



**Issue Date: 03 April 2012**

CASE NO.: 2008-LCA-00017

In the Matter of

**ADMINISTRATOR,  
WAGE AND HOUR DIVISION**  
Prosecuting Party

v.

**ADVANCED PROFESSIONAL MARKETING, INC. and  
MARISSA BECK, Individually and President**  
Respondent

**FINAL DECISION AND ORDER**

**Background and Procedural History**

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(n) (2005) (“INA” or the “Act”), and the regulations promulgated thereunder at 20 C.F.R. § 655.700 *et seq.* It involves a complaint filed by the Administrator, Wage and Hour Division (“Administrator”), against the Respondents, Advanced Professional Marketing, Inc. (“APMI”), and Marissa Beck, individually and as the corporation’s president.

On March 10, 2008, after an investigation into various violations of the governing regulations, the Administrator issued a Notice of Determination, listing multiple violations under the Act and its regulations. In the Notice of Determination, the Administrator determined the Respondents owed back wages in the aggregate amount of \$2,920,270.37 to 156 individually named H-1B non-immigrants. In addition, the Administrator assessed civil money penalties in the aggregate amount of \$512,000.00.

By letter dated March 18, 2008, the Respondents requested a hearing. A hearing was held on February 12, 2009, in New York City. Prior to the hearing, on January 16, 2009, the parties submitted a “Joint Pre-Trial Statement” and a “Stipulation of Facts,” the latter containing Joint Exhibits (“JX”) 1-3. Joint Exhibit 3 is a form WH-56 setting out the back wage amounts that the Administrator determined were owed to each of the 156 non-immigrant employees. At the hearing, I admitted various Exhibits, including the parties’ joint submissions and exhibits, as well as exhibits proffered by each party. I also received testimony from the Administrator’s investigator, Mary Dodds.

On December 31, 2009, I issued a Decision and Order (“D&O”) in this matter.

Upon consideration of the evidence, including the parties’ stipulations, I made multiple findings of undisputed facts. D&O at 15-17. I also made findings of fact, based on what I concluded to be disputed facts and unresolved issues, based on the evidence of record, including evidence adduced at the hearing, as well as the parties’ stipulations. D&O at 17-33.

In sum, I found the following:

Prevailing wage rates: The Administrator’s determination as to the prevailing wage to be used in determining back wage calculation was adequate as to 131 of the 156 H-1B non-immigrants. D&O at 17-22. As to the remaining 25 individuals, I found the Administrator’s determination of the prevailing wage to be inadequate, and I directed recalculation of back wages due, based on the prevailing wages listed in the appropriate LCAs (Labor Condition Applications). D&O at 22-24. See also D&O at 23-24 (summary). The names of the individuals for whom recalculation was necessary were set forth at Appendix D of my D&O.

Applicable periods for which pay was due: I determined that, as to 84 of the 156 H-1B non-immigrants, the Administrator’s determinations as to periods for which back wages were due was adequate. As to the remaining 72 individuals, I found that either the inception or termination date of the back wage calculations contained errors and could not be affirmed. D&O at 24-29. See also D&O at 29 (summary). The names of the individuals for whom recalculation was necessary were listed at Appendix F of my D&O.<sup>1</sup>

Deductions: I determined that the presumptions the Administrator used in determining whether deductions from the H-1B non-immigrants’ pay were wrongly taken and were not in accordance with the regulation. D&O at 30-32. I directed recalculation of back wages for the individuals listed in Appendix G of my D&O. D&O at 33-34.

Civil Money Penalties and Debarment: I affirmed the Administrator’s determinations as to the Respondent’s responsibility to pay Civil Money Penalties, and the total amount of penalties due. D&O at 34-35. I also affirmed the Administrator’s determination regarding the Respondents’ Debarment. D&O at 36.

Interest. I determined that interest was due on the back pay awards, but not on the Civil Money Penalties. D&O at 35-36.

Based on my findings of fact and conclusions of law, I directed that the Administrator re-compute the amount of back wages due, for the individuals listed in Appendix D, F, and G. D&O at 36-37.

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<sup>1</sup> The names of the individuals for whom recalculation on this basis was not necessary were listed in Appendix E. See D&O at 29.

