

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 October 2008

CASE NO.: 2007-LCA-00013

In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION
Prosecuting Party

v.

LUNG ASSOCIATES, PA
Respondent

APPEARANCES:

Kristina Harrell, Esq.
Robert L. Walter, Esq.
For the Administrator

Moonasar Rampertaap, M.D.
Respondent, *pro se*

BEFORE: JOSEPH E. KANE
Administrative Law Judge

**DECISION AND ORDER - AFFIRMING IN PART, REVERSING IN PART,
ADMINISTRATOR'S DETERMINATION**

This action involves a complaint filed by the Administrator, Wage and Hour Division of the United States Department of Labor ("the Administrator"), against Lung Associates, PA ("Respondent"). The Administrator alleges that Respondent violated the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101, *et seq.*, by failing to comply with provisions relating to the H-1B Visa program, found at 8 U.S.C. § 1182(n) and 20 C.F.R. §§ 655.700 – 655.855.

The Act permits employers to hire nonimmigrant alien workers in specialty occupations in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). These workers are commonly referred to as “H-1B nonimmigrants.” *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-010-25 (May 31, 2005). To employ H-1B nonimmigrants, the employer must first complete a Labor Condition Application (“LCA”). 8 U.S.C § 1182(n). The LCA stipulates the wage levels that the employer guarantees for the H-1B nonimmigrants. 8 U.S.C § 1182(n)(1); 20 C.F.R. §§ 655.731, 655.732. The employer then obtains certification from the Department of Labor that it has filed the LCA with Department of Labor. After it secures the certified LCA, the employer submits a copy to the United States Citizenship and Immigration Services (“USCIS”) and petitions for an H-1B classification for the nonimmigrants it wishes to hire. Upon USCIS approval, the United States Department of State issues H-1B visas to the nonimmigrants. 20 C.F.R. § 655.705(b).

In July of 2006, the Administrator began an investigation into alleged violations of the Act by Lung Associates and its President, Moonasar Rampertaap, M.D. (Tr. 39).¹ On March 23, 2007, the Administrator issued a determination pursuant to 20 C.F.R. § 655.815 finding that Respondent violated various provisions of the Act with respect to three H-1B physicians, Dr. Victor Ghobrial, Dr. Jaime Avecillas, and Dr. Jose Yataco, and holding Respondent liable for back wages and civil penalties. (ALJX 1). Respondent filed a request for a hearing, and the claim was referred to the undersigned for a formal hearing. (ALJX 2). A hearing was held on September 25 and 26, 2007 in St. Petersburg, Florida. I afforded all parties the opportunity to offer testimony, question witnesses, and introduce evidence. The record was held open for the filing of post-hearing briefs.

Summary of the Evidence

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. Based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses and gathered impressions as to their demeanor. To the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

I. Testimony of Sandra Kibler (Tr. 21-169)

Ms. Kibler is an investigator for the United States Department of Labor. (Tr. 21). She screens and reviews complaints and files investigations under various federal statutes. (Tr. 21-22). Ms. Kibler was assigned to investigate Respondent after a complaint was received from Dr. Victor Ghobrial, alleging violations of the H-1B program. (Tr. 37-38). The complaint was made by Dr. Ghobrial in a letter dated July 24, 2006. (Tr. 38-39; AX 1). After reviewing the

¹ In this Decision, “ALJX,” “AX,” and “RX” refer to the exhibits of the Administrative Law Judge, Administrator, and Respondent, respectively. “Tr.” refers to the hearing transcript.

complaint and speaking with Dr. Ghobrial, Ms. Kibler sent an “appointment letter” informing Respondent of the investigation and requesting certain documents. (Tr. 40-41; AX 2).

As part of her investigation, Ms. Kibler met with Dr. Rampertaap at his office on August 24, 2006. (Tr. 45). At the meeting, Ms. Kibler reviewed Respondent’s “public access file.” Ms. Kibler observed that certain documents supporting the Labor Condition Applications of Dr. Ghobrial and Dr. Yataco, another H-1B physician employed by Respondent, were not in the file. (Tr. 50; 72). These missing documents included wage information supporting the two Labor Condition Applications² and proof of compliance with the Act’s posting requirements. (Tr. 50-51).

Ms. Kibler was provided with four Labor Condition Applications from Respondent, which had been filed between 2003 and 2006. (Tr. 68-71). One LCA was for Dr. Yataco, another for Dr. Avecillas, and two were for Dr. Ghobrial. (AX 4; AX 6; AX 8; AX 10). Ms. Kibler reviewed the Labor Condition Applications and immediately noticed certain discrepancies, such as the fact that the rate of pay was less than the listed prevailing wage on Dr. Yataco’s LCA and on Dr. Ghobrial’s first LCA. (Tr. 69-70). She also noticed that Dr. Avecillas’s LCA listed a prevailing annual wage of less than \$50,000, which Ms. Kibler thought was too low for a physician. (Tr. 70). The other Labor Condition Applications listed prevailing annual wages in excess of \$100,000. To help determine the correct prevailing wage, Ms. Kibler contacted Danny Romans, an employee with the Florida Agency for Workforce Innovation. (Tr. 71).

During her first meeting with Dr. Rampertaap, Ms. Kibler requested payroll data, but was not provided it until later. (Tr. 55-56). Dr. Rampertaap disputed Dr. Ghobrial’s allegation that he had not been paid a prevailing wage, explaining that, in addition to a regular salary, he had made extra payments to Dr. Ghobrial for covering other doctors. (Tr. 56). Specifically, Dr. Rampertaap cited a payment of \$2,300, but Ms. Kibler was not provided with any evidence of this payment. (Tr. 58). Dr. Rampertaap advised Ms. Kibler that the payment had been reported on IRS Form 1099. (Tr. 67). Subsequently, Dr. Rampertaap provided Ms. Kibler with certain checks proving that he had made various payments to the physicians. (Tr. 79-80).

About one week after meeting with Dr. Rampertaap, Ms. Kibler received a letter from Dr. Yataco, stating that some of his wages had been held by Dr. Rampertaap when he ceased his employment with Respondent. (Tr. 60; AX 11). Ms. Kibler spoke to Dr. Yataco and took a statement. (Tr. 61-62). She then decided to contact Dr. Avecillas to take his statement. (Tr. 62-63). Several months later, Ms. Kibler received letters from all three physicians, informing her that Dr. Rampertaap had sent letters to each physician demanding payment for expenses and in Dr. Ghobrial’s case, \$300,000 for violating a restrictive covenant. (Tr. 76-78; AX 14; AX 15; AX 16).

