

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 28 June 2007

Case No.: 2006-LCA-00029

In the Matter of:

**Administrator, Wage and Hour Division,
Prosecuting Party,**

v.

**Avenue Dental Care *aka*
Mahadeep Virk, DDS, *aka*
Mahadeep Virk DMD Puyallup P.S.,
Respondent.**

APPEARANCES:

Jeannie Gorman, Attorney
For the Department of Labor

Chase C Alvord, Attorney
P. Robert Thompson, Attorney
For Respondent, Avenue Dental Care *aka* Mahadeep Virk, DDS, *aka* Mahadeep Virk DMD
Puyallup P.S.

BEFORE:
Russell D. Pulver
Administrative Law Judge

DECISION & ORDER

This matter arises under the Immigration and Nationality Act of 1990 (the “INA” or the “Act”), 8 U.S.C. §§ 1101(a)(15)(h)(i)(b), 1182(n), and 1184(c), as amended by the American Competitiveness and Workforce Improvement Act of 1998 (the “ACWIA”), as well as the implementing regulations found at 20 C.F.R. Part 655, Subparts H and I. The Act allows employers inside the United States to employ non-immigrant workers in “specialty occupations” within the United States through the use of H-1B visas. Specialty occupations are those that

involve the application of specialized knowledge as well as a bachelor's degree or higher. 8 U.S.C. § 1184(i)(1). This case arises out of the employment of Oshmi Dutta, D.D.S., under this program concerning a determination by the Administrator of the Wage and Hour Division ("the Administrator") of six alleged violations under the Act by Respondent Avenue Dental Care, *aka* Mahadeep Virk, DDS, *aka* Mahadeep Virk DMD Puyallup P.S. ("Respondent"). Roberta L. Sondgeroth, a Wage and Hour Investigator for the United States Department of Labor ("DOL"), investigated Respondent's employment practices after receiving complaints that Respondent was violating the rules surrounding employment under the H-1B program. Following her investigation, the Administrator issued a determination letter to Respondent, dated August 8, 2006, which concluded that Respondent 1) had failed to pay required wages to Dr. Dutta; 2) had failed to provide notice of the filing of Dr. Dutta's Labor Condition Application ("LCA"); 3) had accepted the filing fee from Dr. Dutta for his first LCA; 4) had failed to make the LCA and supporting documentation available for public examination at Respondent's principal place of business or at the place of Dr. Dutta's employment; 5) had failed to maintain a public access file at Dr. Dutta's location; and 6) had failed to cooperate in the investigation. The determination letter further assessed Respondent civil money penalties of \$3,750.00 for failure to comply with the wage requirements and \$500.00 for failure to cooperate in the investigation. Additionally, the determination letter found that Respondent had committed a willful violation of the Act requiring debarment of Respondent from hiring further alien employees pursuant to the Act.

Respondent requested a hearing on this determination on August 22, 2006. A hearing was held on January 8-10, 2007 in Seattle, Washington at which all parties were given an opportunity to be heard. Respondent was represented by Chase C. Alford, Esq. of Tously Brian Stephens, PLLC in Seattle, Washington and by P. Robert Thompson, Esq. of Thompson Immigration Associates in Bellevue, Washington. The Administrator was represented by Jeannie Gorman, Esq. from the Seattle, Washington branch of the Office of the Solicitor, U.S. Department of Labor. At the hearing, testimony was received from Roberta L. Sondgeroth, Mark Wojahn, and Oshmi Dutta, D.D.S. for the Administrator and from Mahadeep Virk, D.D.S., Erica Young, Paul Robert Thompson, Zehara Randhawa, and Rodger Kohn for Respondent. Hearing Transcript ("Tr.") at 37, 224, 253, 454, 503, 561, 575 & 590. Additionally, deposition testimony of Varun Sharma, DMD, was accepted into evidence, without objection, by Respondent in view of his unavailability at the hearing as Respondent's Exhibit KKK. Tr. at 558-560. Administrative Law Judge Exhibits ("ALJ Ex") 1-7 were received into evidence without objection. Tr. at 8. The Administrator's Exhibits ("AX") 1-15, 17-36, and 39-45 were received into evidence without objection. Tr. at 15 & 560. Additionally, AX 37 and 38 were admitted into evidence over objections by Respondent although I permitted Respondent to call Paul Robert Thompson to testify with regard to his preparation of these documents. Tr. at 13-15. AX 16 was excluded from evidence based on Respondent's objection that the document pertained solely to unsuccessful settlement negotiations between the parties. Tr. at 10-13. Respondent's Exhibits ("RX") A-C, E-T, CC-EE, GG, II, KK, PP-AAA, and DDD-KKK were admitted into evidence without objection. Tr. at 26, 357, 386-387, 396-397, 411-412, 535, and 560. RX D, U, V, W, X, Y, Z, AA, BB, FF, HH, JJ, and LL-OO were admitted into evidence over the Administrator's objection as to relevance. Tr. at 21-26. RX BBB and CCC were also received into evidence over the Administrator's objection. Tr. at 200-203. Following the hearing, post hearing briefs were submitted by Respondent on February 26, 2007, and by the Administrator on March 5, 2007.

Contentions of the Parties

The Administrator, the Prosecuting Party in this matter, contends that Respondent owes back wages in the amount of \$304,813.86 up to January 8, 2007, the date of the hearing, and continuing thereafter until the expiration of the LCA to H-1B non-immigrant Oshmi Dutta. The Administrator contends that Respondent failed to pay wages in violation of 8 U.S.C. § 1182(n)(1)(A) and 20 C.F.R. § 655.731(c). Further, the Administrator argues that Mahadeep Virk is individually liable for violations under the Act because he is the “employer” under the Act or, alternatively, is no more than an “alter ego” for Avenue Dental Care and Mahadeep Virk DMD Puyallup P.S. Additionally, the Administrator contends that Respondent owes the civil monetary penalties sought for failure to pay the proper wages and for failure to cooperate in the investigation and should be debarred from participating in the H-1B program for two years as a result of the willful nature of these violations.

Respondent contends that the Administrator’s claim should be denied because Dr. Dutta voluntarily terminated his employment with Respondent and thus has not been “employed” by Respondent since July of 2003. Alternatively, Respondent argues that if employment is established, the period of owed back wages is less than that determined by the Administrator and that credit should be given for sums received by Dr. Dutta as disbursements from the two Oregon LLCs which he and Dr. Virk owned equally. Further, Respondent contends that Mahadeep Virk should not be held personally liable for any violation. Respondent contends that it does not owe reimbursement to Dr. Dutta for payment of his LCA filing fees in the amount of \$2,130.00 as this claim is time-barred. Although Respondent denies violations 4-6 of the findings letter, Respondent agrees to issuance of a compliance order with respect to these record keeping requirements. Respondent claims that it cooperated in the investigation and denies that it should be assessed civil money penalties. Finally, Respondent denies that any violations were willful and thus contests the applicability of the two year debarment sought by the Administrator.

Issues

The issues presented in this case for resolution are:

1. Is Respondent liable for \$304,813.86 in back wages to Dr. Oshmi Dutta in violation of 8 U.S.C. § 1182(n)(1)(A) and 20 C.F.R. § 655.731(c)?
2. If Avenue Dental Care and/or Mahadeep Virk DMD Puyallup P.S. are found liable for back wages, should Mahadeep Virk be held individually liable for Avenue Dental Care/Mahadeep Virk DMD Puyallup P.S.’s violations of the Act?
3. Is Respondent liable for reimbursement of LCA filing fees to Oshmi Dutta?
4. Should civil monetary penalties be assessed against Respondent?
5. Should Respondent be debarred?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FACTUAL BACKGROUND

1. Testimony of Roberta Lynn Sondgeroth

Sondgeroth is a Wage and Hour Specialist (Investigator) and has been employed with DOL since 1990. Tr. at 37-38. She has investigated 10 or 11 prior cases involving H-1B visas. Tr. at 41. Her supervisor is Assistant District Director Mark Wojahn. Tr. at 44. Sondgeroth stated that the investigation against Avenue Dental Care and Dr. Virk was begun in Portland, Oregon when Dr. Oshmi Dutta filed a complaint in September or October of 2005. The investigation was then transferred to Seattle where Dr. Virk was located. Tr. at 44-46, 119. During this investigation, Sondgeroth met initially with Dr. Sharma of Avenue Dental Care Puyallup's clinic together with company attorney P. Robert Thompson. Sondgeroth requested to see records and asked that they be made available when they were not immediately produced at the meeting. She thereafter presented her findings by telephone to Thompson. Tr. at 47; AX 2. Sondgeroth testified that the only difference in this investigation from others she has conducted was that most employers had their records readily available at the initial meeting and Avenue Dental Care did not. Tr. at 48. During the initial April 12, 2006 meeting with Dr. Sharma and Thompson, Dr. Virk was contacted on his cell phone but reception was poor. Sondgeroth stated she was promised the requested records within the week. Tr. at 51-52.