## The Parties' Motion for Reconsideration and Request for a Final Decision and Order

By Joint Motion for Reconsideration, dated January 8, 2010, the parties requested I issue a Final Decision and Order. The basis for their joint request was their recognition that my D&O of December 31, 2009, could not properly be a final Decision and Order, as it did not provide any mechanism for review of the Administrator's revised back wage calculations.<sup>2</sup> The parties suggested a timetable for the Administrator's revised back wage calculations and for the Respondents' objections (if any). In addition, the parties requested I issue a Final Decision and Order after receiving and considering the parties' submissions. Joint Motion at 1-2. The Joint Motion also stipulated that any period for appeal would begin to run after I issued a Final Decision and Order. Joint Motion at 2.

By January 19, 2010, I issued a "Decision and Order on Reconsideration." In that document, I withdrew that portion of my earlier D&O pertaining to the parties' rights to appeal; issued timeframes for the submission of the Administrator's modified back wage computations and the Respondents' objections; and stated that I would issue a Final Decision and Order. Decision and Order on Reconsideration at 2. I also stated that, if necessary, I would order an additional session of hearing to address any issues raised during the back wage recomputation process. Id.

## The Parties' Submissions

On May 12, 2010, the Administrator submitted revised back wage computations, which were asserted to be based on the findings I made in my initial D&O. The Administrator calculated the aggregate back wages due, based on my findings in my initial D&O, to be \$3,947,054.91. This represents an increase of approximately \$1 million from the amount the Administrator initially determined to be due, in the March 2008 Notice of Determination. The Administrator did not submit any objections to my initial D&O.

On June 10, 2010, the Respondents, through counsel, submitted objections to the Administrator's revised back wage calculations. The Respondents' objections were not limited to the calculations themselves, but also addressed the findings in my initial D&O.

In brief, the Respondents' objections consist of the following:

1. Asserted Non-Application of Stipulated Facts: The Respondents objected to the recalculation of the amount of back wages due, particularly the Administrator's revised back wage calculations for those non-immigrants listed in Appendix F of my D&O.<sup>3</sup> Respondents' submission at 1-2. The Respondents also assert that the Administrator's

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<sup>2</sup> The parties addressed their positions at length in a post-hearing conference, on January 7, 2010, held at the parties' request.

<sup>3</sup> In this Final Decision and Order, I will refer to the Administrator's back wage calculations, made in 2008 prior to the hearing, as "initial determinations." I will refer to the Administrator's re-calculated back wage calculations, submitted to me in May 2010, as "revised back wage calculations."

revised back wage calculations “negate and ignore the stipulation of the parties on this issue.” Respondents’ submission at 1.

2. **Applicable Start Date for Back Wage Calculations:** The Respondents objected to the presumption that all of the non-immigrants became available for work not later than 30 days after their arrival in the United States. Respondents’ submission at 4. Specifically, the Respondents assert that the Administrator should bear the burden to establish when an alien first entered the country, and when an alien first made himself available for work. Respondents’ submission at 5.
3. **Additional Pay Data for Two Named Individuals:** In the event I determined that recalculation of wages was necessary, the Respondents requested that the amounts due to two named individuals be adjusted, based on newly obtained payroll data. Respondents’ submission at 5-6.

On review of the parties’ submissions, I find that no additional session of hearing is necessary. See Decision and Order on Reconsideration at 2.

#### Discussion – Effect of Stipulations

In their submission, the Respondents stated that, prior to the hearing, the parties stipulated that the Administrator’s methodology for calculating back wages was reasonable, and also stipulated that the amount of back wages due was correct. According to the Respondents, because the parties are bound by their stipulations, any recomputation of back wages is contrary to the parties’ intent, and contrary to the clear language of the regulations. Respondents’ submission at 1-3.