² Dr. Avecillas’s file contained wage data from the Department of Labor’s website. (Tr. 77; AX 13). The document listed a job title of “Physicians and surgeons, all other” and a prevailing wage of \$49,858 annually.

After compiling the documents from Dr. Rampertaap, Ms. Kibler calculated the amount that each physician had been paid, including reimbursement of certain business expenses that the physicians had received and excluding payments that were not reported to the IRS as wages. (Tr. 115-19). Ms. Kibler then utilized prevailing wage data that she had obtained from Mr. Romans to determine whether the physicians had been paid the prevailing wage. (Tr. 119-36). Ms. Kibler then calculated the back wages owed to each physician. (Tr. 114-143).

II. Testimony of Danny Romans (Tr. 169-205)

Mr. Romans is a Government Operations Consultant for the Florida Agency for Workforce Innovation (“the Agency”). (Tr. 170). Mr. Romans is responsible for assigning prevailing wages for the State of Florida and providing them upon request to employers. (Tr. 170-71). To receive a prevailing wage determination, an employer must provide the job title, description, years of experience, specialized training, and supervisory responsibility. (Tr. 172-73). The Agency classifies jobs according to standard occupational codes (“SOC”) devised by the United States Department of Labor. (Tr. 175). Mr. Romans testified that employers may also access the online wage library (“OWL”) and obtain the prevailing wage on their own initiative. (Tr. 177).

Mr. Romans identified Administrator’s Exhibits 29-32 as prevailing wage requests received between October 30, 2005 and January 17, 2006 on behalf of Respondent. (Tr. 178-79). Mr. Romans classified the jobs as 29-1063, “Doctor of internal medicine.” (Tr. 183). Mr. Romans testified that the classification used by Respondent, 29-1069 “Physicians and surgeons, all other,” is a seldom-used category used only when no other category is appropriate. (Tr. 184-85). Mr. Romans believed that the category 29-1063, “Doctor of internal medicine” was clearly appropriate for the physicians at Lung Associates, because one of the sample job titles for that category is “pulmonary physician.” (Tr. 185-86; AX 28).

III. Testimony of Dr. Victor Ghobrial (Tr. 206 -311)

Dr. Ghobrial is a physician who attended medical school in Egypt and was employed by Respondent as an H-1B nonimmigrant from August of 2003 until July of 2006. (Tr. 207-09, 244). Dr. Ghobrial testified that in obtaining his H-1B Visa, he paid an attorney approximately \$8,000, which was not reimbursed by Respondent. (Tr. 211-12, 255). An employment contract signed with Respondent provided that Dr. Ghobrial would receive \$120,000 during his first year, \$130,000 during his second year, and \$140,000 during his third year, and Dr. Ghobrial testified that he was in fact paid these amounts. (Tr. 215; AX 17).

Dr. Ghobrial testified that in addition to his regular work, he covered for other physicians in the area at the request of Dr. Rampertaap, including a physician named Dr. Argeles. (Tr. 229-31). Dr. Ghobrial testified that Dr. Rampertaap originally asked him to perform this extra work for no additional compensation, but he refused, and Dr. Rampertaap agreed to pay Dr. Ghobrial 70% of the gross earnings associated with this work. (Tr. 232). This money was paid informally by checks issued from Respondent’s bank account, and reported on IRS Form 1099. (Tr. 233). Dr. Ghobrial believed that Dr. Rampertaap was shortchanging him, although he never saw the paperwork and was unable to verify his suspicions. (Tr. 232-33). Dr. Ghobrial testified that he

received Forms 1099 on other occasions from Dr. Ghobrial as reimbursement for business expenses. (Tr. 234-35).

When his first LCA was nearing the end of its three-year term, Dr. Rampertaap asked Dr. Ghobrial to sign a new contract in which he would be responsible for his own health and malpractice insurance and work additional hours. (Tr. 235-238; AX 18). Dr. Ghobrial refused to sign the contract because he viewed it as requiring more work at a lower salary. (Tr. 242). In June of 2006, Dr. Ghobrial discovered letters in the fax machine which Dr. Rampertaap had sent to immigration officials. (Tr. 242). The letters stated that Dr. Ghobrial was not showing up for work and urged that his visa be cancelled. (AX 36, 37). When confronted with the letters, Dr. Rampertaap told Dr. Ghobrial that if he would sign the contract, he would have nothing to worry about, because Dr. Rampertaap would intercede on his behalf to immigration officials. (Tr. 245).

Dr. Ghobrial was very troubled by the letters and the threat of being deported. (Tr. 241-42). At that time, he decided that he needed to leave Lung Associates and seek other employment. (Tr. 241-42). Dr. Ghobrial was able transfer his H-1B Visa and left Lung Associates on July 24, 2006. (Tr. 244). The same day, Dr. Ghobrial filed his complaint with the Department of Labor. (AX 1). On July 28, 2006, Dr. Ghobrial's personal attorney sent a letter to Respondent indicating that Dr. Ghobrial considered the original employment contract to have been breached and that he would no longer be working for Respondent. (AX 40).

On September 12, 2006 Dr. Rampertaap filed a report with the police that Dr. Ghobrial had used his business checking account to pay a \$152 Alltell cell phone bill in August of 2006. (AX 45). On September 28, 2006, the police arrived to interview Dr. Ghobrial, and he initially feared that they were immigration officers. (Tr. 249). The police determined that the report was merely a business dispute and that no crime had occurred. (AX 45). Dr. Ghobrial testified that during his employment, his cell phone bill was paid by Respondent. (Tr. 252). When Dr. Ghobrial left Lung Associates, he requested that the service be cancelled and personally paid a cancellation fee. (Tr. 251-52). In October of 2006, Dr. Ghobrial received a letter from Dr. Rampertaap, demanding reimbursement for various expenses and \$300,000 for violating the restrictive covenant in the employment contract. (Tr. 253). Dr. Ghobrial believed that Dr. Rampertaap began telling area hospitals that he was "illegal." (Tr. 256-57). Dr. Ghobrial believed that all of these actions were retaliation for his report to the Department of Labor. (Tr. 253).

IV. Testimony of Michelle Garvey (Tr. 319-331)

Ms. Garvey testified that she is the Assistant District Director for Enforcement at the Wage and Hour Division, in Tampa, Florida. (Tr. 320). Ms. Garvey testified that she reviewed the facts of the case, assessed civil penalties based on the statutory criteria, and determined that Respondent should be debarred from the H-B1 program for two years. (Tr. 323-25).

V. *Testimony of Dr. Moonasar Rampertaap (Tr. 332-450)*

Dr. Rampertaap presented a significant amount of testimony, most of which was immaterial, irrelevant and unduly repetitious. In response to questions from the Administrator's attorney, Dr. Rampertaap addressed several of the issues in the case, which are summarized below.