Sondgeroth stated the investigation dealt with two LCAs issued to Dr. Dutta running from June 1, 2002 to May 31, 2005, and from June 12, 2005 to June 11, 2008, respectively. She also noted that Avenue Dental Care had several other H-1B employees at several locations. Tr. at 52-56; RX EE. Sondgeroth computed back wages she found due to Dr. Dutta by Respondent as part of her investigation due to the failure to pay the prevailing wage set forth in the LCA. Tr. at 58. Sondgeroth understood that at some point Dr. Virk had refused to W-2 wages to Dr. Dutta and that Dr. Dutta had then made disbursements to himself from the two Oregon clinics that he and Dr. Virk had set up. However, Sondgeroth testified that she did not consider these disbursements to be wages as there were no deductions for payroll taxes taken out and the disbursements were not reported as wages on a W-2 form. Tr. at 60-61. Based on the prevailing wage set forth in the LCAs and the W-2's furnished, Sondgeroth calculated that Dr. Dutta was due back wages of \$94,000.00 in 2003; \$43,061.82 in 2004; \$50,499.12 in 2005; \$115,000.00 in 2006; and \$2,076.92 for the first week of January 2007, up to the date of the hearing. Tr. at 64-74; AX 44. Dr. Dutta received some payments in 2003 apparently as some type of contract laborer but was never given an IRS form 1099. Tr. at 197; RX I. Sondgeroth stated that had the employer chosen to pay the appropriate employment taxes on the 2005 disbursements made to Dr. Dutta, then there would be no back wages owed for 2005. Tr. at 70. Sondgeroth testified that she concluded Respondent's failure to pay Dr. Dutta wages as required by the LCAs was willful since Respondent had other H-1B employees who were correctly paid and furthermore Respondent refused to pay the back wages to Dr. Dutta even after the violation was pointed out by her investigation. Tr. at 75, 78. Sondgeroth also noted that the fact that Respondent paid the appropriate wage under the first LCA then stopped paying the appropriate wage indicated that this violation was willful. Tr. at 76. She stated that Respondent had no prior history of violations

and that these violations apparently pertained only to one of several H-1B employees employed by Respondent. Tr. at 77.

Sondgoreth further testified that Respondent rationalized its failure to pay the required wage to Dr. Dutta by claiming that Dr. Dutta was no longer an employee. Tr. at 81-83. Sondgoreth stated that such an attempt by Respondent to negate the LCA requirements by a private agreement between Drs. Dutta and Virk indicated to her that Respondent had willfully violated the law. Tr. at 84-88. Sondgoreth thus recommended debarment since Respondent had failed to come into compliance despite her investigation and had refused to recognize the employment status of Dr. Dutta. Tr. at 87.

Sondgoreth testified that the employer is required to post its intent to hire an H-1B employee. Tr. at 89. In this case, Sondgoreth stated that Respondent furnished her a “reconstructed” copy of documents to show that the posting had been done. Tr. at 89-90. However, Sondgoreth determined that this “reconstructed” file was insufficient to show that the posting had been properly done in connection with Dr. Dutta’s first LCA since Dr. Dutta told her that the posting had not been done and the “reconstructed” document signed by Dr. Sharma was dated 30 days after the posting was required to be done rather than the 10 days prior to the filing of the LCA as is required. Tr. at 91-93, 189-192; AX 36.

Sondgoreth stated that Dr. Dutta was found to have paid his 2002 LCA filing fee which is prohibited by law although attorney Thompson stated to her that this violation was a common practice among H-1B employers. Tr. at 95-96. With respect to the 2005 LCA filing fee, this was paid by a check drawn on the Clackamas, Oregon LLC and was signed by Dr. Dutta. Thus, Sondgoreth did not view this to be a violation as the payment was not made by the employee. Tr. at 170.

A public examination file is required to be kept by H-1B employers. Tr. at 101. Sondgoreth testified that Respondent did not produce all of the documents required to be kept in the public examination file including particularly payroll records for Dr. Dutta, notice of change in corporate liability reflecting Dr. Dutta’s change to the Oregon locations, and documentation showing the required posting of the notice of filing for Dr. Dutta’s LCA. Tr. at 102, 108, 194-195. Sondgoreth recommended that Respondent be assessed a civil money penalty for failure to cooperate in the investigation since she had requested records on several occasions yet was never furnished complete payroll records for Dr. Dutta. Tr. at 110-112. Sondgoreth stated that she only received summaries of Dr. Dutta’s earnings and not actual payroll records. Tr. at 152; AX 35; RX G.

Sondgoreth stated that there were a number of corporate entities which all operated under the name of Avenue Dental Care, each of which was owned, at least in part, by Dr. Virk. Tr. at 106-107. Sondgoreth considered Avenue Dental Care and all of its locations as a single business enterprise in this case due to Dr. Virk’s common ownership and the operation of all the clinics under the name of Avenue Dental Care. Tr. at 137-140; AX 9; AX 14. Dr. Dutta told Sondgoreth that Dr. Virk essentially forced Dr. Dutta to move to the Oregon clinics by telling him that he was no longer needed at the Puyallup location and would have to move to Oregon if he wished to continue working with Dr. Virk. Tr. at 122, 180-181. Dr. Dutta is listed as a member on the

articles of incorporation for the two Oregon LLCs and he told Sondgoreth that he was a partner in these two clinics. Tr. at 123-125, 157; RX U; RX Y. Dr. Dutta claimed that Dr. Virk sometimes took money from the two Oregon LLCs without leaving enough in their accounts to make payroll and other expenses. Tr. at 157. Dr. Dutta received two payroll checks from the Puyallup clinic in 2004 but stated that he was required to pay these amounts back. Tr. at 164. Although Respondent claimed that the employer-employee relationship with Dr. Dutta had terminated with his move to Oregon, Sondgoreth found that Respondent was still Dr. Dutta's employee as Respondent had not terminated the LCA which he had signed for Dr. Dutta. Tr. at 174-175.

2. Testimony of Mark Wojahn

Wojahn is the Assistant District Director of the Wage & Hour Division of DOL and has been employed by DOL since 1974. Tr. at 225-226. He drafted the findings letter which was issued to Respondent in this case based on a cursory review of the investigative report of Sondgeroth. Ms. Hart was the primary Seattle representative on the review committee who considered the charges in this matter and authorized the issuance of the findings letter. Tr. at 230, 250; AX 1. Wojahn testified that he understood that the findings were issued on the basis that Dr. Dutta should have worked under the existing LCA at the Puyallup office or else a new LCA should have been applied for under the name of the Oregon dental clinic or clinics. Tr. at 247.

3. Testimony of Oshmi Dutta

Dr. Dutta testified that he began work for Avenue Dental Care in September of 2001 and that he is now working as a dentist at Avenue Dental Care clinics in Clackamas and Gresham, Oregon. Tr. at 254. He stated that he initially worked at Avenue Dental Care (previously known as Affordable Dental Care) during his Optional Practical Training ("OPT") as an extension to his student visa and prior to employment as an H-1B employee. Tr. at 255. Dr. Dutta testified that Dr. Virk told him to pay his first LCA filing fee of \$2,130.00 as well as a fee of \$650.00 directly to attorney Thompson for preparing the LCA. Tr. at 257-258; AX 34.

Dr. Dutta stated that he had first known Dr. Virk's brother in India through whom he initially met Dr. Virk in 1998. Tr. at 259. They first discussed employment in June 2001 leading to Dr. Dutta's employment under OPT for Dr. Virk at a daily wage of \$400.00 in the Everett and Puyallup clinics. Tr. at 261-262. Dr. Dutta's wage was raised to \$475.00 daily in June of 2002. Tr. at 263. Dr. Dutta referred to the Puyallup office as the main office and stated that he was last at the Puyallup office in February of 2005 for a meeting with Dr. Virk. Tr. at 265-266, 378. Dr. Dutta testified that after his OPT he received his H-1B visa in June of 2002 while he was working at the main office in Puyallup. Dr. Dutta was paid the LCA prevailing wage rate of \$108,000 through 2002 as well as the first four or five months of 2003. He stated that thereafter he only received a few regular payments in 2004 and for February through April of 2005. Tr. at 275-276. Dr. Dutta admitted that he was paid \$137,000 in 2002. Tr. at 304. Dr. Dutta stated that he never saw any H-1B notices posted at the Puyallup office. Tr. at 267-272.

Dr. Dutta testified that at the end of 2002, Dr. Virk expanded Avenue Dental Care to the two Oregon clinics at which time Dr. Dutta felt that he no longer had a job in Puyallup. Tr. at

274-275. Dr. Dutta stated that he incurred expenses personally in setting up the Oregon clinics as well as for some operating expenses for which some of the moneys paid to Dr. Dutta out of the Oregon clinics' accounts were meant to reimburse him. Tr. at 278-279. Dr. Dutta stated that he asked Dr. Virk in February of 2005 to be paid timely and at the proper rate which he said that Dr. Virk promised to do but did not do so. Tr. at 282. Dr. Dutta was absent from work from October 9 through October 24, 2004 for a personal trip to Dubai and India. Tr. at 283. He also was absent from December 24, 2004 to January 27, 2005 when he was married in India and also traveled to Dubai. Dr. Virk attended Dr. Dutta's wedding in India. Tr. at 284. Dr. Dutta also was absent from work from May 17, 2005 through June 13, 2005 when he attended his sister's wedding in India. Tr. at 285.

Dr. Dutta hired attorney Andrea Bartoloni in Oregon to prepare his second LCA issuing funds from the Oregon clinics to pay him. Tr. at 289-290, 394-396. Bartoloni sent the prepared LCA to Dr. Virk, who was attending Orthodontic training in Boston, who signed and returned the second LCA to Bartoloni for filing. Tr. at 295-296. Dr. Dutta testified that there was no public access file regarding his H-1B employment kept in the Clackamas, Oregon office. Tr. at 299. Dr. Dutta stated that he gave some deposit slips for his personal account to the company bookkeeper so she could deposit checks for him. Tr. at 325.

Dr. Dutta testified that although he held a 50% interest along with Dr. Virk in the two Oregon clinics, his agreement states that his shares would not mature until he had worked with Dr. Virk for five years. Tr. at 339, 341; RX BB at para 9.3.5; RX NN at para 9.3.5. Dr. Dutta stated that he had signed several different employment agreements for each of the two Oregon LLCs but has never seen a fully executed copy of any of these agreements that had Dr. Virk's signature on it. Tr. at 344, 346, 363; RX FFF. Dr. Dutta testified that attorney Thompson had advised Dr. Dutta to file a new LCA in connection with the move to Oregon. Tr. at 347-348. Dr. Dutta stated that he told Dr. Virk to file such a new LCA. Tr. at 349-350. Dr. Dutta stated that later Dr. Dutta asked Thompson to hold off on changing the LCA as Dr. Dutta was not sure he would be staying in Oregon due to his conflicts with Dr. Virk over cash flow and management of the Oregon clinics. Tr. at 351-352, 355, 373. Dr. Dutta conceded that he was the partner in charge of daily operations at both Oregon clinics. Tr. at 361.

