whether a particular paycheck covered a particular pay period. Clean Air’s shoddy efforts at recordkeeping are wholly to blame for this evidentiary mess.

Complainant and Clean Air dispute the date on which complainant “entered into employment” for the company as an H-1B employee. Complainant testified that he resigned from his position as a graduate student researcher so that he could begin his employment with Clean Air on the previously agreed upon date of March 1, 2000 (TR at 379; see also TR at 272-73). Mr. Miller testified that complainant did not become an employee of Clean Air until May, 2000, after his graduation from his master’s program at the University of Pittsburgh (TR at 631-32).<sup>13</sup> Clean Air’s payroll records indicate that complainant first received a paycheck from the company on May 1, 2000 (RX 49, Annexes C-D). Since at the time, Clean Air was paying its employees on a monthly basis, and this paycheck was for the same amount complainant was paid in the succeeding months, this paycheck indicates that complainant started working for Clean Air no later than the beginning of April, 2000 (see *id.*; see also RX 49, Annex D – *Earnings Record* weeks 19-26, which states it covers the period “04/01/2000 – 06/30/2000”). But complainant testified concerning the wide variety of projects and tasks he performed for Clean Air during

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<sup>12</sup> Mr. Wulf stated that he did not become an employee of Clean Air until February 1, 2005. But he worked for Clear Air as a financial consultant from November, 2004 until he became an employee. See TR at 499.

<sup>13</sup> Section 655.731(c)(6)(ii) of the current regulations states that a nonimmigrant already residing in the U.S. must start getting paid at the approved rate not later than 60 days “after the date the nonimmigrant becomes eligible to work for the employer”, whether he is working yet or not. Sixty days after February 24, 2000 is April 24, 2000. Accordingly, the latest respondent could have started paying the complainant would have been April 24, 2000.

March as well as April of 2000 (TR at 336-54), and Mr. Miller did not dispute that he performed work for Clean Air in those months. Rather, Mr. Miller testified that these projects were performed “under the [1999] royalty agreement” (TR at 632; *see also* TR at 446). But Mr. Miller could not point out where that royalty agreement required the complainant to do work for Clean Air (TR at 632-34).

I find that complainant entered into employment with Clean Air as an H-1B employee on March 1, 2000. Complainant made himself available for work for Clean Air by working on projects and attending conferences for the benefit of the company. On March 1, 2000, complainant traveled to Morgantown, West Virginia to participate in two days of safety training concerning vehicle fuels (TR at 337). On March 6, he performed research and analyzed data (TR at 348). From March 9 through 11, 2000, complainant was traveling, attending business meetings, working on “some issue with Caterpillar,” meeting with Clean Air’s immigration lawyer, working on a project to provide Clean Air with “particulate monitoring capabilities,” and researching whether a smaller computer could be used in PEMS (TR at 337-38, 343-44, 348). On March 15 and 16, 2000, complainant was performing research relating to “diesel particulate measurements” and background research for patent purposes (TR at 349). Complainant also traveled to the Clean Cities meeting on March 16 (*id.*). On March 19, complainant prepared a presentation on particulate matter for the Coordinating Research Council (“CRC”) (*id.*). From March 22nd through March 25, complainant traveled to the CRC by bus (*id.*). From March 27 through 29, 2000, complainant represented Clean Air at the CRC Vehicle Workshop (TR at 344).

Complainant also asserted that he worked full time for Clean Air in April of 2000 (TR at 350). On April 4 through 5 and 11, he prepared a research proposal and worked on a grant application for the E56 project with the CRC (*id.*). On April 9, he made telephone calls concerning “engine PRM” on diesel engines and prepared patent applications (*id.*). On April 17, complainant prepared patent applications, worked on the E56 proposal, and applied for access to a fueling station that would allow complainant to use compressed natural gas (TR at 344-45, 351; CX 17). On April 18, complainant performed more patent work, work related to the E56 proposal, met with a Clean Air client concerning a project, and worked on the “CNG” project (TR at 351-52). On April 20, complainant traveled to participate in meetings (TR at 352). On April 21, he met with Clean Air’s patent attorney, worked on public relations projects for the purpose of promoting the PEMS, and modified a van cigarette lighter so that the PEMS could use the power generated by the van (TR at 352). On April 22, complainant took part in an Earth Day demonstration in which he presented a compressed natural gas vehicle (TR at 352). On April 25 and 26, complainant traveled and worked and went to Washington, D.C. as part of Clean Air’s effort to secure funding (TR at 352-53). Finally, on April 29, complainant traveled and worked on a project relating to a company that eventually supplied Clean Air with component parts later used in the PEMS (TR at 353). Complainant’s testimony is credible.

Clean Air did not rebut complainant’s testimony concerning these activities, projects, travel, and research, the amount of hours required to perform them, or complainant’s repeated testimony that he performed the above-noted work on Clean Air’s behalf. Accordingly, I find that complainant has met his burden to prove that he was working and in a productive status for Clean Air throughout March and April of 2000, and is entitled to his full monthly salary of \$3062.00 (the prevailing yearly wage of \$36,744.00 divided by 12) for both months. *See*

§655.731(c)(7)(i)-(ii); RX 49.<sup>14</sup> However, the record indicates that Clean Air paid complainant the required monthly wage of \$3,062.00 for work he performed for the company in April of 2000. Accordingly, no back wages are owed for that time.

Further, the record demonstrates that Clean Air paid complainant wages totaling \$12,248.00, at a rate of \$3,062.00 per month, for work performed between the beginning of May through the end of August, 2000 (RX 49, Annexes C-D). Complainant does not allege that Clean Air failed to pay him the required wages for this period (*see* TR at 336), and I find that Clean Air paid complainant the required wages during this time. Accordingly, no back wages are owed for this period.