I have carefully considered the Respondents’ assertion on this issue. Factual stipulations that parties freely enter into are binding on the parties. Calvin Klein Ltd. v. Trylon Trucking Corp., 892 F.2d 191, (2d Cir. 1989). In general, factual stipulations are also binding on a finder of fact (such as an administrative law judge). Id., at 194. A party’s concession made through a stipulation is binding. Richardson v. Dir., OWCP, 94 F.3d 164, 167 (4th Cir. 1996). Moreover, a fact-finder is not free to pick and choose among stipulations, at will. Gibbs v. Cigna Corp., 440 F.3d 571, 578 (2d Cir. 2006); Hoodo v. Holder, 558 F.3d 184 (2d Cir. 2009). Courts have noted that because stipulated facts relieve the parties of the burden of proving (or disputing) specific facts, admissions are not subject to judicial scrutiny to ensure that the admissions are fully supported by the underlying record. See Hoodo, 558 F.3d at 191 (2d Cir. 2009).

There are exceptions to the general rule that stipulations are binding on a fact-finder. For example, a fact-finder can reject stipulations as to facts when a manifest injustice would thereby occur. PPX Enters., Inc. v. Autofidelity, Inc., 746 F.2d 120, 123 (2d Cir. 1984). Additionally, when a stipulation suggests an ambiguity indicating that the words did not fully and accurately represent the parties’ agreement, the stipulation may be set aside. Katel LLC v. AT&T Corp., 607 F.3d 60, 65-66 (2d Cir. 2010), quoting McCoy v. Feinman, 99 N.Y.2d 295, 302, 785 N.E.2d 714 (N.Y. 2002). Moreover, a court is not bound by stipulations on questions of law. Fisher v. First Samford Bank & Trust Co., 751 F.2d 519, 523 (2d Cir. 1984).

With regard to H-1B cases, at least one administrative law judge has found that an employer's stipulation as to the amount of back wages owed each H-1B worker is binding, and therefore, the Administrator need not recalculate back wage determinations. Administrator v. Am. Truss, Case No. 2004-LCA-00012 (ALJ Nov. 17, 2004), slip op. at 6; see also 29 C.F.R. § 18.51. On review, the Administrative Review Board affirmed the administrative law judge's decision but did not specifically address this aspect of the case.<sup>4</sup> Administrator v. Am. Truss, Case No. 05-032 (ARB Feb. 28, 2007), slip op. at 4-6.

Mindful of the governing precedents, as set forth above, I find that, in general, I am bound by the parties' stipulations. Importantly, I now note, I am bound by stipulations of fact that are not supported by (or in fact may be inconsistent with) the evidence of record. Thus, where the evidence and the stipulations diverge, I must adhere to the parties' stipulations of fact.

With this principle in mind, I now turn to the specific issues raised in the instant proceeding.

### **Prevailing Wage Issue**

As set forth above, in my initial D&O, I found that the Administrator acted reasonably in making prevailing wage determinations as to 131 of the 156 non-immigrants, who were listed in Appendices A, B and C. D&O at 20, 22; see also D&O at 23-24). The only individuals for whom I found the Administrator's prevailing wage determination was not supported by the record were the 25 individuals listed in Appendix D of my initial D&O. D&O at 22-23.

Prior to the hearing, the parties entered into the following stipulations regarding prevailing wage determinations (the numbered paragraphs are those set forth in the parties' stipulations).

*11. The Administrator determined the "required wage" that was required to be paid by the Respondents to their H-1B workers by comparing, in each individual file, either a prevailing wage based on information contained on Respondents' Labor Condition Applications ("LCAs"), information the Administrator obtained from the Department of Labor's Online Wage Library, and/or the employer's actual wage (whichever was higher) to the "wages actually paid" as reflected in the employer's payroll records.*

*12. The Administrator used the documentary evidence and followed the methodology set forth in the regulations to determine the difference between the "required wage" and the "wages actually paid" to each H-1B worker, determining the required wage for each pay period and subtracting any wages paid during that pay period, to arrive at the back wage amounts reflected in the WH-56 (Joint Exhibit 3).*

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<sup>4</sup> However, the Administrative Law Board did find that issues the employer did not specifically raise at the hearing regarding calculation of back wages were waived. Am. Truss, slip op. at 6.