Dr. Rampertaap testified that he believed that the prevailing wage classifications that were used were appropriate. (Tr. 423). This was apparently based on his belief that the physicians were too highly trained to be deemed "Doctors of internal medicine," and because they performed certain surgical procedures, they should be classified as "Physicians and surgeons, all other." (Tr. 428-31).

Dr. Rampertaap testified that he had reimbursed Dr. Ghobrial for his second LCA but did not know whether he reimbursed him for his first LCA, and provided no evidence to establish that he had. (Tr. 393-94, 438). Dr. Rampertaap acknowledged that payments to Dr. Ghobrial for covering other physicians and Christmas bonuses were reported on IRS Form 1099. (Tr. 368-371, 402, 441-42). Dr. Rampertaap acknowledged that he did not pay Dr. Ghobrial the correct prevailing wage for a certain period of time, but blamed this error on his attorneys. (Tr. 372).

Dr. Rampertaap testified that he began speaking with Dr. Ghobrial about his future at Lung Associates during the Fall of 2005 and into the Spring of 2006. (Tr. 340). In one contract proposed by Dr. Rampertaap, Dr. Ghobrial would be a "partner" or "independent contractor," would pay for his own malpractice insurance and other expenses, and would be eligible for bonuses in addition to his salary. (Tr. 340-343; 407-08).

Dr. Rampertaap acknowledged that in a lawsuit against a previous employee, the court held that a restrictive covenant similar to the one contained in Dr. Ghobrial's contract was unenforceable; however Dr. Rampertaap had heard of other cases with different outcomes, and believed that a different judge might find the agreement enforceable. (Tr. 350).

Dr. Rampertaap paid the cell phone bills of his employees, but believed that Dr. Ghobrial impermissibly used Lung Associates' bank account to pay his cell phone bill after his employment ended, which caused Dr. Rampertaap to call the police. (Tr. 346-347).

Regarding Dr. Yataco, Dr. Rampertaap testified that when Dr. Yataco left his employment, Lung Associates had already made advance payments for malpractice and health insurance, which could not be recouped. (Tr. 352). Dr. Rampertaap testified that Dr. Yataco requested that his final wages be withheld in exchange for Dr. Rampertaap not seeking reimbursement of these costs. (Tr. 352, 355-58).

Regarding the letters he sent to the physicians, Dr. Rampertaap testified that after meeting with Investigator Kibler and being told that he should not have withheld money from any of the physicians' paychecks, Dr. Rampertaap sent the letters to the physicians. (Tr. 353). He further testified that he was "fully aware" that he was "not going to get reimbursed," but was

“just trying to get them to pay them as gentlemen [sic], to discuss the case, so we don’t have to pay money or be here today,” and that he “just want[ed] [them] to come in and discuss this case and get rid of it.” (Tr. 353-56). Dr. Rampertaap also testified that he believed it “would cost more legal fees to recoup a couple thousand dollars.” (Tr. 354).

VI. Documentary Evidence from Administrator

The following documentary evidence has been received into evidence:

Administrator’s Exhibit 1 – Letter from Dr. Ghobrial to Department of Labor dated 7/24/2006

Administrator’s Exhibit 2 – Appointment letter from Department of Labor to Lung Associates dated 8/4/2006

Administrator’s Exhibit 3 – Approval notice for Dr. Ghobrial’s first LCA

Administrator’s Exhibit 4 – Dr. Ghobrial’s first LCA

Administrator’s Exhibit 5 – Approval notice for Dr. Avecillas’ LCA

Administrator’s Exhibit 6 – Dr. Avecillas’ LCA

Administrator’s Exhibit 7 – Approval notice for Dr. Yataco’s LCA

Administrator’s Exhibit 8 – Dr. Yataco’s LCA

Administrator’s Exhibit 9 – Approval notice for Dr. Ghobrial’s second LCA

Administrator’s Exhibit 10 – Dr. Ghobrial’s second LCA

Administrator’s Exhibit 11 – Letter from Dr. Yataco to Department of Labor dated 8/21/2006

Administrator’s Exhibit 12 – Written Statement of Dr. Avecillas dated 9/13/2006

Administrator’s Exhibit 13 – Document from online wage library from Dr. Avecillas’ public access file

Administrator’s Exhibit 14 – Letter from Lung Associates to Dr. Avecillas dated 10/4/2006

Administrator’s Exhibit 15 – Letter from Lung Associates to Dr. Yataco dated 10/4/2006

Administrator’s Exhibit 16 – Letter from Lung Associates to Dr. Ghobrial dated 10/13/2006

Administrator’s Exhibit 17 – Employment contract between Lung Associates and Dr. Ghobrial for the period of 6/1/2003 – 6/1/2006

Administrator's Exhibit 18 – Proposed employment contract between Lung Associates and Dr. Ghobrial for the period of 7/1/2006 – 7/1/2009

Administrator's Exhibit 19 – Lung Associates' Annual Report from Florida Secretary of State

Administrator's Exhibit 20 – Statement of Dr. Vecillas dated 11/9/2006

Administrator's Exhibit 21 – Statement of Dr. Yataco dated 11/9/2006

Administrator's Exhibit 22 – Letter from Dr. Ghobrial to Department of Labor dated 11/16/2006

Administrator's Exhibit 23 – Investigator Kibler's worksheet of wages owed to Dr. Vecillas

Administrator's Exhibit 24 – Investigator Kibler's worksheet of wages owed to Dr. Yataco

Administrator's Exhibit 25 – Investigator Kibler's worksheet of wages owed to Dr. Ghobrial

Administrator's Exhibit 26 – Invoice from Dr. Ghobrial's immigration attorney

Administrator's Exhibit 27 – Occupational summary report for "Physicians and Surgeons, all other"

Administrator's Exhibit 28 – Occupational summary report for "Internist, general"

Administrator's Exhibit 29 – Prevailing wage determination dated 11/2/2005

Administrator's Exhibit 30 – Prevailing wage determination dated 11/2/2005

Administrator's Exhibit 31 – Prevailing wage determination dated 11/2/2005

Administrator's Exhibit 32 – Prevailing wage determination dated 1/25/2006

Administrator's Exhibit 33 – Prevailing wage determination dated 1/25/2006

Administrator's Exhibit 34 – Delineation of Privileges for Dr. Ghobrial from Manatee Memorial Hospital

Administrator's Exhibit 35 – Letter from Lung Associates to Department of Homeland Security requesting extension of Dr. Ghobrial's H-1B visa dated 1/30/2006