The 2000 payroll summary (RX 49, Annex D) indicates that Clean Air did not pay complainant the required monthly wage of \$3,062.00 for work complainant performed in September and October (RX 49, Annexes C-D). Respondent contends that complainant was in a nonproductive status due to conditions unrelated to his employment (*id.*, Annex C). At the hearing, complainant asserted that he “was doing work” during this period, although he did not specify the nature of his activities during this time (TR at 354). Complainant testified that at the time, Clean Air was in the process of switching payroll systems, and complainant testified that he believed the reason why he did not get paid was because of “irregularities” stemming from the switch (*id.*). It should be pointed out that Clean Air did not submit payroll records for any of its employees for these months. Complainant’s testimony is not contradicted by Clean Air. There is no indication from the record that complainant was engaged in personal pursuits during this time. Accordingly, Clean Air owes complainant his monthly salary of \$3,062.00 for both September and October, 2000.

Beginning November 17, 2000, complainant’s annual salary was increased to \$40,000.00 per year, and it remained at that rate through December of 2002 (RX 49, Annexes C-D, F-G, I-J; TR at 274). I find that \$40,000.00 per year constitutes the required wage owed to complainant during this time. From November 17, 2000 until August 24, 2001, Clean Air paid complainant \$32,307.66 in biweekly installments of \$1,538.46 (RX 49, Annexes C-D, F-G). Complaint does not contest that he was paid the required wages during this time, and I find that no back wages are owed for this period.

Then, from August 25, 2001 through September 2, 2001, Clean Air did not pay the complainant (RX 49, Annexes F-G). It is unclear whether complainant was paid in the next two, two-week pay periods. Respondent’s payrolls for these two pay periods- the two weeks ending on September 16, 2001 and September 30, 2001 - show the complainant as receiving his regular pay of \$1080.00 (*id.*, Annex G). But the payroll summary (*id.* at Annex F) states that although complainant was paid for the two weeks ending on September 16, 2001, it was a mistake, and the

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<sup>14</sup> *See also Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (“[W]here the employer’s records are inaccurate or inadequate ... an employee has carried out his burden [under the Fair Labor Standards Act] if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference ....”).

pay he allegedly received for this period was applied to the two-week pay period ending on November 11, 2001. Clean Air asserts that complainant was in a nonproductive status from September 3-16 due to conditions unrelated to his employment during this time (*id.*, Annex F). Complainant explained that during some of this time “in the early part of September,” he had gone home to the Czech Republic (TR at 355). There is no indication from the record that complainant was performing projects for Clean Air during his trip. However, Mr. Miller testified that Clean Air allowed its employees to take two weeks of paid vacation (TR at 638). Under §655.731(c)(7)(ii), if an H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to his employment that is subject to payment under the employer’s benefit plan, the employer is still obligated to pay the nonimmigrant the required wage. Since two weeks of paid vacation was a benefit afforded to all of the company’s employees, Clean Air cannot refrain from paying complainant his biweekly salary simply because he was not in a productive status for the company while he was visiting the Czech Republic. Accordingly, Clean Air owes complainant two weeks worth of back wages in the amount of \$1,538.46.

With respect to the remaining time in September of 2001 during which Clean Air paid him no wages (or erroneously paid him wages which it subsequently applied to a later pay period), complainant testified that as a result of airline difficulties in the aftermath of the attacks of September 11, 2001, he was unable to return to the United States on his previously-scheduled date of September 17 (TR 355-56). He explained that Clean Air permitted him to remain in the Czech Republic because Clean Air “indicated that [it was] not able to work on anything because people [were] not reachable and everything [was] in disarray” (*id.*). It is not entirely clear from the record whether complainant was in fact paid during this period of time. However, even if he was not, I find that no back wages are owed for the period complainant was stuck in the Czech Republic after the 9/11 attacks because complainant, and not Clean Air, bore the risk of nonproductivity as a result of his taking a personal vacation out of the country. *See* §655.731(c)(7)(ii). Had Clean Air sent complainant to the Czech Republic or had the record indicated that complainant had to travel to the Czech Republic to perform work for the company, under §655.731(c)(7)(i), complainant would have been entitled to be paid for the time he was stuck overseas. But, as Clean Air did not send complainant to the Czech Republic, and complainant went there for purely personal reasons, respondent had no responsibility to pay complainant the required wage for the duration of the time he was unable to return to the United States.

In 2002,<sup>15</sup> there were six biweekly pay periods, from February through April, during which respondent contends that complainant was in a nonproductive status due to conditions unrelated to his employment and therefore was not paid (*id.*, Annex I). Complainant testified that the reason respondent failed to pay him was because the company did not have the funds to pay

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<sup>15</sup> Complainant testified that there “was a period of time on November 11, 2001 where [he was] not sure if [he] was paid or not” during which he was preparing for a bus testing project at Pennsylvania State University and a “major truck idling testing study” (TR at 356). However, the payroll records and documentation establish that Clean Air paid complainant the required wages during this time (RX 49, Annexes F-G). Further, complainant does not allege that Clean Air failed to pay him the required wage during the remainder of 2001.

him (TR at 359-60).<sup>16</sup> With respect to the work that he performed for Clean Air, complainant testified that in December of 2001, Clean Air had been awarded a project to evaluate emissions from tractor trailers (TR at 357). Complainant testified that, as part of this project, he and other Clean Air employees spent the week before Christmas in Knoxville, Tennessee collecting data from idling trucks (*id.*). Additionally, complainant testified that he worked twelve to sixteen hours per day for about six days driving buses around a test track at the Pennsylvania Transportation Institute and that the company “got paid a little bit of money” for him to do this (TR at 356). Between December 2001 and April of 2002, complainant analyzed data collected from the Knoxville and Pennsylvania Transportation Institute studies (TR at 358). Complainant explained that he worked two shifts during the two weeks of data collection and recalled that there were some nights during which he even slept in the trucks to be tested (TR at 359). Complainant testified that for ten of those twelve weeks, he was analyzing data collected from the studies and writing papers that were eventually presented at the CRC conference in April of 2002 (TR at 357-59; CX 18). Further, Dr. Thomas Lanni, a research scientist with experience in emissions data collection, testified that a general rule of thumb was that for every day spent on emissions data collection, one would spend five days processing and analyzing that data (TR at 97-101). This testimony supports claimant’s own testimony concerning the time it took for him to analyze and prepare for presentation the data from the Knoxville and Pennsylvania studies, all of which was done for the benefit of Clean Air.