22. *During the course of the investigation, Respondents failed to produce documents that were required to be maintained by 20 C.F.R. § 655.760(a) with respect to approximately 39 of the 156 Labor Condition Applications.*<sup>5</sup>

29. *In preparing each Labor Condition Application that was the subject of this investigation, Respondents were required to determine a valid prevailing wage pursuant to one of the methods set forth in 20 C.F.R. § 655.731(a)(2).*<sup>6</sup>

30. *Each Labor Condition Application [that] was prepared by outside counsel [was] relied upon by Respondents to determine the prevailing wage in accordance with the regulations. During the course of the investigation, Respondents' counsel did not produce evidence of how they determined the prevailing wage figures on the LCAs they prepared for Respondents upon Respondents' repeated requests.*

31. *The Administrator reasonably determined that Respondents had failed to establish the validity of the prevailing wage figures listed on their LCAs.*

The parties also made the following stipulation:

14. *The Administrator's total back wage calculation of \$2,920,270.37 is the correct total of the back wages due to the 156 H-1B employees as set forth on Joint Exhibits 2 and 3.*

Upon careful review of the entire record, including the parties' post-hearing briefs, the parties' stipulations, and the Respondents' objections, I find that the parties' stipulations did not include any stipulation as to the reasonableness of the Administrator's prevailing wage determinations. Indeed, as I noted in my initial D&O, the Respondents have continued to assert that the procedure the Administrator's representatives used to determine the applicable prevailing wage to be used was, in some instances, inadequate, and also was inconsistent with the regulation's requirements. D&O at 18-19. Notably, even after the hearing, the Respondents urged that, where the Administrator chose not to use the prevailing wage listed on an employee's LCA, but rather substituted a different prevailing wage, it was appropriate to remand to the Administrator to "correct the back wage calculations using the employer's stated prevailing wage, or to request wage determinations from the ETA [Employment & Training Administration] if she [the Administrator] disagrees with the employer's prevailing wage determination." Respondents' brief at 8.<sup>7</sup>

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<sup>5</sup> This stipulation contains a typographical error, citing "20 C.F.R. § 656.760(a)" instead of the correct section, which is cited above.

<sup>6</sup> This stipulation contains a typographical error, citing "20 C.F.R. § 656.731(a)(2)" instead of the correct section, which is cited above.

<sup>7</sup> In large part, I addressed the Respondents' position on the issue of obtaining wage determinations from the ETA in my order denying the Respondents' Motion for Summary Decision, dated January 27, 2009.

As set forth in my initial D&O, I found that an administrative law judge may review the reasonableness of the Administrator's actions in determining prevailing wages. D&O at 21; see 20 C.F.R. § 655.840(c). On reflection, I reaffirm my finding that this is a matter that is properly within my jurisdiction to adjudicate.

I now move to the Administrator's prevailing wage determinations for the 156 non-immigrant employees. On review, I acknowledge that the parties have entered into many stipulations. Importantly, the parties have stipulated that the Administrator's back wage calculation is the "correct total" of the back wage determinations for the 156 H-1B employees. Stipulations, para. 14. I also recognize that the facts to which the parties have stipulated have focused and narrowed the controverted issues.

However, I also find that the parties' stipulations did not eliminate all issues of controversion on the prevailing wage issue. Specifically, I find that the parties have NOT stipulated that the Administrator's prevailing wage determinations were correct, or even reasonable. Based on the foregoing, and in light of and acknowledging the stipulated facts, I find that it is appropriate for me, at this juncture, to review the prevailing wage determinations the Administrator made for each of the 156 non-immigrant employees. I do so now.

As noted in my initial D&O, as the Administrator's investigator, Ms. Dodds, testified at the hearing, where a correct prevailing wage for the occupation and location was listed in an LCA, she made calculations based on that prevailing wage. T. at 25. Based on my review of the record, as set out in my initial D&O, I found this circumstance applied to 49 of the 156 H-1B non-immigrant workers. I re-affirm my previous finding, which affirmed the Administrator's prevailing wage determinations as to these individuals.<sup>8</sup> See D&O at 20. The names of these individuals are listed in Appendix A of my initial D&O.