Administrator's Exhibit 36 – Letter from Lung Associates to Citizenship and Immigration Services dated 6/5/2006

Administrator's Exhibit 37 – Letter from Lung Associates to Immigration and Naturalization Services dated 6/6/2006

Administrator's Exhibit 38 – Letter of recommendation from Lung Associates for Dr. Ghobrial dated 7/21/2006

Administrator's Exhibit 39 – Letter from Dr. Ghobrial advising medical offices of his departure from Lung Associates dated 7/24/2006

Administrator's Exhibit 40 – Letter from Dr. Ghobrial's attorney to Lung Associates terminating employment dated 7/28/2006

Administrator's Exhibit 41 – Alltell bill dated 8/17/2006

Administrator's Exhibit 42 – Alltell bill dated 10/18/2006

Administrator's Exhibit 43 – Verizon bill dated 9/6/2006

Administrator's Exhibit 44 – Handwritten note, undated

Administrator's Exhibit 45 – Police report dated 9/12/2006

Administrator's Exhibit 46 – Letter of termination from Lung Associates to Dr. Vecillas dated 6/2/2005

Administrator's Exhibit 47 – Letter of termination from Lung Associates to Dr. Yataco dated 2/27/2006

Administrator's Exhibit 48 – Letter acknowledging termination from Dr. Yataco to Lung Associates dated 5/25/2006

Administrator's Exhibit 49 – Final Judgment in the case of *Lung Associates v. Aranibar* dated 1/2/2001

Administrator's Exhibit 50 – Satisfaction of judgment in the case of *Lung Associates v. Aranibar* dated 5/18/2001

Administrator's Exhibit 51 – Summary sheet of violations and penalties assessed dated 3/16/2007

Administrator's Exhibit 52 – 20 C.F.R. § 655.810

VII. Documentary Evidence from Respondent

A number of Respondent's exhibits have also been received and admitted into evidence. Most of these exhibits are irrelevant or duplicative of the Administrator's Exhibits. The relevant exhibits are listed below:

Respondent's Exhibit 5 – Separation agreement for Dr. Vecillas dated 4/25/2005

Respondent's Exhibit 7 – Payroll records for Dr. Ghobrial from the period of 8/25/2003 - 12/23/2005

Respondent's Exhibit 20 – Letter from attorney to Lung Associates regarding prevailing wage for Dr. Yataco

Findings and Conclusions

I. Back Wages

The Administrator alleges that Respondent violated the Act by failing to pay three of its employees, Dr. Ghobrial, Dr. Yataco, and Dr. Avecillas, the prevailing wage and is liable to each employee for back wages as follows: Dr. Ghobrial: \$22,785.60; Dr. Avecillas: \$13,382.88; Dr. Yataco: \$14,989.24.

In an LCA filed pursuant to the Act, the employer must attest that it:

is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B nonimmigrant wages that are at least—

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

(II) the prevailing wage level for the occupational classification in the area of employment[.]

8 U.S.C. § 1182(n)(1)(A)(i); *see also* 20 C.F.R. § 655.731. An employer that fails to pay wages as required by the Act is liable for back wages equal to the difference between the amount that should have been paid and the amount that was actually paid.³ 20 C.F.R. § 655.810. In this case, the Administrator determined that Respondent is liable for the following back wages:

³ An earlier version of the Act contained a safe-harbor provision, which provided that, "[n]o prevailing wage violation will be found if the employer paid a wage that is equal to, or more than 95 percent of, the prevailing wage as required by [Section 655.731(a)(2)(iii)]." 20 C.F.R. § 655.731(d)(4) (2004). On December 8, 2004, the President signed into law the Consolidated Appropriations Act of 2005, which amended INA Section 212(p)(3), 8 U.S.C. § 1182(p)(3) (2005), and became effective on May 11, 2005, to require an employer to pay a wage that is 100 percent of the prevailing wage. *Amtel Group of Fla., Inc., v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 2004-LCA-6 (Sept. 29, 2006) (*citing* 69 Fed. Reg. 77326, 77366, 77374-77375 (Dec. 27, 2004)). In calculating back wages in this case, the Administrator applied the safeharbor provision where applicable. (Tr. 121-24).

Dr. Ghobrial:

Time Period	Weeks	Prevailing annual wage	Prevailing wage for time period	Actual wages paid	Underpayment / amount owed
Week ending 8/24/2003 to Week ending 8/22/2004	53	\$133,494	\$136,061.07	\$122,538.30	\$13,522.73
Week ending 7/9/2006 to Week ending 7/23/2006	3	\$172,203	\$9,934.80	\$8,076.93	\$1,857.87
Expenses 2003 (attorney fees, visa fees)	-	-	-	-\$7,405.00	\$7,405.00
Total underpayment / amount owed					\$22,785.60

Dr. Avecillas:

Time Period	Weeks	Prevailing annual wage	Prevailing wage for time period	Actual wages paid	Underpayment / amount owed
Week ending 8/29/2004 to Week ending 7/31/2005	49	\$134,202.00	\$126,459.69	\$113,076.80	\$13,382.88
Total underpayment / amount owed					\$13,382.88

Dr. Yataco:

Time Period	Weeks	Prevailing annual wage	Prevailing wage for time period	Actual wages paid	Underpayment / amount owed
Week ending 8/7/2005 to week ending 5/14/2006	39	\$134,202.00	\$100,651.59	\$94,499.95	\$6,151.64
Week ending 5/15/2006 to Week ending 5/31/2006	2.6	\$134,202.00	\$6,710.10	0	\$6,710.10
Expenses (attorney fees)	-	-		-\$2,127.50	\$2,127.50
Total underpayment / amount owed					\$14,989.24

A. Whether the Administrator Properly Determined the Prevailing Wage

The “prevailing wage” is determined for the occupational classification in the area of intended employment and must be determined as of the time of the filing of the LCA. 20 C.F.R. § 655.731(a)(2). The regulations require that the prevailing wage be “based on the best information available.” *Id.* The Department considers a determination from the relevant “State

Workforce Agency” (“SWA”)⁴ to be the most accurate and reliable source for determining the prevailing wage. *Id.*

The regulations require the Administrator to determine whether an employer has the proper documentation to support its wage attestation. 20 C.F.R. § 655.731(d)(1). Where the documentation is nonexistent or insufficient to determine the prevailing wage, or where the employer has been unable to demonstrate that the prevailing wage determined by an alternate source is in accordance with the regulatory criteria, the Administrator may contact the Department of Labor’s Employment and Training Administration (“ETA”), which shall provide the Administrator with a prevailing wage determination.⁵ *Id.* The Administrator shall use this determination as the basis for determining violations and for computing back wages, if such wages are found to be owed. *Id.*

If the employer objects to the prevailing wage determination, it must file a request for review with the agency that made the determination. 20 C.F.R. § 655.731(d)(2). If the employer fails to do so, the prevailing wage determination “shall be deemed to have been accepted by the employer as accurate and appropriate (as to the amount of the wage)” and thereafter shall not be subject to challenge in a hearing before the Office of Administrative Law Judges. 20 C.F.R. § 655.731(d)(2)(ii).