In 2006, Dr. Dutta received distributions of over \$46,000.00 from the Gresham clinic and over \$179,000.00 from the Clackamas clinic. Tr. at 364. The bookkeepers for the company, Fruci & Associates, wrote most of the checks for the Oregon clinics. Tr. at 365. Dr. Dutta testified that he had two paychecks issued to him at the end of 2004 by the Puyallup clinic, and due to cash flow issues with the Oregon clinics he was required to reimburse these two checks. Tr. at 384. During the course of this investigation, Dr. Dutta has offered to sell his interest in the two Oregon clinics to Dr. Virk at fair market value, but has received no response. Tr. at 411, 426; RX HH. Two other dentists working with Dr. Virk, Dr. Nigham and Dr. Han, are also involved in disputes with Dr. Virk over their business relationships. Tr. at 413-415; RX OO; RX PP. Dr. Dutta is in charge of hiring and firing office staff as well as any associate dentists at the two Oregon clinics. The office staffs at the two Oregon clinics collect accounts receivable and coordinate with the Avenue Dental Care bookkeepers (Fruci & Associates) to get the bills for the clinics paid. Tr. at 429-430.

4. Testimony of Mahadeep Virk

Dr. Virk graduated from University of Pennsylvania dental school in 1998. He then became an associate of Dr. Stephen Paige at Affordable Dental Care in Bellevue, Washington, and became Dr. Paige's partner in that clinic within two months. Tr. at 454. They then opened three other Affordable Dental Care offices in Puyallup and Everett, Washington. Tr. at 455. In 2001, Dr. Virk bought total ownership of the Everett and Puyallup offices from Dr. Paige and sold his interest in the Everett office back to Dr. Paige. At the suggestion of his creative manager, Dr. Virk changed the operating name of his clinics from Affordable Dental Care to Avenue Dental Care. Dr. Virk stated that he opened another clinic in Bremerton, Washington in 2001 and then opened locations in Edmonds, Washington and Clackamas and Gresham, Oregon in 2003. Tr. at 455-456. Dr. Virk presently owns all of the Puyallup clinic as well as all of the Bremerton clinic as he recently bought the shares of Dr. Himashu Nigham, his former partner in the Bremerton clinic. Tr. at 456. Dr. Virk also owns part of the marketing company which scouts for new business locations for Avenue Dental Clinics. Tr. at 458. Dr. Nigham was a classmate of Dr. Virk at the University of Pennsylvania dental school. Dr. Nigham initially worked for Dr. Virk at the Puyallup clinic until he moved over to the Bremerton clinic as the business in Bremerton built up in 2002. Tr. at 457-459. Dr. Han was a partner in the Everett clinic corporation until late 2006. Tr. at 462.

Bremerton and Puyallup are separate corporations with separate tax id numbers which file separate tax returns. Tr. at 460. The clinics at Everett, Edmonds, Bremerton and Puyallup are all organized and operated as separate corporations. Tr. at 463-464. The Clackamas and Gresham clinics are separate corporations under Oregon laws which were set up in 2003 with Drs. Virk and Dutta each owning 50%. Tr. at 466. Dr. Virk stated that both Affordable Dental Care and Avenue Dental Care were dba's and have no legal identity. Tr. at 557.

Dr. Virk lived in Boston, Massachusetts from August 2003 through June 2006 as he took orthodontic training at Boston University. Thus, Dr. Dutta was responsible for running the two Oregon clinics. Tr. at 467. Dr. Virk testified that all of the Washington clinics are set up as subchapter S corporations while the two Oregon clinics are LLCs. Dr. Virk stated that Dr. Dutta told Dr. Virk that attorney Thompson had advised they be LLCs and not subchapter S corporations due to Dr. Dutta's H-1B status. Tr. at 468.

Dr. Virk stated that he met Dr. Dutta through Dr. Virk's brother and they became close friends. Tr. at 469. Dr. Virk's brother, Navdeep Virk, is also a dentist and operates three dental clinics in Spokane and Kennewick, Washington under the name of Avenue Dental Care although Respondent has no ownership in any of these three clinics. Tr. at 470. Dr. Virk testified that Dr. Dutta suggested the idea of his working for Dr. Virk under the H-1B program as Dr. Virk was previously unaware of the program. Tr. at 471. Dr. Virk stated that he told Dr. Dutta to hire an attorney for the first LCA. Tr. at 552. Thereafter, Dr. Virk brought in Dr. Varun Sharma and three other dentists at his clinics under the H-1B program. Tr. at 472-473. Dr. Virk testified that none of these other H-1B dentists had made any complaint to him regarding wages. Tr. at 473-474. Dr. Virk stated that when he learned of the DOL investigation, he advised calling attorney Thompson as he was the company's advisor on H-1B matters. Tr. at 474.

Dr. Virk stated that Dr. Dutta worked for the Puyallup clinic until June of 2003 when Dr. Dutta left for Oregon. Tr. at 475. Dr. Virk stated that Dr. Dutta was aggressive in seeking ways to increase his income but wanted to live in a metropolitan area. The marketing company, Pacific Dental Alliance, advised that the Seattle area was not a good choice for opening additional clinics but that the Portland, Oregon area was a good market for opening two new clinics. Dr. Virk testified that Dr. Dutta was keenly interested in the two new Oregon offices as Dr. Dutta was aware that Dr. Virk's partners in other newer locations, Drs. Han and Nigham, were making substantial incomes off those clinics. Tr. at 475-476. Dr. Virk stated that Dr. Dutta was so anxious to open the Oregon clinics that Dr. Dutta contacted leasing agents in Oregon to look for potential clinic space to lease. Tr. at 477-478.

Dr. Virk testified that he told Dr. Dutta to talk to attorney Thompson about his H-1B status and the Oregon clinics. Dr. Virk stated that he offered to keep all of the Oregon clinics' shares in Dr. Virk's name and then transfer them to Dr. Dutta when he was able to obtain his green card. Dr. Virk understood from Dr. Dutta that as long as the Oregon corporations were LLCs, there was no problem with Dr. Dutta's H-1B status. Tr. at 479-481. Dr. Virk denied that he ever put any pressure on Dr. Dutta to move to Oregon and specifically denied that Dr. Dutta had told him that attorney Thompson had advised that a new LCA be obtained for Oregon. Tr. at 481-483.

Dr. Virk testified that revenues from the Oregon clinics were not good for the first six months of operation as they were getting established. Tr. at 484. Dr. Virk stated that he worked a few days in the Oregon clinics before he left for school in Boston leaving Dr. Dutta to run the clinics. Tr. at 485. Dr. Virk testified that cash flow from the Oregon clinics was poor in 2004 as well and loans from the Puyallup clinic to the two Oregon clinics had to be made to meet expenses. Tr. at 486; RX K.

Dr. Virk stated that he first learned of a complaint from Dr. Dutta regarding his pay when he got a letter from Dr. Dutta's attorney in the summer of 2005 alleging that Dr. Virk was in violation for not properly paying Dr. Dutta. Tr. at 487. Dr. Virk stated that Dr. Dutta was paid as a contract laborer in 2003 because Dr. Dutta told Dr. Virk's wife, who was then doing the bookkeeping, that such payments would help Dr. Dutta on taxes. Tr. at 488. Dr. Virk testified that he did not take any distributions from the Oregon clinics in 2006 or 2007 and does not believe that he has taken out more than \$10,000.00 since the Oregon clinics started. Tr. at 489. Further, Dr. Virk stated that he did not believe that any of the Puyallup clinic loans to the Oregon clinics have been paid back. Tr. at 490. Dr. Virk stated that Dr. Dutta wrote checks on the Oregon clinics' accounts which sometimes resulted in the accounts being overdrawn. Dr. Virk stated the accountants complained to Dr. Dutta about his writing checks but could not stop it as Dr. Dutta is an equal partner in the clinics with Dr. Virk. Tr. at 491. Dr. Virk stated that all of the office staff and dentist associates were hired by Dr. Dutta for the two Oregon clinics. Tr. at 492. Dr. Virk stated that Dr. Dutta in his offer to sell Dr. Virk his shares in the Oregon clinics in the summer of 2005 asked for a salary in the alternative. Tr. at 494.

Dr. Virk admitted that he signed both of Dr. Dutta's LCAs as employer but doesn't recall whether the LCAs were posted as required. He stated that he assumed Dr. Dutta posted the LCAs. Tr. at 536-537. Dr. Virk testified that he received the second LCA when he was at a

hospital clinic in Boston and thus signed it and returned it immediately without reading it. Dr. Virk stated that when he actually read the LCA later that evening, he noticed that the Puyallup clinic was still listed as the employer. Dr. Virk testified that he called Dr. Dutta who responded that he would take care of getting a new application to correct the employer listed. Dr. Virk stated that he assumed Dr. Dutta had taken care of this matter. Dr. Virk stated that he never spoke with attorney Bartoloni. Tr. at 521-525. Dr. Virk admitted that he did not know the specific record keeping requirements for an LCA in 2002. Tr. at 551. Dr. Virk stated that he has been unable to fire Dr. Dutta since they each own 50% of the two Oregon clinics. Tr. at 527. Dr. Virk testified that he had also been involved in a dental software venture with Dr. Dutta but after investing \$140,000.00, he had not seen any results. Tr. at 528-529.