Ms. Dodds testified that, in some instances where an "incorrect" prevailing wage was listed on an LCA, she substituted a correct prevailing wage. T. at 22. In my initial D&O, I found, based on my review of the record and the documents relating to each of the employees, that this circumstance applied to 43 of the 156 H-1B non-immigrant workers. See D&O at 20. I found the Administrator's action in substituting the correct prevailing wage was a purely ministerial task, akin to correcting typographical errors. Consequently, I concluded that the Administrator's actions were reasonable and proper. Id. The individuals concerned are listed by name in Appendix B of my initial D&O. I re-affirm my prior determination.

In instances where no LCA was available for an employee, Ms. Dodds testified at the hearing, she made calculations based on an appropriate prevailing wage. T. at 26-29. In my initial D&O, I found that Ms. Dodds likely extrapolated prevailing Occupational Employment Survey (OES) wage data from data the Respondents had cited in other LCAs, generally based on presumptions that the employees were physical therapists and were working in New York (Manhattan). D&O at 20. Notably, the accuracy of the prevailing wage data from which Ms.

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<sup>8</sup> In some instances, the Administrator's calculations were based on a prevailing wage that differed by \$10 per year from the prevailing wage listed in the LCAs. In such circumstances, the Administrator waived the discrepancy. See T. at 24.

Dodds apparently extrapolated was not disputed. Therefore, I affirmed the Administrator's determinations as to the prevailing wage for the employees who were listed by name at Appendix C of my initial D&O. D&O at 22. On review, I affirm my prior finding as to the prevailing wages used for these individuals.

In my initial D&O, I found that, for the remaining employees (those not covered under any of the circumstances above), the record reflected that LCAs existed and the prevailing wages in the LCAs were not obviously incorrect.<sup>9</sup> These employees were listed by name at Appendix D of my initial D&O. Further, I found there was no testimonial or documentary evidence explaining why the Administrator's investigator substituted prevailing wage data in these circumstances. D&O at 22. Consequently, I found that, as to these employees, the Administrator did not carry its burden to establish that the prevailing wage amounts listed on the LCAs were incorrect or were otherwise inadequate for establishing the applicable prevailing wage, and I remanded the matter back to the Administrator to recalculate back wages owed, based on the prevailing wage data of record in the employees' LCAs. D&O at 23.

After careful review of all the evidence, and considering the parties' arguments, I find that the parties did not stipulate that the Administrator's actions in substituting different prevailing wage rates were correct, or even reasonable. To the contrary, I find that the absence of any stipulation leads me to infer that the parties are unable to agree to the correctness of the Administrator's actions in making determinations as to applicable prevailing wage rates.

I conclude that I may make factual findings, as supported by the evidence of record, so long as my findings do not conflict with the parties' stipulated facts. I do note that the parties stipulated that the Administrator's aggregate back wage determination of \$2,920,270.37 was the "correct" total of back wages due. Stipulations, para. 14.<sup>10</sup> In light of the parties' lack of stipulation regarding the correctness of the prevailing wages, I conclude that this stipulation is ambiguous, as it is susceptible of multiple interpretations. For instance, the parties may have agreed on the "bottom line" of the Administrator's initial determinations – that is, a limitation on the Respondents' total back wage obligations, but not have agreed on the accuracy of the underlying back wage determinations as to each employee. Alternatively, a close reading of the language in this stipulation indicates that it is possible the only matter stipulated to was the Administrator's accurate arithmetic calculation (that is, the addition of all of the Administrator's assessments was correctly tabulated to be \$2,920,270.37).<sup>11</sup> As noted above, I am not bound by a stipulation that is ambiguous. See Katel LLC, 607 F.3d at 65-66.

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<sup>9</sup> I also found these circumstances were distinguishable from those where the investigator knew the prevailing wage the Respondents cited was incorrect because it was an "even rate" and substituted an applicable prevailing wage. See D&O at 20 and Appendix B.

<sup>10</sup> The full stipulation is as follows: "14. *The Administrator's total back wage calculation of \$2,920,270.37 is the correct total of the back wages due to the 156 H-1B employees as set forth on Joint Exhibits 2 and 3.*"

<sup>11</sup> I note that the WH-56 form listing the back wages due to each of the 156 employees has an aggregate total of \$2,920,270.40, which differs from the amount in the stipulation by \$0.03.