Here, Investigator Kibler obtained an occupational classification and prevailing wage determination from Danny Romans, of the Florida Agency for Workforce Innovation. (Tr. 71). Respondent failed to object to the prevailing wage determination in the manner prescribed by the regulations and therefore, is deemed to have accepted this determination. Therefore, the only issue subject to review regarding the prevailing wage in this hearing is whether the Administrator’s initial request for a wage determination was “warranted.” 20 C.F.R. § 655.840(c). The Administrator’s request for a wage determination is deemed “warranted” where the employer’s documentation supporting its prevailing wage determination is “nonexistent” or “insufficient” to support its prevailing wage attestation. 20 C.F.R. §§ 655.731(d); 655.731(b)(3). If I find that the request was warranted, I am required to “accept as final and accurate the wage determination.” 20 C.F.R. § 655.840(c) (“Under no circumstances shall the administrative law judge determine the validity of the wage determination”).

Ms. Kibler testified that the only documentation contained in Respondent’s public access file was a print-out supporting Dr. Avecillas’s LCA. (Tr. 50; 72). There was no documentation supporting the Labor Condition Applications of Drs. Ghobrial or Yataco. Therefore, the

⁴ Prior to 2006, State Workforce Agencies (“SWA”) were called “State Employment Security Agencies” (“SESA”). 71 Fed Reg. 35521.

⁵ According to the Administrator, the Department of Labor, Bureau of Labor Statistics (“BLS”) collects wage data for its Occupational Employment Statistics (“OES”) program, which it compiles in the Occupational Information Network (“O*NET”) database and makes available to the public at <http://online.onetcenter.org>. State Workforce Agencies also have access to the data, which they can use to determine prevailing wage rates for each state. *See also* http://www.bls.gov/oes/oes_ques.htm.

Administrator's request for a prevailing wage determination for these physicians was clearly warranted. Regarding Dr. Avecillas, Respondent maintained only a print-out listing the prevailing wage for "Physicians and surgeons, all other." (Tr. 50; 72; AX 13). This document was insufficient to comply with the documentation requirements of 20 C.F.R. § 655.731(b)(3)(iii). Moreover, it should have been obvious to Dr. Rampertaap that a document listing a prevailing wage of less than \$50,000 for a physician would be viewed with skepticism, yet he failed to retain or provide any additional documentation supporting this extremely low wage. Accordingly, I find that Respondent's public access lacked the proper documentation for its prevailing wage determinations, and the Administrator was clearly justified in obtaining a prevailing wage determination. Therefore, I must find that the prevailing wage used by the Administrator is correct.⁶

B. Whether the Administrator Properly Determined the Amount Actually Paid.

For an employer's payments to count toward the required wage, they must be "shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due." 20 C.F.R. § 655.731(c)(2). Additionally, the payments must be reported to the Internal Revenue Service, with appropriate withholding for the employee's federal income tax and FICA obligations. 20 C.F.R. § 655.731(c)(2); *Administrator v. Synergy Sys., Inc.*, ARB No. 04-076, ALJ No. 2003-LCA-022 (June 30, 2006).

Dr. Ghobrial was employed by Respondent from August 2003 until July of 2006. (Tr. 209). Dr. Ghobrial's employment contract provided that he would have received \$120,000 in his first year, \$130,000 in his second year and \$140,000 in his third year. (AX 17). Dr. Ghobrial testified that he was in fact paid these amounts. (Tr. 215). Additionally, Respondent's payroll records indicate that Dr. Ghobrial's biweekly gross pay was \$4,615.38 during his first year, \$5,000 during his second year, and \$5,384.62 during his third year. (RX 6). The amounts used by the Administrator and reflected in the table are consistent with this evidence. Accordingly, I find that the Administrator properly calculated the actual wages received by Dr. Ghobrial for the relevant time periods. Although payroll records for Drs. Yataco and Avecillas are not in the record, Investigator Kibler testified that she made her calculations based on the information provided by Dr. Rampertaap, and no contrary evidence has been presented.

⁶ Even if I were empowered to independently determine the validity of the prevailing wage used by the Administrator, I would conclude that it is correct, based on Mr. Romans' persuasive testimony that "Doctor of internal medicine" is the appropriate classification for a pulmonary physician, and that "Physicians and surgeons, all other" is a seldom-used classification that serves as a "catch-all." (Tr. 178-86). Dr. Rampertaap's attempt to argue that the physicians should be classified as "Physicians and surgeons, all other" due to the fact that they performed certain surgical or quasi-surgical procedures, is irrational and unpersuasive. If credited, Dr. Rampertaap's testimony would suggest that the physicians possess a greater degree of skill than the typical pulmonary physician or doctor of internal medicine, which logically, would support a higher prevailing wage than that listed for "doctor of internal medicine," not a lower prevailing wage.

As best as the undersigned can ascertain, Dr. Rampertaap's defense is based on his claim that he made additional payments to the physicians that are not reflected in his payroll records. Ms. Kibler testified that during her investigation, Dr. Rampertaap told her he had paid more than he was required to because he paid extra when Dr. Ghobrial covered for other physicians. (Tr. 56). Similarly, at the hearing, Dr. Rampertaap testified that he paid his employees Christmas bonuses and extra money for covering for other physicians. (Tr. 372). However, Dr. Rampertaap testified that these amounts were reported on Form 1099. (Tr. 368-71). Accordingly, the administrator correctly determined that these amounts do not qualify as "wages paid," as that term is defined by 20 C.F.R. § 655.731(c)(2).

C. Whether the Administrator Properly Added Certain Expenses to the Amount Owed to Dr. Ghobrial and Dr. Yataco

The employer may make certain "authorized deductions" which do not count against the employer's obligation to pay the required wage. 20 C.F.R. § 655.731(c)(9). Authorized deductions include tax withholdings and other deductions which are "reasonable and customary in the occupation and/or area of employment (e.g., union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution. . .)" 20 C.F.R. § 655.731(c)(9)(i-ii). Certain deductions are not permitted, including "business expenses," costs connected to the performance of the H-1B program, and "penalt[ies] for ceasing employment with the employer prior to an agreed date." 20 C.F.R. § 655.731(c)(9-10). "[A]ttorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition" are expressly defined as "business expenses." 655.731(c)(9)(ii). "Where a worker is required to pay an expense, it is in effect a deduction in wages which is prohibited if it has the effect of reducing an employee's pay (after subtracting the amount of the expense) below the required wage." *Administrator v. Kutty*, ARB No. 03-022, ALJ No. 01-LCA-010 (May 31, 2005) (*citing* 65 Fed. Reg. at 80199 (2000)).