Additionally, complainant testified concerning a number of projects that he and other Clean Air employees performed for the company during this time. In March of 2002, complainant traveled to Sterling Heights, Michigan to perform testing on the engines used in forklifts for a potential customer that was evaluating whether it ought to use the PEMS for its forklift emissions monitoring (TR at 360-61). Complainant testified that Clean Air paid for his hotel stay during this trip (TR at 360). Complainant and other Clean Air employees were involved in the development of test protocols used by the California Air Resources Board in the monitoring of emissions from highway trucks in April of 2002 (TR at 361). Complainant testified further that around February 9 and 12 of 2002, he performed “baseline studies” concerning a fuel additive that complainant evaluated with his pickup truck (TR at 362). Clean Air was paid for this “small project” (*id.*). Complainant also performed “several days” of “comparison testing” on the PEMS in Los Angeles (TR at 362-63). During the last week of April, 2002, complainant attended the CRC and presented a paper (TR at 364; CX 18). Complainant’s testimony regarding his work during these 12 weeks is unrebutted and credible. I find that the record establishes that claimant was in productive status for 12 weeks during which Clean Air failed to pay him the required wage. Accordingly, I find that Clean Air owes complainant back wages in the amount of \$9,230.76.<sup>17</sup>

Under the terms of the 2002 LCA, which governed complainant’s employment with Clean Air as an H-1B nonimmigrant from December 31, 2002 until December 31, 2005, the

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<sup>16</sup> Of course, lack of available funding would not excuse the company from its obligation to pay complainant the required wage “free and clear, when due” §655.731(c)(1).

<sup>17</sup> Complainant does not allege that Clean Air failed to pay him the required wage during the remainder of the year 2002, and I find that no back wages are owed for this period.

prevailing wage for complainant's full time position as an "Environmental Engineer" was \$37,211.00 per year (AX 1, 3). Complainant's rate of pay was listed at \$40,000.00 per year (AX 1, 3). I find that \$40,000.00 per year constitutes the required wage owed to complainant during this period of authorized employment under the 2002 LCA. The record indicates that from January 10, 2003 through February 7, 2003, Clean Air paid complainant the required wage in three biweekly installments of \$1,538.46 (RX 1, Annexes B-C). Accordingly, no back wages are owed for that time.

Complainant's annual salary was then increased to \$60,000.00 per year (RX 1, Annexes B-C; TR at 274). The record demonstrates that Clean Air paid complainant a biweekly wage - when it paid him - in the amount of \$2,307.69 beginning on February 24, 2003 and continuing throughout the remainder of complainant's employment with the company (RX 1, Annexes B-C, E-F, H-I). Accordingly, I find that the required biweekly wage owed to complainant was \$2,307.69, and that Clean Air met its obligation to pay complainant this wage for only one week (RX 1, Annexes B-C). Then, for three pay periods in March and April, 2003, Clean Air paid complainant no wages (*id.*)<sup>18</sup>. Clean Air contends that complainant was in a nonproductive status due to conditions unrelated to his employment during these six weeks (*id.*, Annex B). Complainant disputes this, and contends that the reason he was not paid for these four pay periods is that the company failed to pay wages to any of its employees for those pay periods (TR at 383-84). As proof, complainant points to respondent's payrolls. The payrolls for the first five pay periods in 2003, ending on March 3, 2003, show that, with only two exceptions, the employees were paid with checks consecutively numbered from 237 through 283. The paychecks for the pay period ending January 5, 2003 were numbered from 237 through 245; for the pay period ending January 19, 2003 the paychecks were numbered from 246 through 254. For the pay period ending February 2, 2003, check number 255 is skipped, and the paychecks are numbered from 256 through 263. For the pay period ending February 16, 2003, the paychecks are numbered from 264 through 271. For the pay period ending March 3, 2003, number 272 is skipped, and the paychecks are numbered from 273 through 283. For those five pay periods, an average of nine paychecks were issued. So, for the next four pay periods, ending on March 16, March 30, April 13, and April 27, assuming the complainant was the only employee who was not paid, there should have been an average of eight checks a pay period issued; and for the pay period ending May 11, 2003, the next check number should be about 316. Instead, the payroll for the pay period ending May 11 starts with check 284, the very next check in the sequence following the payroll for the pay period ending March 3. So, as complainant alleges, it seems that respondent's failure to pay him had nothing to do with the work complainant was performing. Rather, Clean Air did not pay any of its employees for these pay periods. Accordingly, Clean Air owes complainant back wages for the three pay periods ending March 16, March 30 and April 13, 2003, at a biweekly salary of \$2,307.69 (*See* §§655.731(a)(2)(vi), 655.731(c)(4), 655.731(c)(7)(i)). This equals \$6,923.07.

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<sup>18</sup> Complainant actually was not paid for a fourth consecutive pay period as well, the pay period ending April 27, 2003. But in RX 1, Annex B, respondent alleges that complainant was paid for that pay period on August 12, 2003; and the payroll on that date (Annex C of RX 1) shows that complainant received two full pay checks.