On review, therefore, I re-affirm my finding, as set forth in my initial D&O, that the Respondents' back wage obligation for the 25 individuals listed by name in Appendix D should be reassessed. D&O at 22-23.

### Conclusion – Prevailing Wage Determinations

To summarize, as set forth above, I re-affirm my prior determinations regarding the prevailing wage rates upon which the Administrator made back wage calculations for the 131 employees listed by name in Appendices A, B, and C of my initial D&O. With regard to the remaining 25 individuals, I re-affirm my prior determination, as set forth in my initial D&O, that the Administrator must recalculate the Respondents' back wage obligations.

I will address the Administrator's submissions, as applied to each of the 25 individuals, later in this Final Decision.

### Beginning and Ending Dates of Employer's Wage Obligations

The Respondents' submission specifically objects to the recalculation of the beginning and ending dates of their back wage obligations. Respondents' submission at 1. As the Respondents stated, these recalculations "negate and ignore the stipulation of the parties on the issue." Id.

The parties' stipulations relevant to this issue include the following (the numbered paragraphs are those set forth in the parties' stipulations):

5. *The Administrator gathered documentary evidence relating to the 156 individuals listed on the Summary of Unpaid Wages ("WH-56") on whose behalf back wages are sought by the Administrator. A copy of the WH-56 is attached as Joint Exhibit 3. The WH-56 reflects the results of the Administrator's pay period-by-pay period calculation of back wages owed, based on payroll records produced by Respondents and immigration-related documentation produced by Respondents to the Administrator or acquired by the Administrator from other sources.*

6. *The documentary evidence contains the complete record of payments of wages for which Respondents have been credited for each employee toward their obligation to pay the required wage.*

7. *The documentary evidence contains the best available evidence of the dates on which each of the 156 H-1B employees became available for work.*

8. *The documentary evidence contains the best available evidence of the dates on which each of the 156 H-1B employees terminated their H-1B employment, or on which the H-1B payment obligation ended by expiration of the underlying Labor Condition Application, whichever was sooner.*

9. *The documentary evidence provides the best available evidence of the time periods employed and the back wages owed to the 156 H-2B employees as reflected on the WH-56 (Joint Exhibit 3).*

13. *The Administrator reasonably estimated the start date and end dates of employment, reasonably determined the periods of productive status for each H-1B employee, reasonably determined the wages actually paid to each H-1B employee.*

14. *The Administrator's total back wage calculation of \$2,920,270.37 is the correct total of the back wages due to the 156 H-1B employees as set forth on Joint Exhibits 2 and 3.*

I have carefully reviewed the parties' stipulations of fact, the Respondents' assertions on reconsideration, and my earlier D&O. In my D&O, I made multiple findings, consistent with the parties' stipulations. These findings included the following:

- The documentary evidence the Administrator gathered constituted the "best available" evidence of the dates the employees became eligible for work. D&O at 27; see also stipulations, para. 7.
- The documentary evidence the Administrator gathered constituted the "best available" evidence of the dates the Respondents' obligation to pay the employees, based on their H-1B status, terminated. D&O at 27; see also stipulations, para. 8.
- The Administrator's action in not calculating the Respondents' back pay obligations for dates earlier than October 2003 was reasonable. D&O at 28.
- The Administrator's determination that back pay was not due for any period after an LCA expired or was revoked was reasonable. D&O at 28.

In my initial D&O I also noted that as to some employees record data was "incomplete" or "conflicting." D&O at 28. I concluded, consequently, that as to 72 of the 156 H-1B employees, either the inception date or the termination date of the back wage calculation "contain[ed] errors" and could not be affirmed. D&O at 29. I reversed the Administrator's determination as to the back wages owed these individuals, who were listed in Appendix F. Id.

On review, I now find that this determination was inconsistent with the parties' stipulations.<sup>12</sup> In particular, my determination was inconsistent with the stipulations that the Administrator's documentary evidence contains the "best available evidence" of the dates on which the employees became available for work (stipulations, para. 7); the dates on which the employees terminated their employment or the Respondents' obligation to pay the employees otherwise ended (stipulations, para. 8); and the time periods and back wages owed the employees (stipulations, para. 9).