In calculating the amount of Dr. Ghobrial's underpayment, the Administrator added \$7,405.00 for attorney fees and H-1B visa fees. Specifically, the Administrator determined that Dr. Ghobrial paid \$6,275 in attorney fees and \$1,130 in visa fees, for which he was not reimbursed. These expenses were paid in 2003, a period during which Dr. Ghobrial was already being underpaid, and depressed his salary further below the required wage. (AX 25). Ms. Kibler testified that she ascertained this amount during her investigation. (Tr. 129). Additionally, Dr. Ghobrial testified that he paid approximately \$8,000 in attorney fees and was not reimbursed by Lung Associates. (Tr. 211-12). Dr. Rampertaap testified that he was "sure" he paid the fees, but at an earlier deposition, he testified that he was "not sure" whether he paid the fees. (Tr. 335-36, 393). Of greatest significance, however is the absence of any documentation to establish that Respondent reimbursed Dr. Ghobrial for these expenses. Therefore, I conclude that the administrator properly added an additional \$7,405.00 to the amount that Dr. Ghobrial is owed.

In calculating the amount of Dr. Yataco's underpayment, the administrator added \$2,127.50 for attorney fees paid in connection with Dr. Yataco's H-1B visa. Specifically, the Administrator determined that Dr. Yataco paid a total of \$3,562.50 and was only reimbursed for

\$1,435.00, a difference of \$2,127.50. (AX 24). Since Dr. Yataco was underpaid during his entire tenure, these expenses depressed his wage further below the required wage. Ms. Kibler testified that she ascertained this amount during her investigation based on the evidence provided by Respondent. (Tr. 119-20). As there is no contrary evidence, I find that the Administrator properly added an additional \$2,127.50 to the amount that Dr. Yataco is owed.

Accordingly, I affirm the Administrator’s calculations of back wages owed to the physicians.

II. Civil Penalties

The Act provides that the Administrator “may” assess civil money penalties up to \$1,000 for non-willful violations such as failure to pay wages and up to \$5,000 for willful violations or for discrimination. 8 U.S.C. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii). The regulations specify seven factors that may be considered in determining the amount of the civil money penalties to be assessed:

- (1) Previous history of violations;
- (2) The number of workers affected by the violation or violations;
- (3) The gravity of the violation;
- (4) Efforts made by the employer in good faith to comply with the Act;
- (5) The employer's explanation of the violation;
- (6) The employer's commitment to future compliance;
- and (7) 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). Here, the Administrator assessed penalties as follows:

Violation	Employee	Penalty
Willful misrepresentation of material fact on LCA (rate of pay)	Dr. Ghobrial	\$2,375
Willful failure to pay required wage	Dr. Ghobrial	\$2,375
Willful failure to pay required wage	Dr. Yataco	\$2,375
Required or accepted payment of the additional petition fee	Dr. Ghobrial	\$475
Required or attempted to require a penalty for ceasing employer prior to agreed date	Dr. Ghobrial	\$425
Required or attempted to require a penalty for ceasing employer prior to agreed date	Dr. Yataco	\$425

Required or attempted to require a penalty for ceasing employer prior to agreed date	Dr. Avecillas	\$425
Discrimination against employee for protected conduct	Dr. Ghobrial	\$4,250
Total		\$13,125

A. Willful Misrepresentation of Material Fact on LCA

An employer must attest on the LCA that it will pay the H-1B nonimmigrant the required wage. The Administrator found that Respondent willfully misrepresented a material fact on Dr. Ghobrial's second LCA by listing a prevailing annual wage of approximately \$160,000, while intending to pay Dr. Ghobrial less. The evidence establishes that during this same period, Dr. Rampertaap was negotiating an "independent contractor" or "partnership" arrangement with Dr. Ghobrial, which required Dr. Ghobrial to pay certain business expenses, such as malpractice insurance, which would have reduced his salary below the amount listed on the LCA. (Tr. 340-43). Thus, it was reasonable for the Administrator to find that Dr. Ghobrial willfully misrepresented the wage he intended to pay on Dr. Ghobrial's second LCA. This determination is affirmed.

B. Willful Failure to Pay Required Wage

The Administrator found that Respondent's failure to pay the prevailing wage was a willful violation with respect to portions of the wages not paid to Dr. Ghobrial and Dr. Yataco. Specifically, The Administrator found that Dr. Rampertaap willfully failed to pay the required wage to Dr. Ghobrial for time worked between July 9, 2006 and July 23, 2006. The Administrator argues that Dr. Rampertaap knew that the second LCA and its higher wage was controlling for this period, but paid Dr. Ghobrial according to his private contract with Dr. Ghobrial. Dr. Ghobrial's LCA for this time period listed a prevailing annual wage of approximately \$160,000, yet Dr. Ghobrial was paid an annual wage of approximately \$140,000. Unlike the other Labor Condition Applications, in which Respondent paid the listed, albeit incorrect wage, here Respondent failed to even pay the listed wage. Accordingly, the evidence supports a finding that Dr. Rampertaap's failure to pay Dr. Ghobrial the required wage was, in part, willful.

A portion of the back wages to which Dr. Yataco is entitled was for his final two weeks and three days of employment, a period of time for which Respondent did not pay Dr. Yataco any wages at all. Dr. Rampertaap testified that when Dr. Yataco left his employment, Lung Associates had already made advance payments for malpractice and health insurance, which were expenses which could not be recouped. (Tr. 352). Dr. Rampertaap testified that Dr. Yataco requested that his final wages be withheld in exchange for Dr. Rampertaap not pursuing reimbursement of these costs. (Tr. 352, 355-58). I do not find Dr. Rampertaap's testimony to be

credible in this regard,⁷ and his justification for withholding wages for various business expenses finds no support in the regulations. *See* 20 C.F.R. § 655.731(c)(9)(iii).

Accordingly, the Administrator could reasonably find that Respondent's failure to pay the required wage was a willful violation, and its determinations in this respect are affirmed.