When Dr. Dutta complained through his attorney in the summer of 2005, Dr. Virk hired another immigration attorney who gave conflicting advice from that of attorney Thompson in that the new attorney opined that an H-1B worker could also be an owner. Tr. at 531-532; RX JJJ. Dr. Virk stated that he was aware of only one version of an employment agreement for Dr. Dutta with the Oregon clinics which Dr. Virk assumes is in effect. Tr. at 534; RX FFF. Dr. Virk testified that he did not pay Dr. Dutta after May of 2005 since he felt Dr. Dutta was no longer an employee but rather a partner in the two Oregon clinics. Tr. at 549. Dr. Virk never attempted to withdraw Dr. Dutta's LCA as he understood that an LCA could not be withdrawn while an investigation was ongoing. Tr. at 551-552.

5. Testimony of Erica Young

Young is a CPA tax accountant with Fruci & Associates of Spokane, Washington. She testified that all nine Avenue Dental Care clinics have common ownership or family relationship. Tr. at 503. Fruci & Associates took over the accounting for Avenue Dental Care clinics in March of 2005 and has handled each of the clinics as separate corporate entities with separate accounting books kept for each. Tr. at 504-505. Young testified that Dr. Dutta asked her in April of 2005 to prepare a letter in connection with his immigration papers which she then faxed to attorney Bartoloni. Tr. at 505-506; RX HHH. Thereafter, Dr. Dutta called Young back and asked that she change the letter to delete any mention of the names and Employer Identification Numbers of the two Oregon clinics leaving only the Puyallup clinic Employer Identification Number on the letter. Young changed the letter and faxed it again to attorney Bartoloni. Tr. at 507-508; RX III. Young's firm prepared RX F which shows all payments made to Dr. Dutta. Tr. at 509. Young testified that under IRS rules, the two Oregon clinics were to be treated as partnerships since there were only two owners of each LLC, Drs. Virk and Dutta. Tr. at 510. Thus, Young stated that neither partner in the two Oregon LLCs could be paid as employees under these IRS rules but rather required that they be paid any "guaranteed payments" with no deductions for taxes, Social Security, etc. to be reported to the IRS under the partnership K-1 rather than an employee W-2 form. Tr. at 511. Young testified that Dr. Dutta was paid pursuant to K-1's by the two Oregon entities but could not recall any payments being made by the two Oregon clinics to Dr. Virk. Tr. at 512-513.

6. Testimony of Paul Robert Thompson

Thompson met with Dr. Sharma and Sondgeroth on April 12, 2006 as counsel for Avenue Dental Care. Tr. at 561. Thompson testified that his firm prepares public information files whenever the firm processes an H-1B application and sends the file to the employer. Tr. at 562. The public information file for Dr. Dutta's application could not be located by Avenue Dental Care so Thompson's office reconstructed the file from its own copies of the documents. RX RR. Thompson testified that he never saw Dr. Dutta's public information file at Avenue Dental Care's offices and has no idea when or how it was misplaced. Tr. at 562, 572-573. Thompson stated that he did furnish copies of his reconstructed public information file on Dr. Dutta to Sondgeroth on the day following their meeting. Tr. at 563; RX AAA. Thompson testified that Dr. Dutta asked Thompson in late 2003 or 2004 whether Dr. Dutta could own the company employing him under H-1B rules to which Thompson responded that in Thompson's opinion he could not be an owner of the employing entity under H-1B rules. Tr. at 564-565. Thompson further stated that he advised Dr. Dutta by e-mails in July and August of 2003 that Dr. Dutta needed to amend his LCA if he was changing his work location from Puyallup, Washington to the Oregon clinics. Tr. at 566-567. Thompson stated that Dr. Dutta e-mailed him in January of 2004 indicating that Dr. Dutta wanted to keep the Puyallup entity as the H-1B employer since Dr. Dutta stated that he spent some of his time working at the Puyallup clinic. Tr. at 568; RX JJ.

7. Testimony of Zehara Randhawa

Randhawa was married to Dr. Virk from 1994 through December of 2004, and acted as bookkeeper for the Avenue Dental Care clinics. Tr. at 575-576. Randhawa issued Dr. Dutta two payroll checks from the Puyallup clinic account in late 2004 as Dr. Dutta indicated that he needed these payroll checks for his prospective wife's visa with their marriage taking place in December of 2004. Randhawa then asked Dr. Dutta to repay the two checks shortly thereafter as he was not a Puyallup employee. Tr. at 580-582. She testified that Dr. Dutta was keenly interested in the business opportunity presented by opening up the two Oregon clinics with Dr. Virk. Tr. at 583-584. Randhawa testified that she suggested to Dr. Dutta that he deposit only every other distribution check while working in Oregon so that she could deposit or save for him half of his money as she stated he agreed with her that such savings were a good idea. Tr. at 586. Randhawa stated that dentists were commonly paid as contract labor and issued IRS form 1099's rather than W-2's because dentists frequently changed clinics, in her experience. Tr. at 586-589.

8. Testimony of Rodger Kohn

Kohn is a Seattle attorney retained to act as business counsel to Dr. Virk and the various clinics in which Dr. Virk has an interest. Tr. at 591. Kohn testified that he met and spoke with Drs. Virk and Dutta when setting up the two Oregon clinics. He testified that he suggested setting the two Oregon entities up as LLCs and not subchapter S corporations as the other clinics were because Kohn knew that subchapter S rules require all owners to be U.S. citizens and Dr. Dutta was not a U.S. citizen. Kohn denied talking to Dr. Dutta about any immigration issues in connection with setting up the Oregon clinics as Kohn does not deal in immigration law matters. Tr. at 592-594. Kohn stated that he understood that there was an operating agreement for the Oregon clinics signed by both parties although he could not recall ever seeing a copy with Dr.

Virk's signature. Tr. at 596-597. Kohn stated that he may have drawn up several drafts of the agreement but there would have been only one final version of the agreement which he believed was in effect. Tr. at 598-599. Kohn testified that he had most of his contact with Dr. Dutta regarding the Oregon clinics once they were in operation although he sometimes spoke with Dr. Virk about issues at the clinics. Tr. at 614-615.

9. Deposition Testimony of Varun Sharma

Dr. Sharma is currently employed as a dentist at the Avenue Dental Care office in Puyallup, Washington where he has worked since August of 2002. RX KKK at 6, 14. Dr. Sharma holds a DMD, doctorate of dental medicine which he received from Boston University in 2002. RX KKK at 7. Dr. Sharma received education in dentistry in India and practiced dentistry and oral surgery in India for three years prior to applying to Boston University. RX KKK at 8-9. In view of his training in India, Dr. Sharma completed an expedited two year course of study at Boston University rather than the usual four year program required for graduation. RX KKK at 20. Dr. Sharma initially met Dr. Virk while attending dental school in India. RX KKK at 15-16. Dr. Sharma first worked at Avenue Dental Care in Puyallup under the Optional Training Program as an extension of his student visa at \$400 per day. RX KKK at 24-25. Dr. Sharma stated that he applied for an H-1B visa through Avenue Dental in June of 2003. RX KKK at 26.

Dr. Sharma testified that although he worked primarily at the Puyallup clinic, he did work briefly at the Bremerton clinic as well as a few days in the Spokane clinic owned by Dr. Virk's brother. RX KKK at 30. Dr. Sharma stated that his H-1B visa was extended for three years and will expire in 2009. RX KKK at 32. Dr. Sharma currently receives \$700.00 per day plus bonuses which reached a total of almost \$200,000.00 for 2005, as reported on his W-2. RX KKK at 32-33. Dr. Sharma testified that the Puyallup clinic has an office manager but Dr. Sharma has helped oversee the work of the office manager, particularly during the three years that Dr. Virk spent in orthodontic training in Boston; he stated he was acting simply as a friend to Dr. Virk. RX KKK at 37, 42-44. Dr. Sharma stated that he receives two weeks of paid vacation per year as well as paid federal holidays working for Avenue Dental Care. RX KKK at 49-51.

Dr. Sharma testified that he paid about \$1,500 to attorney Thompson to prepare his H-1B application and another \$1,500 for the filing fee and that he was reimbursed by Avenue Dental Care for the filing fee portion, and that Dr. Sharma's wife, Arpita Sharma, who is also a dentist, paid the same amount as fees with similar reimbursement from Avenue Dental for the filing fees. RX KKK at 53-54, 81. Dr. Sharma testified that he did not recall if a notice was posted for his initial LCA and that he did not think one was posted for his second LCA. RX KKK at 59. Dr. Sharma recalled some type of document being posted in the Puyallup clinic for Dr. Dutta but could not recall any such postings for the other H-1B workers at Avenue Dental. RX KKK at 85-86.

Dr. Sharma testified that he understood that there were problems in the business relationship between Drs. Dutta and Virk, which he believed arose out of the two Oregon clinics not producing the revenues that were expected. RX KKK at 65-66. Dr. Sharma stated that he was told by attorney Thompson that Thompson was of the opinion that an H-1B worker could not be a partner in his employing firm. Dr. Sharma testified that he researched this issue on the internet

and came to the conclusion that an H-1B employee could not be employed by a firm in which the H-1B employee owns 50%. RX KKK at 67.