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<sup>12</sup> I also note that in my initial D&O I concluded that "the Administrator bears the burden to establish the appropriateness of all back wage determinations." D&O at 28. In making this conclusion, I failed to take the parties' stipulations into account, and I also failed to consider that this statement is not consistent with my finding that the regulation provides guidance on the applicable inception date of an employer's pay obligation. See 20 C.F.R. § 655.731(c)(6).

I also find that there is no basis, in the record, for my departure from the parties' stipulations as to these factual conclusions. I am mindful, upon review, that the parties' stipulations may diverge from (or be inconsistent with) the evidence of record. Most notably, on careful consideration, I conclude that I am not free to depart from the parties' stipulations of fact, in the absence of unusual circumstances (such as a determination that adhering to the stipulations would constitute a manifest injustice). Upon due consideration, I find that no such unusual circumstances, such as would justify my rejection of the parties' stipulations, are present with regard to this issue.

#### Conclusion – Beginning and Ending Dates of Employer's Back Wage Obligations

Mindful of the parties' stipulations that the documentary record contains the "best evidence" of the dates on which the employees became available for work and the dates their employment terminated (or the Respondents' obligation to pay wages otherwise ended), I conclude that my prior determination that the back wage determinations as to the 72 employees listed in Appendix F contained errors, was itself in error. D&O at 29; see stipulations, paras.7, 8. Rather, as set forth in the parties' stipulations, I should have concluded that the Administrator's determination as to the starting and ending dates of employment, as well as the periods of productive status for each employee, were reasonable. See stipulations, para. 13. On review, I now so find.

Having found that the Administrator's determinations were reasonable, I find that Appendices E and F are in error, and I withdraw them from my Decision.

#### APMI's Deductions

In my Decision and Order, I found that the record established that the Respondents took various deductions from the employees. As the Administrator's witness, Ms. Dodds testified, the Administrator determined that all of these deductions were improper, except those for insurance. Hence when calculating back wages due, all the improper deductions were construed as nonpayment of wages in those amounts. D&O at 30; see also T. at 30, 72-75.

The parties' stipulations relating to this issue included the following:

6. *The documentary evidence contains the complete record of payments of wages for which Respondents have been credited for each employee toward their obligation to pay the required wage.*

9. *The documentary evidence provides the best available evidence of the time period employed and the back wages owed to the 156 H-1B employees as reflected on the WH-56 (Joint Exhibit 3).*

12. *The Administrator used the documentary evidence and followed the methodology set forth in the regulations to determine the difference between the "required wage" and the "wages actually paid" to each H-1B worker, determining the required wage for each pay period and*

*subtracting any wages paid during that pay period, to arrive at the back wage amounts reflected in the WH-56 (Joint Exhibit 3).*

*13. The Administrator reasonably estimated the start date and end dates of employment, reasonably determined the periods of productive status for each H-1B employee, reasonably determined the wages actually paid to each H-1B employee.*

*14. The Administrator's total back wage calculation of \$2,920,270.37 is the correct total of the back wages due to the 156 H-1B employees as set forth on Joint Exhibit 2 and 3.*

In their post-hearing brief, the Respondents asserted that there is no violation where deductions do not result in the employee's receipt of an amount below the required wage. Respondents' brief at 8-9. After an analysis of the Department of Labor's comments to the most recent substantive revision of 20 C.F.R. § 655.731, I concluded that the Respondents' position on this issue was correct. D&O at 31. I specifically found that "deductions that do not reduce pay below the required wage are permitted." *Id.* Consequently, I reversed the Administrator's determination that all deductions the Respondents took from the employees constituted non-payment of wages. D&O at 32. Specifically, I reversed the Administrator's back pay terminations for those employees listed in Appendix G. D&O at 33-34.

On review of this issue, I find that, taken together, the parties' stipulations reflect the parties' agreement that the Administrator's treatment of deductions when making the initial back wage determinations was reasonable. Specifically, the parties stipulated that the evidence the Administrator's representatives considered included the "complete record of payments of wages" and "provides the best available evidence" of "the back wages owed." *See* stipulations, paras. 6, 9. The parties also agreed that, using this information, the Administrator followed the methodology set forth in the regulations to determine the difference between the "required wage" and the "wages actually paid" to each H-1B worker, to arrive at the back wage amounts due (stipulations, para. 12).