C. Required or Accepted Payment of Visa Fees

The Administrator found that Respondent required Dr. Ghobrial to pay fees associated with his H-1B visa. The Act forbids an employer from requiring a nonimmigrant to pay or reimburse the employer the fees associated with the application. 8 U.S.C. § 1182(n)(2)(B)(vi)(II). Dr. Ghobrial testified that he was required to pay the fee associated with his first LCA and was not reimbursed by Respondent. (Tr. 211-12, 255; AX 26). Dr. Rampertaap presented inconsistent and conflicting testimony on this issue and produced no documentation to suggest that Dr. Ghobrial had in fact been reimbursed. (Tr. 393-94, 438). Accordingly, the Administrator reasonably found that Respondent violated this provision and assessed a modest penalty of \$475. This determination is affirmed.

D. Required or Attempted to Require a Penalty for Ceasing Employment Prior to Agreed Date

In October of 2006, Dr. Rampertaap sent letters to Drs. Ghobrial, Yataco, and Avecillas demanding "reimbursement" of certain "fees."⁸ (AX 14-16). The letter to Dr. Ghobrial also alleged that he had violated a restrictive covenant and that Dr. Rampertaap would be suing him for \$300,000. (AX 16). The Administrator found that this was a violation of the Act's anti-penalty provision and assessed three fines of \$425, for a total of \$1,275.00. The Administrator argues that Lung Associates did not incur any interview, search fees, or third party repayments

⁷ Dr. Rampertaap's claim that he was justified in withholding wages from Dr. Yataco is particularly unconvincing in light of the evidence that Dr. Yataco was in fact involuntarily terminated. A letter dated February 27, 2006, advised Dr. Yataco that "due to unforeseen circumstances, we have the need to terminate your contract prematurely." (AX 47).

⁸ The contracts used by Dr. Rampertaap contained the following provision:

If Physician terminates his employment within three years without good cause on his part then Physician agrees to pay all interview, relocation, search fees, and third party support repayments directly attributable to this employment arrangement. Good cause shall mean that Physician has terminated employment after Corporation has materially breached this agreement and failed to correct such breach within a reasonable time of receiving notice thereof. Physician will be considered to have terminated employment if physician gives notice not to renew under Section 2.01.

(AX 17).

and that Dr. Rampertaap acknowledged that he did not believe that he was going to be reimbursed. Thus, the Administrator argues that Dr. Rampertaap “used the letters to penalize the doctors.”

The Act provides:

(A) The employer is not permitted to require (directly or indirectly) that the nonimmigrant pay a penalty for ceasing employment with the employer prior to an agreed date. Therefore, the employer shall not make any deduction from or reduction in the payment of the required wage to collect such a penalty.

(B) The employer is permitted to receive bona fide liquidated damages from the H-1B nonimmigrant who ceases employment with the employer prior to an agreed date. However, the requirements of paragraph (c)(9)(iii) of this section must be fully satisfied, if such damages are to be received by the employer via deduction from or reduction in the payment of the required wage.

(C) The distinction between liquidated damages (which are permissible) and a penalty (which is prohibited) is to be made on the basis of the applicable State law. In general, the laws of the various States recognize that liquidated damages are amounts which are fixed or stipulated by the parties at the inception of the contract, and which are reasonable approximations or estimates of the anticipated or actual damage caused to one party by the other party's breach of the contract. On the other hand, the laws of the various States, in general, consider that penalties are amounts which (although fixed or stipulated in the contract by the parties) are not reasonable approximations or estimates of such damage. The laws of the various States, in general, require that the relation or circumstances of the parties, and the purpose(s) of the agreement, are to be taken into account, so that, for example, an agreement to a payment would be considered to be a prohibited penalty where it is the result of fraud or where it cloaks oppression. Furthermore, as a general matter, the sum stipulated must take into account whether the contract breach is total or partial (*i.e.*, the percentage of the employment contract completed) In an enforcement proceeding under subpart I of this part, the Administrator shall determine, applying relevant State law (including consideration where appropriate to actions by the employer, if any, contributing to the early cessation, such as the employer's constructive discharge of the nonimmigrant or non-compliance with its obligations under the INA and its regulations) whether the payment in question constitutes liquidated damages or a penalty.

20 C.F.R. § 655.731 § (c)(10)(i); 8 U.S.C. § 1182(n)(2)(C)(vi)(I).

Initially, I find that Dr. Rampertaap's reference to the contract's restrictive covenant cannot form the basis of a violation, because the stated purpose of that provision is to compensate Respondent for the violation of a restrictive covenant, and not for “ceasing employment with the employer prior to an agreed date.” Thus, a threat to collect a stipulated

sum for violating a restrictive covenant, whether or not deemed a “penalty,” does not violate the Act’s prohibition of “requir[ing] . . . that the nonimmigrant pay a penalty *for ceasing employment with the employer prior to an agreed date.*” 20 C.F.R. § 655.731 § (c)(10)(i) (emphasis added).

This leaves Dr. Rampertaap’s demand for “reimbursement” of “interview, relocation, search fees, and third party support repayments directly attributable to [the] employment arrangement” as the only potential violation of the Act’s anti-penalty provision. As required by the regulations, I turn to Florida law for guidance regarding the distinction between an unenforceable penalty and a valid liquidated damages clause:

[T]his Court established the test as to when a liquidated damages provision will be upheld and not stricken as a penalty clause. First, the damages consequent upon a breach must not be readily ascertainable. Second, the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages.

Lefemine v. Baron, 573 So.2d 326 (Fla. 1991) (citing *Hyman v. Cohen*, 73 So. 2d 393 (Fla. 1954)). Based on this authority, I am unable to conclude that the amount sought by Dr. Rampertaap would be deemed an unenforceable “penalty” under Florida law. The amount sought was not a “sum stipulated,” but rather the actual cost associated with hiring the physician, and thus, it cannot be said that the amount sought was “grossly disproportionate to any damages that might reasonably be expected to follow from a breach” or that it was “intended only to induce full performance.”

The Administrator argues that Dr. Rampertaap’s testimony that he did not intend to collect the fees establishes that the letters were intended solely to “penalize” the physicians. However, the Administrator has cited no authority supporting its suggestion that Dr. Rampertaap’s subjective motivation in attempting to enforce the clause is relevant to whether the amount sought would be deemed a “penalty” under the test quoted above.⁹ Accordingly, the Administrator has failed to establish a violation of the Act’s anti-penalty provision by demonstrating that Dr. Rampertaap’s attempt to collect an unspecified sum for “interview, relocation, search fees, and third party support repayments directly attributable to this employment arrangement” would be deemed an unenforceable penalty under Florida law.¹⁰ Therefore, the \$1,275 penalty assessed for this violation is reversed.

⁹ However, as discussed below, I find this evidence to be highly relevant to the issue whether Dr. Rampertaap violated the Act’s whistleblower protection provision by sending the threatening letters in retaliation for Dr. Ghobrial’s protected activity.