B. STATUTORY FRAMEWORK

The H-1B visa program permits employers to temporarily employ non-immigrants to fill specialized jobs in the United States. The Act requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage, in order to protect U.S. workers and their wages. Under the Act, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must receive permission from the DOL before the alien may obtain an H-1B visa. The Act defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. § 1184(i) (1). To receive permission from the DOL, the Act requires an employer seeking permission to employ an H-1B worker to submit a Labor Condition Application ("LCA") to the DOL. *See* 8 U.S.C. § 1182(n)(1); *In the Matter of Eva Kolbusz-Kline v. Technical Career Institute*, ALJ No. 93-LCA-4, 1994 WL 897284, at *3 (Sec'y July 18, 1994). Only after the employer receives the Department's certification of its LCA may the INS approve an alien's H-1B visa petition. 8 U.S.C. § 1101(a) (15) (H) (1) (B); 20 C.F.R. § 655.700. The Act provides that the LCA filed by the employer with the DOL must include a statement to the effect that the employer is offering to an alien status as an H-1B non-immigrant, that wages for H-1B visa holders are at least equal to the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is higher, based on the best information available at the time of filing the application. 8 U.S.C. § 1182(n) (1) (A). The Act directs the DOL to review the LCA only for completeness or obvious inaccuracies. Unless the Department finds that the application is incomplete or obviously inaccurate, the Department shall provide the certification described by the Act within seven days of the date of the filing of the application. 8 U.S.C. § 1182 (n) (1) and 20 C.F.R. § 655.740. Upon certification of the LCA by DOL, the employer is required to pay the wage and implement the working conditions set forth in the LCA. 8 U.S.C. § 1182(n)(2). These include hours, shifts, vacation periods, and fringe benefits. *Id.* The Department has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation of the required wages. *See* 20 C.F.R. Part 655 Subpart H. The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid, debarment of the employer from future employment of aliens, civil money penalties, and other relief that the Department deems appropriate. 20 C.F.R. §§ 655.810, 655.855. An employer also has a duty to notify INS "immediately" of any changes in the terms and conditions of an H-1B nonimmigrant's employment. 8 C.F.R. § 214.2(h)(11).

C. FAILURE TO PAY WAGES TO OSHMI DUTTA

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the United States Supreme Court held that once an employee has shown that he performed work and was not properly paid for it, and he produces sufficient evidence of the amount and extent of work as a matter of just

and reasonable inference, the burden shifts to the employer to produce evidence of the precise amount of work that was performed or evidence to negate the inference created by the employee's evidence. *Id.* at 687-88. The Court explained that it is the employer's duty to keep precise records and that such a burden should not fall on the employee and bar the employee from recovery when such records cannot be produced. *Id.* at 687. Although *Mt. Clemens Pottery* involved a claim brought under the Fair Labor Standards Act, the Supreme Court's holding has been adopted in deciding claims brought under other acts, such as the Davis-Bacon Act (see *In the Matter of Permis Construction Corp.*, WAB No. 87-55, 1991 WL 494686, at *4 (WAB Feb. 26, 1991), and most notably, by the Administrative Review Board in an LCA case (see *Administrator, Wage and Hour Division v. Ken Techs., Inc.*, ARB No. 03-140, ALJ No. 03-LCA-15, 2004 WL 2205233, at *2 (ARB Sept. 30, 2004). Thus, if I initially find that the Administrator has established that Respondent failed to properly compensate the H-1B nonimmigrant worker, then Respondent bears the burden of establishing the existence of circumstances that warrant the wages not being paid or benefits not being offered, by a preponderance of the evidence. *Ken Techs., Inc.*, 2004 WL 2205233, at *2. Otherwise, Respondent is liable for the payment of back wages and other financial remedies.

The prevailing wage shown on Dr. Dutta's LCA was the wage that Respondent was required to pay him. 8 U.S.C. § 1182(n)(1)(A). An employer satisfies his required wage obligations by paying this wage to the employee, cash in hand, free and clear, due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the required wage. 20 C.F.R. § 655.731(c)(1). This wage must be reflected in employer's payroll records, and taxes withheld and paid to the IRS. 20 C.F.R. § 665.731(c)(2)(i), (ii). The investigator calculated the wages due pursuant to the LCA in the amount of \$304,813.86 through the date of the hearing, giving credit for all payroll amounts reflected in Respondent's records with appropriate deductions for periods of Dr. Dutta's voluntary absences from the country and without any credit for payments made to Dr. Dutta for which no taxes were withheld and which were not reflected as payroll amounts on Respondent's records. AX 44. Respondent contends that Dr. Dutta was not entitled to H-1B wages upon his transfer to the new Oregon Avenue Dental Clinics as he was no longer an "employee" of Respondent. In the alternative, Respondent contends that Dr. Dutta was paid wages equivalent to, and in some instances, in excess of the LCA specified wages through distributions of partnership income from the Oregon clinics and/or other non-payroll disbursements. RX E-T, DDD-EEE, GGG. In the further alternative, Respondent contends that Dr. Dutta should not receive any additional wage payments as Respondent claims that Dr. Dutta has "dirty hands" due to his role in the filing of the second LCA and/or failure to file a new LCA and thus "cannot seek vindication under the Act for an asserted injury caused by his own malfeasance," citing *Balakrishna v. Seymour Electric, Inc.*, 00-LCA-6, slip op. at 5 (ALJ Dec. 22, 2000).

Dr. Virk as the Employer

The Administrator named as the Respondent in this case "Avenue Dental Care *aka* Mahadeep Virk, DDS, *aka* Mahadeep Virk DMD Puyallup P.S." and argues that Mahadeep Virk is individually liable for violations under the Act because he is the "employer" under the Act or, alternatively, is no more than an "alter ego" for Avenue Dental Care and Mahadeep Virk DMD Puyallup P.S. Respondent apparently contends that the only Respondent, and thus the only

employer in this case, should be Mahadeep Virk DMD Puyallup P.S. It is on this basis that Respondent contends that no wages are due Dr. Dutta as Respondent contends his employment under the LCA was terminated when Dr. Dutta left the Puyallup clinic and began working in the two Oregon clinics. Thus, the crucial issue with respect to the back wage claim is the identity of the H-1B employer of Dr. Dutta.

The Regulations at 20 C.F.R. § 655.731(c)(7)(i) provide that: If the H-1B nonimmigrant is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or any other reason except as specified in paragraph (c)(7)(ii) of this section, the employer is required to pay the salaried employee the full pro-rata amount due, [...] at the required wage for the occupation listed on the LCA. Under its “no benching” provisions, the INA requires that an employer pay the required wage specified in the LCA even if the H-1B nonimmigrant employee is in a nonproductive status (i.e., not performing work) because of lack of assigned work or some other employment-related reason. 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. §§ 655.731(c)(6)(ii), (7)(i); *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-010 through 01-LCA-025, slip op. at 7 (ARB May 31, 2005); *Rajan v. International Bus.Solutions, Ltd.*, ARB No.03-104, ALJ No. 03-LCA-12, slip op. at 7 (ARB Aug. 31,2004). But an employer need not pay wages to H-1B non-immigrants that are in nonproductive status due to conditions that remove the non-immigrants from their duties at their “voluntary request and convenience” or which render them unable to work, such as a requested leave of absence. 20 C.F.R. § 655.731(c)(7)(ii).

Payment need not be made if there has been a *bona fide* termination of the employment relationship. INS regulations require the employer to notify the INS that the employment relationship has terminated so that the petition is cancelled. 8 C.F.R. § 214.2 (h)(11). However, a *bona fide* termination does not require strict compliance with statutory formalities. The Board has held that whether a termination is *bona fide* does not turn solely on whether the employer notified INS. The employer should be permitted to present other evidence concerning whether it terminated the H-1B employee. Filing such notification with INS constitutes additional, not conclusive, evidence of termination. *Ken Techs., Inc.*, 2004 WL 2205233, at *3.

The original LCA submitted for Dr. Dutta lists the employer’s full legal name as “Mahadeep S Virk DBA Affordable Dental Care”. See AX 4 at 22. Dr. Virk signed the LCA as “Owner Dentist/President”. AX 4 at 24. The Petition for a Nonimmigrant Worker, INS Form I-129 filed in conjunction with the initial H-1B application for Dr. Dutta, contains the identical information with regard to the proposed employer. AX 5. The employer’s letter in support of the I-129 Petition filed by Respondent describes the employer as follows:

Affordable Dental Care is a dental practice that is 100% owned by Mr. Mahadeep S. Virk, the petitioner. Affordable Dental Care has offices throughout the State of Washington, in Everett, Puyallup, Spokane and Bremerton. It employs roughly 50 people, eight of which are dentists. The practice’s annual revenues are approximately \$4.5 million.

AX 9 at 35.

This same letter in support states that it is filed by “Mahadeep S. Virk, dba Affordable Dental Care (Affordable Dental Care)” and also is signed by Mahadeep S. Virk as Owner/President of Affordable Dental Care. AX 29. The second LCA filed on behalf of Dr. Dutta in April of 2005 lists the employer as “Avenue Dental Care” and is signed by Mahadeep Virk as “Owner Dentist/President”. RX HHH. The attached letter in support notes that Avenue Dental Care was “formerly known” as Affordable Dental Care.¹ RX HHH. Notably, Legal Memoranda in support of H-1B petitions for Drs. Arpita Sharma and Rafael Dimayuga submitted on behalf of Avenue Dental Care by Respondent’s counsel in this matter in August and October of 2005 also state the employer as “Avenue Dental Care” which is described as a dental practice 100% owned by Dr. Mahadeep S. Virk with offices throughout the state of Washington and Oregon (*emphasis added*). AX 37 and 38.

The current DOL regulation defines employer for purposes of the LCA process as follows:

Employed, employed by the employer, or employment relationship means the employment relationship as determined under the common law, under which the key determinant is the putative employer’s right to control the means and manner in which the work is performed. . . .

Employer means a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H-1B nonimmigrants . . . The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H-1B nonimmigrant is deemed to be the employer of that H-1B nonimmigrant.

20 CFR § 655.715 (2002).

The definitions in effect under the previous regulation, prior to passage of the ACWIA contained only the following definition of employer:

Employer means a person, firm, corporation, contractor, or other association or organization in the United States:

- (1) Which suffers or permits a person to work within the United States;
- (2) Which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and
- (3) Which has an Internal Revenue Service tax identification number.

¹ Dr. Virk testified that he changed the name from Affordable Dental Care to Avenue Dental Care on the advice of his “creative manager” presumably Pacific Dental Alliance, which he also owns, at least in part. Tr. at 455, 458, 475-476.