From approximately the end of April until the pay period ending October 26, 2003, Clean Air apparently paid complainant the required biweekly wage of \$2,307.69, albeit sometimes as much as six months late (RX 1, Annexes B-C). Complainant does not allege that Clean Air failed to pay him the required wages during this time, and I find that no back wages are owed for this period. Then, for the next three biweekly pay periods, Clean Air did not pay any wages to complainant (*id.*). The company contends that complainant was in a nonproductive status due to conditions unrelated to his employment during these six weeks (*id.*, Annex B). In regard to the week of October 27-November 2, 2003, it does not appear that any of respondent's employees were paid, so any contention that complainant was not paid for that week because he was not doing work for Clean Air is incorrect. Accordingly, the respondent owes him back wages for one week's worth of work in the amount of \$1,153.85.

Next, although he was listed on the payroll for his usual two-week's wages for the pay period ending November 16, 2003, respondent stated that it applied this pay to the pay period ending June 22, 2003 (*id.*). Accordingly, complainant was not paid for the pay period ending November 16, 2003. Complainant testified that in November of 2003, two PEMS units were manufactured and subsequently sold to customers (TR at 388). Complainant participated in two one-week training sessions with two of Clean Air customers in Buffalo prior to undergoing surgery to remove a tumor on his spine (TR at 388-89). Complainant's testimony is uncontradicted and credible, and I find that complainant was in productive status for Clean Air during this time. Accordingly, he is owed additional back wages of \$2,307.75.

The next payroll should have been for the two weeks ending November 30, 2003, but instead it was for the two weeks ending December 7, 2003 (*id.*, Annex B, C). Since no check numbers were skipped, it seems as if none of respondents' employees were paid for the week of November 17-23, 2003. Accordingly, any representation that complainant was not paid for that week because he was not performing work for the respondent would have been incorrect. Instead, he was not paid because respondent did not pay its employees for that week, and he is entitled to be paid another \$1153.85.

On or about November 20, 2003, complainant had the surgery mentioned above. Complainant testified that he remained in the hospital for about three days and was then confined to a rehabilitation facility for a week and a half (TR at 389). Complainant testified further that he understood that he was entitled to two weeks of sick leave for his time in surgery and recovery (*id.*). Complainant asked Mary Julian, Clean Air's Director of Operations (*see* CX 30), whether he was entitled to sick leave and testified that Ms. Julian said he would be covered for those two weeks. However, there is no evidence that Ms. Julian was empowered to change the terms of complainant's employment with Clean Air; and while complainant's testimony is uncontradicted, the record does not establish whether two weeks of paid sick leave was a benefit afforded to all of Clean Air's employees. Further, although complainant states that he was performing work for the respondent to relieve his boredom while he was in rehabilitation and convalescing from the surgery (TR at 389-92), even with the few restrictions placed on the complainant in the way he performed his job, he had no reason to expect that he would be on paid status during this time. Accordingly, I find that complainant was in a nonproductive status due to conditions unrelated to his employment for which Clean Air was not required to pay him any wages. *See* §655.731(c)(7)(ii).

Complainant does not contest that Clean Air paid him the required wages during the last few weeks of 2003, and the record reflects that Clean Air met its obligation to pay complainant the required wages during the remainder of the year. Accordingly, no back wages are owed for that time. For the year 2004, the record reflects that Clean Air paid complainant \$57,692.25 in 25 payments of \$2,307.69 (RX 1, Annexes E-F). Many of these payments were months late (*id.*, at Annex E). Moreover, respondent's pay periods were sometimes longer than two weeks, although respondent paid its employees as if all the pay periods were the same length. For example, pay period 13 on the 2004 pay summary is listed as covering the period from May 31 to June 17; pay period 16 covers the period August 1 to August 22; and pay period 22 covers the period October 11 to October 29 (*id.*). During one biweekly pay period at the end of August and beginning of September, 2004, Clean Air paid complainant no wages (*id.*). The company contends that complainant was in a nonproductive status due to conditions not related to his employment (*id.*, Annex E). Complainant testified that during 2004, he was in the Czech Republic for two weeks during which time he was not working for Clean Air (TR at 298). Complainant returned to the United States on September 10, 2004 (*id.*). By his own admission, complainant was not in productive status for Clean Air during these two weeks in 2004. However, under §655.731(c)(7)(ii), Clean Air was required to pay complainant for his two weeks of vacation, since the benefit was afforded to all of the company's employees.

Since respondent's pay records are so confused, the most practical way to determine whether the complainant was underpaid for 2004 is simply to deduct the total paid to him in 2004 from his required yearly wage of \$60,000, which equals 2,307.75. This is almost exactly how much his bi-weekly pay should have been. Accordingly, Clean Air owes complainant back wages in the amount of \$2,307.75 for 2004.

Concerning 2005, the record demonstrates, and all parties agree, that Clean Air paid complainant only one paycheck of \$2,307.69, for the two weeks from January 31 to February 13 (AX 9; RX 1, Annexes H-I; TR at 294-95). The Administrator contends that Clean Air failed to pay any wages to complainant for eight weeks and two days during which complainant was in productive status for the company (AX 9). But the W&H investigator's spread sheet showing his calculations of back wages due shows that the complainant did not get paid for nine full weeks and one partial week in 2005. That document shows that complainant was not paid for the week ending January 2, 2005, yet no back wages for this period were sought by W&H (*id.* at 1). If there is an explanation for this discrepancy in the record, it has not come to my attention. The Administrator determined that Clean Air owed complainant \$9,692.34 in back wages for work he performed for the company during this time period (AX 9-11).