¹⁰ The clause very likely would be found to be unenforceable, as the physicians likely had “good cause” to terminate their employment, which by the terms of the contract, would not trigger the obligation to reimburse the fees. See 65 Fed. Reg. 80174 (“It is the Department’s expectation that where there is a constructive discharge, or the employer has committed substantive violations of the H-1B provisions directly impacting on the employee (such as wage and benefit

E. Discrimination Against Employee for Protected Conduct

The Administrator alleges that Respondent violated the Act's whistleblower protection provisions by retaliating against Dr. Ghobrial for reporting violations of the Act to the Department of Labor. The Act provides:

It is a violation of this clause 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 (which term, for purposes of this clause, includes a former employee and an applicant for employment) 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); 20 C.F.R. § 655.801.

In interpreting and applying this provision, the Department is guided by "the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by [the] department." 65 Fed. Reg. 80178. For the Administrator to prevail on its discrimination charge, he must prove by a preponderance of the evidence that the doctors engaged in protected activity, that Dr. Rampertaap knew about this activity, and that he took adverse action against them "because of" their protected activity. *Administrator v. Kutty*, ARB No. 03-022, ALJ No. 01-LCA-010 (May 31, 2005). The "because of" standard is satisfied if the protected activity was a "motivating factor" in the unfavorable action. *See Talukdar v. U.S. Dept. of Vet. Affairs, Med. and Reg'l Office Ctr., Fargo, N.D.*, ARB No. 04-100, ALJ No. 2002-LCA-25 (Jan. 31, 2007).

It is undisputed that Dr. Ghobrial engaged in protected activity by sending a letter to the Department of Labor on July 24, 2006, in which he alleged that Respondent failed to pay the prevailing wage. (AX 1; Tr. 37). Dr. Rampertaap became aware of this protected activity in August of 2006 after receiving an "appointment letter" and meeting with Investigator Kibler. (AX 2; Tr. 45). On October 13, 2006, Dr. Rampertaap sent a letter to Dr. Ghobrial threatening legal action and demanding reimbursement of employment-related expenses and \$300,000 for violating a restrictive covenant. (AX 16). The threat of a lawsuit may amount to retaliatory adverse action under federal law. *See NLRB v. United States Postal Service*, 536 F.3d 729 (11th Cir. 2008).

violations), State law would not permit the employer to collect the payment"). However, this does not establish that the clause is an unenforceable penalty, which is defined by Florida law as a payment of a "stipulated sum" that is "grossly disproportionate to any damages that might reasonably be expected to follow from a breach." *Lefemine, supra*.

Dr. Rampertaap testified that after meeting with Investigator Kibler and being told that he should not have withheld money from any of the physicians' paychecks, he sent the letters to Dr. Ghobrial and the other physicians. (Tr. 353). He further testified that he was "fully aware" that he was "not going to get reimbursed," but was "just trying to get them to pay them as gentlemen [sic], to discuss the case, so we don't have to pay money or be here today," and that he "just want[ed] [them] to come in and discuss this case and get rid of it." (Tr. 353-56). Dr. Rampertaap also believed that a lawsuit would not be worthwhile, testifying that it "would cost more [in] legal fees to recoup a couple thousand dollars." (Tr. 354).

Based on Dr. Rampertaap's testimony that he had no intention of actually suing the doctors, his decision to send a demand letter to Dr. Ghobrial was clearly an attempt to dissuade Dr. Ghobrial from pursuing his complaint and to recoup any costs that Dr. Rampertaap expected to incur as a result of the Department of Labor's investigation. Such action would clearly have a chilling effect on Dr. Ghobrial or other employees who might consider engaging in protected activity in the future. Accordingly, I find that the Administrator has established that Respondent violated the Act by engaging in unlawful discrimination. I further find the penalty of \$4,250 to be reasonable in light of the regulatory criteria.¹¹

F. Violations for Which No Penalty was Assessed

The Administrator also determined that Respondent violated the Act's requirement that the employer post certain information prior to participating in the H-1B program, 8 U.S.C. § 1182(n)(1)(C)(ii), and retain certain documentation in a public access file. 8 U.S.C. § 1182(n)(1)(G)(ii). Investigator Kibler's uncontradicted testimony supports these findings. (Tr. 50-51). Accordingly, these findings are affirmed. However, no civil penalty was assessed.

G. Debarment

The Administrator recommended that Respondent be debarred from participating in the H-1B program for two years. Pursuant to 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 Act 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 Administrator determined that Respondent is subject to debarment. (AX 51; ALJX 1). As noted above, I find that the Respondent willfully failed to pay wages to Dr. Ghobrial and Dr. Yataco. Pursuant to 20 C.F.R. § 655.810(d), Respondent is debarred from the H-1B program for a period of two years.

¹¹ The Administrator cites other alleged retaliatory acts by Dr. Rampertaap, including filing a police report against Dr. Ghobrial, informing local hospitals that Dr. Ghobrial was not authorized to work, and sending letters containing unfavorable allegations against Dr. Ghobrial to immigration officials. I need not address these additional acts, as the letters that Dr. Rampertaap sent directly to the physicians were clearly retaliatory and sufficient to establish a violation of the Act's whistleblower protection provision.

III. Conclusion

Based on the findings in this hearing, the Administrator's determinations are affirmed, except for its determination that Respondent violated the Act's anti-penalty provision found at 8 U.S.C. § 1182(n)(2)(C)(vi)(I), which is reversed.

Order

1. Respondent is HEREBY ORDERED to make the following payments:
 - i. \$22,785.60 in back wages to Dr. Victor Ghobrial;
 - ii. \$13,382.88 in back wages to Dr. Jaime Avecillas;
 - iii. \$14,989.24 in back wages to Dr. Jose Yataco; and
 - iv. \$11,850.00 in civil penalties to the Department of Labor.
2. Respondent shall also pay pre-judgment and post-judgment interest on all back wages.¹²
3. Respondent is debarred from participating in the H-1B program for two years pursuant to 20 C.F.R. § 655.810(d)(2).

A

JOSEPH E. KANE
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, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

¹² The Board has held that an award of interest is appropriate in light of the "'make whole' goal of back pay." *Amtel Group of Fla., Inc.*, ARB No. 04-087, ALJ No. 2004-LCA-6 (ARB Sept. 29, 2006). In calculating interest, the Board requires that interest be 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. *See Doyle v. Hydro Nuclear Serv.*, ARB Nos. 99-041, 99-042, 00-012; ALJ No. 89-ERA-22, slip op. at 18-21 (May 17, 2000).

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).