20 CFR § 655.715 (1995).

According to the ACWIA, "employer" means any group which may be treated as a single employer under subsections (b), (c), (m) or (o) of Section 414 of the Internal Revenue Code. IRC §414(b) makes reference to IRC §1563(a) which stipulates that controlled group of corporations means any of the following: parent-subsidary controlled group, brother-sister controlled group; combined group; and certain insurance companies. Prior to the enactment of the ACWIA, corporations were required to file new LCAs when a change in corporate structure occurred and this in turn triggered the requirement of filing amended H-1B petitions with the INS. ACWIA now provides that a new LCA is not required when there is merely a change in the tax identification number or EIN, as long as the new employer has assumed the obligations and liabilities of the former company's previously approved LCA(s). Additionally, legislation amended Section 214(C) of the INA to read:

(10) An amended H-1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner.

INA § 214(m)(1).

The DOL regulations state that "[w]here an employer corporation changes its corporate structure as the result of an acquisition, merger, "spin-off," or other such action, the new employing entity is not required to file new LCAs and H-1B petitions with respect to the H-1B nonimmigrants transferred to the employ of the new employing entity regardless of whether there is a change in the Employer Identification Number (EIN), provided that the new employing entity maintains in its records a list of the H-1B nonimmigrants transferred to the employ of the new employing entity..." 20 CFR 655.730(e). In addition, the DOL regulations require the employer to maintain in its public access file, a document which contains the following:

- (i) Each affected LCA number and its date of certification;
- (ii) A description of the new employing entity's actual wage system applicable to H-1B nonimmigrant(s) who become employees of the new employing entity;
- (iii) The EIN of the new employing entity (whether or not different from that of the predecessor entity); and
- (iv) A sworn statement by an authorized representative of the new employing entity expressly acknowledging such entity's

assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective LCA filed by the predecessor entity. Unless such statement is executed and made available in accordance with this paragraph, the new employing entity shall not employ any of the predecessor's H-1B nonimmigrants without filing new LCAs and petitions for such nonimmigrants.

20 CFR § 655.730(e)

The DOL regulations also confirm that the new entity may not use the predecessor's existing LCAs and must file new LCAs in order to support new or extending any H-1B nonimmigrant after the corporate change has occurred. 20 CFR § 655.730(e)(iv)(C)(2).

The Administrator named Mahadeep S. Virk as an individual and as aliases his dba of Avenue Dental Care as well as the “headquarters” corporation of Dr. Virk, Mahadeep Virk DMD Puyallup P.S., as Respondent in this case. Respondent argues that Dr. Virk signed documents only as the President of the corporation, and not in his individual capacity, so the corporation, and not Dr. Virk, was the employer. Respondent’s post-hearing brief at 4. In the ordinary course of events, the individual signing the LCA and H-1B petitions on behalf of a corporation would not be considered to be the employer in his or her individual capacity. Investigator Sondgeroth testified that she considered Avenue Dental Care including all of its locations to be a single business enterprise due to Dr. Virk’s common ownership and the operation of all the clinics under the name of Avenue Dental Clinic. Tr. at 106-107, 137-140. The investigation was commenced against Dr. Virk dba Avenue Dental Care. AX 2. Indeed, the first notification to DOL that there were in fact legal entities other than Dr. Virk and his dba of Avenue Dental Care was the letter dated April 13, 2006 from Respondent’s counsel to the investigator following the initial meeting regarding the investigation. AX 14. Only after notification of the investigation has Respondent attempted to claim that Dr. Dutta’s employer was anyone other than Dr. Virk under his assumed business names of Affordable Dental Care and then Avenue Dental Care. While Dr. Virk testified that he noticed on Dr. Dutta’s renewal LCA that the business location was still listed at the Puyallup address rather than the Oregon address and requested that Dr. Dutta correct the location to Oregon and note his ownership in these two Oregon locations, he signed as the “Owner Dentist/President” of Avenue Dental Care, the H-1B employer and took no further steps to change the identification or location of the employer. Tr. at 521-525. Further, even after this alleged conversation with Dr. Dutta to “correct” the employer name to the correct corporate name, Dr. Virk continued to sign and submit LCAs for at least two other H-1B employees under his assumed business name of Avenue Dental Care. AX 37 and 38. Had Dr. Virk ever submitted any LCA or supporting documentation on behalf of Dr. Dutta under an existing legal corporate name rather than under his assumed business names, then the question of whether Dr. Virk, as an individual, can be considered to be Dr. Dutta’s employer, would cast the issue in the context of piercing the corporate veil. However, no such legal corporate name was ever presented as an H-1B employer of Dr. Dutta until well after the investigation was under way when apparently it was felt that such a change would support Respondent’s position that Dr. Dutta no longer worked

for the H-1B employer on his LCA.² Based on the particular facts of this case, however, I conclude that the Administrator's view that Dr. Virk was the employer is a reasonable interpretation of the regulations and of the LCA documents themselves.

Respondent knew or should have known that the INA's implementing regulations require that the H-1B nonimmigrant's employer notify the INS immediately of any changes in the terms and conditions of the employment of a "beneficiary" such as Dr. Dutta that might affect eligibility as an H-1B nonimmigrant. Respondent knew or should have known that the INA and regulations require the employer to submit a letter to INS advising of the termination of the "beneficiary" in order to cancel the petition, or LCA. It is undisputed that Respondent did not report a termination or any change in the employment relationship. It is also undisputed that Respondent did not tender to Dr. Dutta the costs of his transportation home to India, as would be required following a *bona fide* termination under the LCA. Considering these facts, it is obvious that there was no termination of Dr. Dutta's employment in this case by his employer, Dr. Virk under his assumed business name of Avenue Dental Care. Rather, at best there was a "corporate restructuring" which would have required that the appropriate information be corrected and maintained in the public access file pursuant to 20 C.F.R. § 655.730(e), or at least a modification requested to change the work location to Oregon. While none of these actions were taken, the totality of the circumstances clearly establish that Dr. Dutta has never been terminated from his employment by Dr. Virk dba Avenue Dental Care and thus is entitled to be paid his LCA wages.

Only payroll wages are considered wages for H-1B purposes

The Act unequivocally requires the employer to pay an H-1B employee the greater of the prevailing wage or the actual wage that it pays to other workers of like qualifications who are working in the same position as the H-1B nonimmigrant. 8 U.S.C. § 1182(n)(1)(A)(i). The regulations provide that "The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9)9 of this section may reduce the cash wage below the level of the required wage". 20 C.F.R. § 655.731(c)(1). In addition, the regulations state that "cash wages paid" must be shown in the employer's payroll records as earnings and disbursed to the employee, cash in hand, and must be reported to the IRS as employee's earnings, with appropriate tax withholdings. 20 C.F.R. §

² I would note that even if the corporate name had been used in this instance, the circumstances as to the interaction between these Avenue Dental Care clinics whether measured by federal standards such as set forth in *United States v. Pisani*, 646 F.2d 83, 86 (1981)(deciding that applying state law to cases involving Medicare could frustrate its purpose of providing prompt reimbursements to providers); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979)("Federal law governs questions involving the rights of the United States arising under nationwide federal programs"); *United States v. Bestfoods*, 524 U.S. 51, 55 (1998)(leaving open the question whether state or federal law applies to pierce the corporate veil in cases involving federal statutes) or under state laws of Washington set forth in *Roberts v. Hilton Land Co.*, 45 Wash. 464, 466-468 (1907); *Pohlman Inv. Co. v. Virginia City Gold Mining Co.*, 184 Wash. 273, 282 (1935); or under Oregon law as in *Amfac Foods, Inc. v. Int'l Sys. & Controls Corp.*, 294 Or. 94, 107-110 (1982) would justify piercing the corporate veil under an alter ego theory and holding Dr. Virk responsible as the employer herein due to such factors as undercapitalization (only capital apparently used for the two Oregon LLCs were loans from the Puyallup corporation owned 100% by Dr. Virk), failure to observe corporate formalities (notably in never using the legal name in any identification of the clinic either to the public or to DOL), non-payment of dividends (at least not to Dr. Virk), absence of corporate records (leading to question of whether there was in fact an employment agreement that was fully executed), and the fact that corporation is merely a façade for the dominant shareholder(s), etc. *Pisani*, 646 F.2d at 88.

655.731(c)(2)(i) and (ii). Payments made as a share of profits are not H-1B wages nor a proper deduction from wages within the meaning of the regulations as the agreement regarding these sums are separate and apart from the H-1B wage requirements. *See Wage & Hour Division, ESA, USDOL v. Prism Enterprises of Central Florida, Inc.*, ARB No. 01-080, ALJ No. 01-LCA-8 2003 WL 22855211, at *3 (Nov. 25, 2003). Accordingly, the back wages owed are as calculated by the Investigator without any credit for non-payroll payments.

Alleged Dirty Hands of Dr. Dutta

The “dirty hands” argument put forth by Respondent seeking to bar any recovery on behalf of Dr. Dutta herein rests on the premise that Dr. Dutta committed some acts of malfeasance, if not outright fraud, in connection with his LCA. Respondent contends that Dr. Dutta himself should have taken steps to amend or file a new LCA upon his move to work in the two new Oregon clinics. Additionally, Respondent contends that Dr. Dutta should have modified the renewal of his LCA to reflect his employment in Oregon. This contention raises the issue as to whether an LCA for an H-1B employee can be issued to an employing entity in which the H-1B employee has an ownership interest. This issue is somewhat analogous to the LCA determination to be made with respect to an application for permanent immigration status where, pursuant to the definition of employment in § 656.50, the alien must work for an employer other than himself. If the position for which certification is sought constitutes nothing more than self-employment, it does not constitute genuine "employment" under the regulations, and labor certification is barred *per se*. *Modular Container Systems, Inc.*, 89-INA-228, 1991 WL 223955, at *1 (July 16, 1991) (*en banc*), citing *Hall v. McLaughlin*, 864 F.2d 868, 870 (D.C. Cir. 1989); *Edelweiss Manufacturing Co., Inc.*, No. 87-INA-562, 1988 WL 235693, at *4 (Mar. 15, 1988) (*en banc*). Thus, LCAs for permanent immigration status have been denied where the employer was solely owned by the alien. *See Malone & Associates*, 90-INA-360, 1991 WL 223954, at *8 (July 16, 1991) (*en banc*); *Bulk Farms, Inc.*, 89-INA-51, 1990 WL 300071, at *3 (Jan. 3, 1990); *Amger Corp.*, 87-INA-545, 1987 WL 341738, at *2 (Oct. 15, 1987).