Clean Air did not appeal the Administrator's determination, and Mr. Miller testified that Clean Air only disputed the Administrator's determination with respect to wages owed to complainant during 2004 (TR at 722). As Mr. Miller testified, complainant did not receive the wages he was owed from January to March 16, 2005 because the Clean Air had no money to pay its employees and none of respondent's employees were paid during this period (other than the single two-week period from January 31 to February 13) (TR at 718-21).<sup>19</sup> Although

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<sup>19</sup> Mr. Miller stated that eventually, all of Clean Air's employees except for the complainant were paid the wages they were owed for January to March, 2005 (TR at 719-20). Apparently

respondent's payroll summary states that complainant was not paid his required wages during this period because he was not performing work for respondent (RX 1, Annex H), this clearly was not the case, and complainant is entitled to the wages he is owed.

In any event, complainant was performing work for the respondent at that time. He testified that during the first week of January 2005, he worked at the New York State Department of Environmental Conservation Emissions Testing lab in Latham, New York repairing a PEMS device (TR at 277). Complainant was preparing for a project that Clean Air was to undertake with the New York State Energy Research and Development Authority ("NYSERDA") (TR at 278). Later in the first week of January, complainant worked with another Clean Air employee to repair an instrument (*id.*). During the second week of January, complainant performed emissions testing on visitor buses used at Yosemite National Park (TR at 279). Although complainant performed the bus testing as part of his volunteer work for the California Air Resources board, he also spent time repairing the instrument and performing cold-weather tests on the PEMS insulation that he had previously procured during the first week of January (TR at 279-80). During the third week in January, complainant was preparing himself for training pursuant to a contract held by Clean Air to develop the Fourier Transform Infrared Spectrometer ("FTIR") (TR at 281). The last week of January, complainant attended the training with a Clean Air colleague and attended a workshop to improve his skills and his work at Clean Air (TR at 281-82).

During late January and early February, complainant worked with a Clean Air colleague to prepare a PEMS for an overseas customer (TR at 287). Complainant also testified that he answered questions from representatives of the New York Power Authority concerning emissions measurements (*id.*). During the first week of February, complainant worked with a colleague to ready a PEMS for testing for a Clean Air customer (TR at 284). Complainant spent the next week in Yellowstone National Park providing training to a Clean Air customer and helping the customer use the PEMS on snow coaches (TR at 286). Complainant then took part in a meeting with the NYSERDA project manager concerning the FTIR instrument (TR at 286-87). Then, after collecting the various instruments he needed to work on the FTIR project, complainant performed miscellaneous duties at Clean Air and then spent two weeks at the New York State DEC Automotive Emissions Laboratory assembling a system and performing testing pursuant to Clean Air's contract with NYSERDA (TR at 288-89). In March, 2005, complainant went to the Vermont Agency of Natural Resources on Clean Air's behalf to diagnose a problem with the PEMS and to arrange training for state employees on the proper use of the device (TR at 289, 291). Complainant also returned to Clean Air's office from a California trip during which he had repaired a PEMS (TR at 292).

Complainant's testimony is uncontradicted and credible, and I find that he has met his burden to establish the amount and extent of the work he performed for Clean Air during the nine weeks and two days in which Clean Air failed to pay him the required wage. *See Mt.*

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these wages were not paid until after the Administrator issued his decision on January 23, 2006 (*see* AX 11), since Miller stated that the reason the complainant was not paid these overdue wages was because of "the award from Labor . . . ." TR at 720.

*Clemens Pottery Co.*, 328 U.S. at 687. Accordingly, I find that Clean Air owes complainant back wages in the amount of \$10,846.19 for this period.

#### 4. Complainant's Termination

That Clean Air owes complainant back wages for periods of time when he was in productive status for the company but not paid is not the end of the inquiry. The regulations provide that the employer of an H-1B nonimmigrant is not obligated to pay the nonimmigrant the required wage "if there has been a *bona fide* termination of the employment relationship." §655.731(c)(7)(ii) (emphasis in original). But as the ARB held in *Amtel Group*, "to ultimately effectuate a '*bona fide* termination' under the INA, an employer must notify the INS [now the USCIS] that it has terminated the employment relationship with the H-1B nonimmigrant and provide the employee with payment for transportation home." ARB No. 04-087, at 11 (Sept. 29, 2006) (citing 65 Fed. Reg. 80,170 (Dec. 20, 2000)). It is insufficient for an employer of an H-1B nonimmigrant to merely provide him with notice of his termination. *Amtel Group*, *supra* at 11. While notice to the H-1B nonimmigrant is certainly "concomitant to termination of the employment relationship," notice to the nonimmigrant alone is not sufficient to end the employer's obligation to pay the employee the required wages. *Id.*

In this case, complainant received notice of his termination on Wednesday, March 16, 2005, through the e-mail authored by David Miller (CX 27; TR at 293). As discussed above, Mr. Miller waited until July 29, 2005 to inform the USCIS of complainant's termination and to withdraw Clean Air's sponsorship of the I-140 petition the company had filed on complainant's behalf (RX 41; TR at 687-89). However, complainant testified that his attorney notified USCIS that he had been terminated by respondent within a week or two of his termination (TR 491). Further, although there is no evidence in the record that Clean Air provided complainant with payment for transportation back to the Czech Republic, he did not return to the Czech Republic when his employment with respondent ended. Instead, he began working for Konhein & Ketcham ("K&K") as an environmental engineer in April, 2005, at a salary of \$65,000 a year (TR at 34-35).<sup>20</sup> He remained with K&K on a full-time basis for a year, and at the time of the hearing he was still working there about 30 hours a week (TR at 37, 39, 41). In addition, since early 2006 he has worked as a research scientist at the State University of New York at Albany, where he is paid about \$40,000 a year (TR at 485-86).