Although there is no prohibition in the INS and DOL H-1B regulations that specifically bars H-1B workers from holding an ownership interest, an employment relationship is required whereby the employer has the power to "hire, pay, fire, supervise, or otherwise control the work of such employee.". 8 CFR §214.2 (h)(1)(ii). This regulation further states:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States, which:

(1) Engages a person to work within the United States:

(2) Has an employer-employee relationships with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and has an Internal Revenue Service Tax identification number."

Id.

As noted previously herein, the DOL regulations similarly define an employer as "a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H-1B nonimmigrants and/or U.S. worker(s). The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H-1B nonimmigrant is deemed to be the employer of that H-1B nonimmigrant." 20 C.F.R. § 655.715.

Neither the Statute nor the Regulations set forth any definitive standards as to exactly what type, degree or percentage of ownership is unacceptable for approval of an H-1B LCA. The lack of clarity as to this issue is borne out by the testimony in this case that two immigration attorneys who were consulted on this issue had differing opinions as to whether the 50% ownership by Dr. Dutta in the two Oregon clinics was acceptable for H-1B purposes. A paper prepared for practicing immigration attorneys also notes the uncertainty surrounding this issue:

It may be difficult for owners with significant ownership interests to meet the requirement in the regulations that there be an employer-employee relationship. This includes privately held corporations or partnerships filing for owner-employees. Just how much is *too much* to own is arguable, but an H-1B worker who owns more than 50% of the sponsoring entity will have a slim chance of meeting the employer-employee relationship and therefore will not be able to petition for him/herself.

Alan Tafapolsky, *Foreign Entrepreneurs and Immigration: Founding and Funding a Business in the United States--What Are Your Options? How Ownership Interests Affect Business Immigration, Part I*, 03-06 IMMIGRBRIEF 1 (June 2003).

In the present case, Dr. Dutta was putatively a 50% owner of the two Oregon clinics.³ While Dr. Dutta certainly had an interest in maintaining his H-1B status permitting him to stay and work in this country, Dr. Virk likewise had an interest in Dr. Dutta's remaining legally in this country and being able to work in the Oregon clinics thus building the businesses in which Dr. Virk had a 50% interest, and the right to the entire ownership of the ongoing businesses in the event of Dr. Dutta's departure within the initial five years of operation. Accordingly, both Drs. Dutta and Virk had significant monetary stakes in maintaining Dr. Dutta's H-1B status. However, the regulations require that the employer take the necessary steps to apply for the LCA and to maintain the required documentation, including the duty to seek amendment or a new LCA when required. The obligation is not that of the H-1B employee. While Dr. Virk attempted to delegate these responsibilities to Dr. Dutta, such delegation of responsibility is clearly not permissible.

³ Dr. Dutta, according to the Agreement, could not dispose of his 50% interest until the expiration of 5 years except by way of selling his interest to Dr. Virk for the amount of his capital contribution, which apparently was zero. RX BB at para 9.3.5; RX NN at para. 9.3.5. Thus, whether Dr. Dutta was in fact a 50% owner during the initial five years of the clinics is an interesting issue, but not one requiring resolution in this matter.

As to the alleged claim of fraud on the part of Dr. Dutta, it has been noted above that the law is not entirely clear with regard to the partial ownership issue. Further, and most importantly, the second LCA application submitted by the attorney retained by Dr. Dutta in Oregon simply retained the same amalgamated description of the employer as “Avenue Dental Care” just as had the original LCA for Dr. Dutta, as well as the LCAs for other Avenue Dental Care H-1B employees. AX 5, 37, 38. Dr. Virk chose to submit the first LCA for Dr. Dutta, as well as other LCAs for other H-1B employees, under the name of Affordable Dental Care later changed to Avenue Dental Care⁴ and not under any of his individual clinic corporate names. Further, the description used in all of these LCAs sets forth the assets, income, number of employees and other information relative to all of Dr. Virk’s dental clinics operating under the name of Avenue Dental Care. Having represented himself as the “president” of Avenue Dental Care in all of these LCAs, the undersigned finds that it was reasonable for attorney Bartoloni to continue with this same global designation. While certainly there should have been a change in the location of Dr. Dutta’s employment noted at least in the second LCA, the duty to do so was on the part of the employer and not the employee.⁵ While Dr. Dutta may have been motivated in not making any changes to the LCA by his desire to avert any possibility of the LCA being questioned, I do not find in light of all the circumstances herein that any such perceived “malfeasance” on his part in this respect was so egregious as to deny him the wages which the LCA clearly set forth.

I recognize that both Dr. Virk and Dr. Dutta might also have other rights or remedies that arise under, for instance, a separate employment agreement or contract, common law, or other state or federal statutes apart from the H-1B provisions of the INA. The scope of the undersigned’s jurisdiction to review cases involving an employment relationship arising under the INA, however, extends only insofar as that relationship arises under, or is terminated pursuant to, the INA’s H-1B provisions. *See* 8 U.S.C. § 1182(n)(1)-(2); 20 C.F.R. §§ 655.705(a)-(b), 655.731, 655.732, 655.845; Secretary’s Order No. 1-2002, 67 Fed. Reg. 64,272; *Amtel Group of Fla., Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 04-LCA-6, slip op. at 9-10 (ARB Sep. 26, 2006). The issue here does not involve breach of an employment contract but rather the requirements of Department regulations governing H-1B visas and sanctions for noncompliance therewith. An employer is required to comply with the terms and conditions set forth in an LCA notwithstanding any side agreement he might have with the nonimmigrant alien employee. *See Balakrishna*, 00-LCA-6, slip op. at 5. Accordingly, I decline to adjust the LCA wages due Dr. Dutta. as calculated by Investigator Sondgeroth, using the various amounts argued by Respondent to be appropriate setoffs against these calculated wages due as such determination is beyond the scope of this administrative proceeding.

D. INDIVIDUAL RESPONSIBILITY OF MAHADEEP VIRK

As discussed hereinabove, Dr. Virk should be held individually responsible as an employer for the violations of the statute and regulations.

E. PAYMENT OF LCA FILING FEES BY DR. DUTTA

⁴ Dr. Virk testified he knew neither of these assumed business names were legal entities, see Tr. at 557.

⁵ The I-129 submitted by attorney Bartoloni did list Dr. Dutta’s home address in Portland, Oregon as did the accompanying form for Dr. Dutta’s spouse. RX HHH.

Pursuant to the regulations, the employer may not receive, nor may the H-1B employee pay, any part of the LCA filing fee or attorney fees incurred in connection with its filing. 20 C.F.R. §§ 655.731(c)(9)(ii), (iii)(C), and (c)(10)(ii). Pursuant to 20 C.F.R. § 655.810(e)(1), the Administrator may order the employer to return such funds paid by the employee. Respondent admits that Dr. Dutta was required to pay both the filing fee and attorney's fees in connection with the filing of his initial LCA but argues that this claim by the Administrator falls outside the statute of limitations.

The INA contains a one-year statute of limitations for investigations by the Administrator:

. . . No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. . . .

8 U.S.C. § 1182(n)(2)(A).

Dr. Dutta's complaint was filed in September 2005. The initial LCA for Dr. Dutta was filed in May 2002. I conclude that the claim on behalf of Dr. Dutta is not barred by the statute of limitations. The one-year statute of limitations does not operate as a limitation on the scope of remedies sought. 20 CFR § 655.806(a)(5). As the Administrative Review Board stated in a decision pertaining to the Immigration Nursing Relief Act of 1989 ("INRA"):

At this point we hasten to hold that the question of what time limitation, if any, applies to calculating back pay awards . . . does not involve a discussion or analysis of statutes of limitation. . . . "Statute of limitations" is the term referring to statutes prescribing the time beyond which a plaintiff may not *bring a cause of action*; generally, a fixed time period within which a *lawsuit must be brought* after a cause of action accrues. . . . "The purpose of such statutes is to keep stale litigation out of the courts. They are aimed at *lawsuits*, not at the consideration of particular issues in lawsuits." . . . It is not unusual for federal statutes to impose different time limits for filing a complaint and for calculation (of) back pay. For example, Title VII of the Civil Rights Act of 1964 requires that a charge be filed within one hundred eighty days after the alleged unlawful employment practice occurred, but back pay accrues for a period of two years prior to filing the charge. . . .

Administrator v. Alden Management Services, Inc., ARB Nos. 00-20 and 00-21, ALJ No. 1996-ARN-3, slip op. at 14 (ARB Aug. 30, 2002).

The ARB went on to hold that the period for recovery of back pay is the maximum period a nonimmigrant nurse may be admitted on an H-1A visa, six years, based on the language of 8 U.S.C. § 1182(m)(4). *Id.* at 15. Further, the regulation itself specifically states that the one year

jurisdictional bar “does not affect the scope of the remedies which may be assessed by the Administrator.” 20 C.F.R. § 655.806(a)(5). Applying the reasoning in *Alden Management*, I conclude that just as Dr. Dutta is entitled to back pay for the entire period he was authorized to work under his H-1B visa, he likewise is entitled to recovery of the costs and fees he incurred with his LCA. Dr. Dutta testified that he was required to pay the filing fee of \$2,130.00 directly to attorney Thompson. Accordingly, I find that Dr. Dutta is entitled to reimbursement by Respondent in the amount of \$2,130.00.