For two reasons, I hold that the complainant is entitled to receive his required wages from the respondent only through March 31, 2005. First, since the USCIS was notified of the termination of complainant and respondent's employment relationship not later than the end of March, the termination became *bona fide* at that time. The immigration regulations state that "[i]f the [employer] no longer employs the [nonimmigrant], the [employer] shall send a letter explaining the change(s) to the director who approved the petition." 8 C.F.R. §214.2(h)(11)(i)(A). Although in this case it was the complainant rather than the respondent who notified USCIS, the result is the same. There is no apparent reason why notice to USCIS by

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<sup>20</sup> In addition to his salary, complainant receives health insurance, two weeks paid vacation, and participation in a 401-K at K&K. TR at 41.

the nonimmigrant, which in substance is similar to notice by the employer, would fail to end the H-1B employment relationship.

But even if the complainant's termination did not become effective until July 29, 2005, complainant still should not be awarded back wages subsequent to the start of his employment by K&K. For he did not incur a loss of earnings once he began working for K&K. The purpose of awarding back wages to a successful complainant is to make the complainant whole, not to punish the employer. *E.g.*, *Amtel Group, supra*, at 12; *cf. Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, at 11 (May 17, 2000), *rev'd on other grounds sub. nom. Doyle v. U.S. Sec'y of Labor*, 285 F.3d 243 (3d Cir. 2002). Once he started working for K&K, complainant was in the same – or even a better – position that he was in while working for Clean Air. Accordingly, it would be inappropriate to order Clean Air to pay back wages to the complainant once he began working for K&K. Accordingly, I award complainant back wages for the last two weeks of March, 2005, at his bi-weekly wage of \$2,307.69.

In sum, I have awarded the complainant a total of \$46,955.37 in back wages.

*5. Willful Understatement of Complainant's Job Qualifications for the Purpose of Securing a Lower Prevailing Wage Quotation.*

Complainant's second allegation is that Clean Air willfully understated the qualifications necessary to perform his job so that it could secure a lower prevailing wage rate on the two LCAs. Complainant contends that the job classifications contained in the LCAs are "entry-level" positions that did not accurately reflect his level of expertise or the roles he performed at Clean Air. He argues that he was a respected expert in his field and that annual salaries for persons with comparable education and experience fall between a range of \$75,000.00 to \$80,000.00 per year. He also contends that Clean Air represented him as the company's "Senior Research Scientist," and seeks back wages based on the difference between the wages paid to him and a yearly salary of \$79,985.00.

As noted, the prevailing wage is the wage "for the occupational classification in the area of [the H-1B nonimmigrant's] intended employment. §655.731(a)(2). It is determined as of the time an employer files an LCA with DOL. *Id.* Although an employer is not required to utilize any "specific methodology" to determine the prevailing wage, the employer "may utilize a SESA [State Employment Security Agency],<sup>21</sup> an independent authoritative source, or other legitimate sources of data." *Id.* The regulations declare that the SESA rate is the most accurate and reliable prevailing wage source, and that "[i]n all situations where the employer obtains the prevailing wage determination from the SESA, the Department [of Labor] will accept that prevailing wage determination as correct (as to the amount of the wage) and will not question its validity where the employer has maintained a copy of the SESA prevailing wage determination." §655.731(a)(2)(iii)(A)(3). In signing the LCA, the employer declares under penalty of perjury that all of the information provided on the form is "true and correct." *See* §655.730(c). The

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<sup>21</sup> A State Employment Security Agency "means the State agency designated under section 4 of the Wagner-Peyser Act to cooperate with [the Department of Labor's Office of Workforce Security] in the operation of the national system of public employment offices." §655.715.

W&H Administrator is empowered to enforce employer compliance with these provisions and may determine whether an employer failed to accurately specify the occupational classification in which the H-1B nonimmigrant was to be employed and may assess a penalty against the employer if such failure was “substantial or willful”. §655.805(a)(6) & (b); *see also* §655.805(c); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133-35 (1988). Mr. Murray testified that Clean Air did not commit fraud with respect to the documentation that the company used to secure its prevailing wage determination (TR at 220), and the Administrator’s determination contained no finding that Clean Air misrepresented complainant’s job classification. I agree with the Administrator’s determination on this issue.

The 1999 LCA lists a prevailing wage of \$36,744.00 per year for complainant’s position as a Mechanical/Design Engineer (RX 49, Annex A). Clean Air obtained its prevailing wage rate from the applicable SESA, the Pennsylvania Department of Labor and Industry (*id.*). In its prevailing wage request for the 1999 LCA, Clean Air represented that complainant’s job duties would include “assist[ing] in the design and development of [e]mission monitoring systems ... building prototypes of the systems ... design[ing] and conduct[ing] scientific studies evaluating the feasibility and accuracy of the systems ... [and] assist[ing] in production operations development, user training, and systems troubleshooting” (*id.*). The request also provides that complainant must have held a bachelor’s degree in the field of emission technology, energy management, or a related science or engineering discipline and must have knowledge of vehicle exhaust emissions monitoring (*id.*). The SESA approved the request at a prevailing wage rate of \$2,318.00 per month (or \$27,816.00 per year). Nevertheless, the 1999 LCA lists a prevailing annual wage rate that is almost \$10,000.00 higher than the rate approved by the SESA (RX 49, Annex A; *see also* TR at 511-14).

There is no indication that Clean Air failed to accurately specify the duties and requirements of complainant’s position. It is clear from the record that while complainant has extensive scientific knowledge in the area of portable emissions monitoring, he was always part of a team effort to manufacture and market a portable emissions product. Clean Air was in the business of producing marketable emissions products. The record also makes clear that complainant worked with other Clean Air employees in completing contract projects awarded to the company. I find that the job description submitted to the SESA reflects the fact that Clean Air understood that complainant would take the lead role in developing and conducting the scientific tests and methodology used to evaluate the PEMS devices but would work collaboratively with other employees to develop and market the product. And given complainant’s role in that effort, I have no basis upon which to find that Clean Air was not truthful in describing aspects of complainant’s job as “assisting” roles. And, while complainant presented extensive testimony from current colleagues and documentary evidence concerning his expertise and ability in the field of emissions research (TR at 37-39, 57, 59, 61-62; CX 1), that evidence does not establish that Clean Air understated complainant’s duties at the time it submitted the request to the Pennsylvania SESA.

The 2002 LCA lists the prevailing wage for complainant’s position as an Environmental Engineer as \$37,211.00 per year and states that the source for this wage was the New York SESA (RX 9). The documentary evidence indicates that the SESA made a prevailing wage determination, although the record does not contain Clean Air’s description of complainant’s job

duties and qualifications (*id.*). Complainant has not presented evidence that Clean Air misstated complainant's job description and requirements when it obtained the prevailing wage determination from the New York SESA. Further, the testimony and documentary evidence concerning his qualifications and expertise do not establish that Clean Air misstated or understated complainant's job requirements.

Relatedly, complainant contends that he should have been paid a salary higher than the salaries he received under the LCAs on the ground that he performed higher-level work than that of a mere mechanical or environmental engineer. Relying on the testimony of current colleagues whose job skills and educational backgrounds the complainant contends are comparable to his own, as well as testimony concerning his own current salary, complainant argues that he should have received an annual salary of around \$80,000.00 from Clean Air (*See* TR at 35, 37, 40-41). Complainant argues that he was the Clean Air's most senior scientific employee who spearheaded scientific testing and development of the PEMS and that he played a leading role in the various contracts that Clean Air held with government entities. He notes that Clean Air represented him to be the company's Senior Research Scientist and argues that Clean Air inaccurately specified his job description and wage rate on the LCAs that would govern his employment with the company.

However, under §655.731(c)(8), even if an H-1B employee worked in an occupation "other than that identified on the employer's LCA, the employer's required wage obligation is based on the occupation identified on the LCA, and not on whatever wage standards may be applicable in the occupation in which the employee may be working." Clean Air never submitted an LCA on complainant's behalf for the position of "Senior Research Scientist" or for any other senior or directorial position. *See Amtel Group, supra* at 6. Further, even if complainant had worked as the company's Senior Research Scientist and the "lead" employee of all of the company's efforts, Clean Air's obligation to pay him the required wage would still be based on the occupations and wages identified in the 1999 and 2002 LCAs. In any event, in February, 2003, complainant's salary was raised to \$60,000.00 a year, \$20,000.00 above the rate set in the LCA, making the prevailing wage stated in the LCA moot for the rest of complainant's employment with Clean Air.

#### *6. Retaliation Through Wrongful Termination and Withdrawal of the I-140 Petition*

Next, complainant alleges that Clean Air twice retaliated against him by: (1) firing him when he complained about not being paid the required wage; and (2) withdrawing the I-140 petition as retaliation for filing complainants with the Department of Labor. Since I have already awarded complainant back wages, and he is not seeking reinstatement (TR at 12), there is nothing further that the complainant can obtain by also proving discrimination. Nevertheless, since the parties presented evidence and argument regarding this issue, I will address it at this time.

The INA prohibits an employer from retaliating against an H-1B employee, providing that:

(iv) [i]t is a violation ... for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or *in any other manner discriminate against an employee* ... includ[ing] a former employee ... because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

8 U.S.C. §1182(n)(2)(C)(iv)(emphasis added); *see also* 20 C.F.R. §655.801(a)-(b); §655.805(a)(13). The language and intent of this provision is similar to the language and intent contained in the employee protection provisions of the environmental and nuclear whistleblower statutes administered by the Department of Labor. *See* 65 Fed. Reg. 80,178 (Dec. 20, 2000) (“The Department is of the view that Congress intended that the Department, in interpreting and applying this provision, should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department.”); *see also* 144 Cong. Rec. S12752 (Oct. 21, 1998).

In order to prevail on a claim of retaliation, complainant bears the burden of demonstrating by a preponderance of the evidence that respondent took an adverse employment action against him because he engaged in protected activity. *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and other anti-discrimination statutes. *See Overall v. Tennessee Valley Authority*, Nos. 1998-111 & 128, at 12-13 (ARB Apr. 30, 2001) (citing, *inter alia*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000)).

In the absence of direct evidence of discrimination (and there rarely is direct evidence of discrimination), a complainant can prove retaliatory discrimination through the establishment of a *prima facie* case. A *prima facie* case is established when complainant shows: (1) that the employer is governed by the INA; (2) that complainant engaged in protected activity; (3) that he suffered an adverse employment action; and (4) that a “nexus” exists between the protected activity and the adverse employment action. *Kahn*, 64 F.3d at 277.

The employee's burden of satisfying the four elements of the *prima facie* case is not “onerous,” and a *prima facie* showing is “quite easy to meet.” *Burdine*, 450 U.S. at 253. By establishing a *prima facie* case, complainant creates a rebuttable presumption that the employer's choice to institute the adverse employment action was the result of impermissible factors in violation of the INA. *Kahn*, 64 F.3d at 277-78. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. The employer's burden is simply one of production. Upon satisfaction of its burden of production, the presumption raised by the *prima facie* case is rebutted, and the onus is once again on the

employee to prove that the employer's proffered legitimate reason is a mere "pretext" and not the true reason for the challenged employment action. *Burdine*, 450 U.S. at 256. In so-called mixed motive cases, where the employer was motivated by both lawful and unlawful factors to take the adverse employment action, once the complainant has made a showing that the protected activity "was a contributing factor" in the adverse employment action, the burden of persuasion then shifts to the employer to demonstrate that it would have taken the same unfavorable personnel action in the absence of such behavior. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Mt. Healthy City Sch. Dist. Bd. Of Ed. v. Doyle*, 429 U.S. 274 (1977).