F. VIOLATION OF NOTICE AND RECORD-KEEPING REQUIREMENTS

The Administrator found that Respondent violated the notice requirement under 20 C.F.R. § 655.805(a)(5) and the record keeping requirement under 20 C.F.R. § 655.805(a)(14). No penalty was assessed against Respondent for such violations. Under 20 C.F.R. § 655.805(a)(5), an H-1B employer must provide notice of the filing of a labor condition application. The employer is to post notice of filings in two or more conspicuous locations in the employer’s establishment in the area of intended employment. The notice shall indicate that H-1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the locations at which the H-1B nonimmigrants will be employed; and that the LCA is available for public inspection at the H-1B employer’s principal place of business in the U.S. or at the worksite. 20 C.F.R. § 655.734. Under 20 C.F.R. § 655.805(a)(14), an H-1B employer must make available for public examination the application and necessary documents at the employer’s principal place of business or worksite. The labor condition application must be available for public examination within one working day after the date on which the labor condition application is filed with the Department of Labor. The following documentation is necessary to have available for public examination: (1) a copy of the certified labor condition application; (2) documentation which provides the wage rate to be paid the H-1B nonimmigrant; (3) a full, clear explanation of the system that the employer used to set the actual wage paid to the H-1B nonimmigrant; (4) a copy of the documentation the employer used to establish the prevailing wage for the occupation for which the H-1B nonimmigrant is sought; (5) a copy of the documents with which the employer has satisfied the notification requirements of Section 655.734; (6) a summary of the benefits offered to U.S. workers in the same occupational classifications as H-1B nonimmigrants; (7) statements accepting H-1B obligations in the event of a change in corporate structure; (8) a list of any entities included as part of the single employer in making the determination as to its H-1B dependency status; (9) where the employer is H-1B dependent and/or a willful violator, and indicates on the LCA that only exempt H-1B nonimmigrants will be employed, a list of such exempt H-1B nonimmigrants; and (10) where the employer is H-1B dependent or a willful violator, a summary of the recruitment methods used and the time frames of recruitment of U.S. workers. 20 C.F.R. § 655.760.

While Respondent contends that it fully complied with all notice and recordkeeping requirements, it is clear from the testimony and evidence herein that this is not entirely accurate. Investigator Sondgeroth requested the pertinent records initially but testified that she never did receive actual payroll records for Dr. Dutta, only summaries of various payments made. Tr. at 110-112, 152; AX 35; RX G. Further the public examination file was deficient in that it contained neither change of corporate liability information concerning Dr. Dutta’s relocation to

Oregon nor the required posting of the notice of filing for Dr. Dutta's LCA. Tr. at 102, 108, 194-195. In rebuttal, Respondent points to the "reconstructed" file put together by attorney Thompson following commencement of the investigation as the original public examination file could not be located by Respondent. Tr. at 89-90. The fact that the required public examination file could not be found and had to be reconstructed sufficiently established the fact that Respondent failed in the recordkeeping requirement. Further, Dr. Dutta testified that he never saw any H-1B postings. Tr. at 267-272. While Dr. Sharma is presented as the signatory to the notice in the reconstructed file, he testified that he recalled some type of document being posted for Dr. Dutta but could not recall any such postings for himself nor for any of the other subsequent three H-1B dentists hired by Respondent. RX KKK at 53-54, 59, 81, 85-86. Dr. Virk testified that he could not recall whether the notice for Dr. Dutta was posted but assumed that Dr. Dutta had posted it. Tr. at 536-537. As to the documentation regarding changes in corporate liability, there is no indication that such documents were ever prepared much less maintained in the public examination file. Aside from denying admission of the violation, Respondent has produced no credible evidence to rebut the Investigator's finding that the notice and record keeping regulations were violated. Thus, I find that Respondent violated Sections 655.805(a)(5) and 655.805(a)(14).

G. CIVIL MONEY PENALTIES

The Administrator assessed \$4,250.00 in civil money penalties against Respondent, consisting of \$3,750.00 for willful failure to comply with the LCA wage requirements and \$500.00 for failure to cooperate in the investigation. Respondent asserts that no civil money penalty should be assessed because the violations were not willful. Under 20 C.F.R. § 655.810(b)(2), an Administrator may assess civil money penalties, in an amount not to exceed \$5,000.00 per violation for "[a] willful failure pertaining to wages/working conditions (§§ 655.731, 655.732), strike/lockout, notification, labor condition application specificity, displacement (including placement of an H-1B nonimmigrant at a worksite where the other/secondary employer displaces a U.S. worker), or recruitment." Willful failure is defined as "a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sections 212(n)(1)(A)(i) or (ii), or 212(t)(1)(A)(i), or (ii) of the INA, or §§ 655.731 or 655.732." 20 C.F.R. § 655.805(c); *see also McLaughlin v. Richland Shoe Company*, 486 U.S. 128, 133-135 (1988). The Administrator may assess up to \$1,000.00 per violation as civil money penalties for failure to cooperate with the Administrator's investigation. 8 U.S.C. § 1182(n)(2)(C); 20 C.F.R. § 655.810(b)(1). In determining the amount of the civil money penalty, the Administrator shall consider the type of violation committed and factors such as: previous violations by the employer under the INA; the number of workers affected by the violation; the gravity of the violation; efforts made by the employer in good faith to comply with the Act; the employer's explanation of the violation; the employer's commitment to future compliance; and the extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties. 20 C.F.R. § 655.810(c).

After determining there was a violation of the INA, one must determine if the violation(s) were willful, meaning there was "a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section ... § 655.731." 20 C.F.R. § 655.805(c). This determination is important, as only violations, as set forth in 20 C.F.R. § 655.805(a)(2), that are

willful allow for the assessment of penalties and disqualification. 20 C.F.R. § 655.805(b). Respondent has maintained that he was unaware of the legal requirements set forth under the Act and its regulations, and that any noncompliance was the failure of attorneys or the employees themselves. While Respondent may not have been well versed on the INA, his total failure to investigate any of his responsibilities under the Act, relying instead on the advice and actions of the H-1B employee, amounts to a “reckless disregard” for which penalties and disqualification are warranted. *See Administrator v. Home Mortgage Company of America, Inc., et al.*, ALJ No. 04-LCA-40, slip op. at 15 (ALJ Mar. 6, 2006). Moreover, Dr. Mahadeep Virk signed both the LCAs for Dr. Dutta, obligating himself to observe its terms.

On each LCA application, filed by the Employer, there is the following statement immediately above the signature line:

H. Declaration of Employer

By signing this form, I, on behalf of the employer, attest that the information and labor condition statements provided are true and accurate; that I have read the sections E and F of the cover pages (Form ETA 9035CP), and that I agree to comply with the Labor Condition Statements as set forth in the cover pages and with the Department of Labor regulations (20 C.F.R. part 655, Subparts H and I). I agree to make this application, supporting documentation, and other records, available to officials of the Department of Labor upon request during any investigation under the Immigration and Nationality Act.

AX 4 and RX HHH.

Additionally, next to the signature line is a statement warning of civil or criminal actions if the statements made therein are found to be fraudulent. These statements not only warn the signer of possible actions against him, but point him to the appropriate sections of the regulation to ensure compliance. Dr. Virk’s defense that he did not read the applications is not good enough. The forms themselves make one fully aware of the need for compliance. Dr. Virk’s failure to read the LCAs when he signed them is not a defense. *See Administrator v. Jackson*, ARB No. 00-68, ALJ No. 1999-LCA-4, slip op. at 4 (ARB April 30, 2001). Dr. Virk chose to submit the LCAs as Avenue Dental Care (and previously Affordable Dental Care) rather than any particular corporate entity and his attempt now to claim that the employer was only the headquarters corporation is a thinly veiled and tardy attempt to change the reality of his actions in an attempt to gain an advantage in his ongoing business dispute with Dr. Dutta. This violation is compounded by the efforts to thwart the DOL’s investigation by not producing documents, delaying in producing other documents, and producing “reconstructed” public access files. I find that the failure to pay wages in accordance with 20 C.F.R. § 655.805(a)(2) and the failure to cooperate in the investigation were willful as defined by the regulations, and therefore civil penalties and disqualification are warranted per 20 C.F.R. § 655.805(b). After consideration of the factors under § 655.810(c), the Administrator applied a 25% reduction to the maximum penalty permitted under 20 C.F.R. § 655.810(b)(2), thus, resulting in a \$3,750.00 civil money

penalty. I find that the failure to pay the H-1B employee the required wage was a willful violation of 20 C.F.R. § 655.731. I further find that the \$3,750.00 civil money penalty assessed against Respondent is reasonable. The Administrator applied a 50% reduction to the maximum penalty permitted under 20 C.F.R. § 655.810(b)(1), thus, resulting in a \$500.00 civil money penalty for failure to cooperate in the investigation. I find that the failure to cooperate was willful and that the civil money penalty of \$500.00 is reasonable.

H. DEBARMENT OF RESPONDENT FROM H-1B PROGRAM

The Administrator recommended that Respondent should be debarred from participating in the H-1B program for two years. Under 20 C.F.R. § 655.810(d), an employer shall be disqualified from approval of any petitions filed by, or on behalf of, the employer pursuant to section 204 or section 214(c) of the INA for at least two years for a willful failure pertaining to wages/working conditions, strike/lockout, notification, labor condition application specificity, displacement, or recruitment. Based on the regulation and Respondent's willful failure to pay wages, the Prosecuting Party argues that Respondent should be debarred. As noted above, I find that Respondent willfully failed to pay wages to Dr. Dutta. Pursuant to 20 C.F.R. § 655.810(d), Respondent is debarred from the H-1B program for a period of two years.

ORDER

Accordingly, the Administrator's decision is **AFFIRMED**, and Respondent's appeal is **DENIED**.

A

Russell D. Pulver
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 accepted the case for review. *See* 29 C.F.R. § 655.840(a).