Assuming for the purposes of this decision that complainant has established a *prima facie* case, respondent has met its burden to produce evidence of a nondiscriminatory reason for discharging complainant. As is clear from the testimony, the employment relationship between the complainant and the respondent was rapidly falling apart in early 2005. Complainant and Mr. Miller frequently disagreed over a wide range of issues relating to complainant's employment relationship with Clean Air, issues that had nothing to do with Clean Air's failure to pay complainant the required wage. The parties' failure to memorialize and adequately document the parameters of complainant's employment relationship with the company, beyond that which was documented in the LCAs, appears to have led to a variety of disagreements that intensified over the course of complainant's employment. In particular, complainant and Mr. Miller had constant disagreements concerning complainant's use of time for personal projects and complainant's presence in Clean Air's offices. Additionally, personality conflicts between the two were amply apparent on the record. Although, at the hearing, there seemed to be no animosity between Mr. Miller and complainant, both had grown frustrated with each other and each others' working styles over the course of complainant's employment. Complainant made it clear to Mr. Miller that he was not interested in being a "typical" employee; yet Mr. Miller complained when complainant would not act as if he was a "team player" on Clean Air projects or was pursuing his own projects. Furthermore, even if complainant could prove that Clean Air was motivated to fire him, even only in part, by his requests to be paid the required wage, Clean Air has met its burden to prove that it would have fired complainant in any event. Mr. Miller's testimony that complainant's style of working drove him "crazy" and that by 2005, he could not handle complainant any more, is amply demonstrated throughout the record (TR at 686-87).

With respect to complainant's allegation that Clean Air retaliated against him for filing his complaints with the Department of Labor by threatening to and ultimately withdrawing the I-140 petition that the company had filed on complainant's behalf as a means of forcing complainant back into employment with the company, I find no evidence of retaliation. Complainant is unable to meet even his *prima facie* burden with respect to this claim. Although Clean Air must comply with the INA and implementing regulations, and the filing of a complaint with the Administrator is clearly protected conduct, complainant has not shown that he suffered an adverse action with respect to his employment under provisions of the INA and regulations governing the relationship between H-1B employers and employees. That Clean Air chose to withdraw its offer to complainant of permanent, future employment through the withdrawal of the I-140 petition is not evidence that it took some adverse action with respect to complainant's employment with the company under the governing provisions of the H-1B program and the terms of the 1999 and 2002 LCAs. Additionally, even if complainant was able to establish a *prima facie* case of discrimination, Clean Air was required, as a matter of law, to inform the

USCIS when it no longer wished to employ complainant in a permanent capacity. *See* 8 C.F.R. §214.2(h)(11). Mr. Miller's testimony makes clear that respondent had no intention of permanently hiring complainant by the time he filed his complaint with the Department of Labor. In fact, he had been fired two months earlier. Respondent had a legitimate, nondiscriminatory reason, a requirement of Federal law, for withdrawing the I-140 petition it had filed on complainant's behalf. Accordingly, Clean Air did not retaliate against complainant for engaging in protected conduct under the INA.

#### *7. Requiring Consideration as a Condition of Continued Employment*

Finally, complainant alleges that Clean Air required "consideration" as a condition of his continued employment with the company. It is not clear exactly what "consideration" complainant alleges Clean Air demanded. Furthermore, to the extent that that the company used complainant's termination of March 16, 2005 as a bargaining tool to persuade complainant to return to employment with the company, I have addressed that issue in the above discussion concerning complainant's termination.

#### *8. Pre and Post Judgment Interest*

Under the applicable case law, complainant is entitled to both pre and post judgment interest on the backpay respondent has been ordered to pay to him. In *Doyle v. Hydro Nuclear Services, Inc.*, *supra*, the ARB held that both pre and post judgment interest must be compounded quarterly at the rate for underpayment of Federal income taxes. That rate will be applied here.

#### *Conclusion*

In summary, complainant has successfully proven that Clean Air failed to pay him the entirety of the required wages owed to him during periods from 2000 through 2005. Respondent is therefore liable for \$46,955.37 in back wages. Furthermore, complainant "is also entitled to prejudgment compound interest on the back pay award and post judgment interest until [Clean Air] satisfies the debt." *Innawalli v. American Information Technology Corp.*, ARB No. 04-165, ALJ No. 2004-LCA-00013, at 8-9 (Sept. 29, 2006) (citing *Amtel Group*, ARB No. 04-087 at 12). The pre and post judgment interest is to be calculated according to the procedures set out in *Doyle v. Hydro Nuclear Services, Inc.*, *supra*.

### **ORDER**

***IT IS ORDERED*** that:

1. The Determination of the Administrator, Wage and Hour Division, United States Department of Labor is hereby **MODIFIED IN PART**. Clean Air Technologies International, Inc. shall pay back wages to Complainant Michal Vojtisek-Lom in the amount of \$46,955.37 plus pre-judgment and post-judgment interest on the back wages from the date each paycheck was due until paid, compounded and posted quarterly, at the

rate for underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C. §6621(b)(3) plus three percentage points.

2. Clean Air Technologies International, Inc. shall maintain documentation as required by the INA and the applicable regulations.

**SO ORDERED.**

**A**

JEFFREY TURECK  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within thirty (30) calendar days of the date of issuance of the administrative law judge’s decision. *See* 20 C.F.R. §655.845(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. §655.845(a). If no Petition is timely filed, then the administrative law judge’s decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has