I note that the Respondents' submission specifically objected to all of the recalculations required by my previous Decision and Order.<sup>13</sup> Respondents' submission at 1. The Respondents also stated that the parties' stipulations were "based on the common acknowledgment and understanding that the documentation in this case was incomplete." Respondents' submission at 2. I do note that the parties' stipulations seem to be inconsistent with the Respondents' assertion that the Administrator's treatment of deductions was contrary to the regulation, as expressed in the Respondents' post-hearing brief. Respondents' brief at 8-9. In my initial D&O, I focused on the Respondents' assertion and failed to take into consideration the effect of the parties' stipulations.

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<sup>13</sup> I note that the effect of my determination regarding the Administrator's treatment of deductions would have resulted, in most instances, in reductions as to the amount of back pay owed.

In light of the Respondents' asserted objection to the recalculation of back wages due, and on review of this very complex issue, I reverse my prior determination, as set forth in my D&O, that back wages need to be recalculated for the individuals set forth in Appendix G, because of the Administrator's treatment of deductions. See D&O at 33-34.

#### Conclusion – APMI's Deductions

Because I have now determined that this aspect of my prior Decision and Order was inconsistent with the parties' stipulations, I find that it was not necessary for the Administrator to recalculate back wages due, based on my determinations regarding APMI's deductions from employee pay. I now affirm the Administrator's treatment of deductions, when calculating back wages due.<sup>14</sup> Therefore, I find that Appendix G was in error, and I withdraw it from my Decision.

#### The Administrator's Submission of Revised Back Wage Calculations

In my initial D&O, I directed the Administrator to recalculate back wages due for many of the 156 H-1 B employees. The Administrator did so. See Administrator's submission of May 12, 2010.

As set forth above, I have now determined that the parties' stipulations adequately addressed the issues of starting/ending dates and deductions, relating to the Respondents' back wage obligations. I now have affirmed the Administrator's initial determinations on the starting/ending dates of the back wage calculations and on the treatment of deductions from worker pay, for all of the 156 H-1 B employees. Consequently, it is not necessary for the Administrator to recalculate these issues. As set forth above, I have withdrawn Appendices E, F, and G, because they pertain to those issues. I also have reaffirmed the Administrator's initial determinations as to the prevailing wages used in the initial determinations for the employees listed by name in Appendices A, B, and C (131 of the 156 employees).

Consequently, based on the foregoing, I affirm the Administrator's initial determinations, as listed in the WH-56 (Joint Exhibit 3) submitted at the hearing, for all employees except the 25 employees listed by name in Appendix D of my initial D&O.

In my initial D&O, I directed that the Administrator recalculate the back wages due for the 25 employees listed by name in Appendix D of my initial D&O. D&O at 22-24; Appendix D. I have reviewed the Administrator's revised back wage calculations, regarding the 25 employees listed by name in Appendix D, submitted on May 12, 2010.

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<sup>14</sup> My findings, as set forth above, regarding the prevailing wage determinations are not necessarily inconsistent with my findings regarding the Respondents' practice of taking deductions from their employees' pay. My finding regarding the prevailing wages is based on the Administrator's failure to establish the basis for substituting other prevailing wage data for the data in the Respondents' records. See above.

In submitting revised back wage calculations, the Administrator complied fully with my directives, as set forth in my initial D&O. Consequently, in some instances, Administrator's revised back wage calculations included changes to the starting and/or termination dates and different treatment of deductions. This is because the Administrator complied with the directive in my D&O to address these issues as well. However, as set forth above, I now have affirmed the Administrator's treatment of starting/ending dates and deductions. Any of the Administrator's revisions to back wage calculations based on amended starting/ending dates, or changed treatment of deductions, must be disregarded.

My adjustments to the back wages due to the employees listed in Appendix D of my initial D&O are set forth in the attached Appendix. Departures from the Administrator's revised back wage calculations (except those based on starting/ending dates and treatment of deductions) are explained in the "Notes to Appendix." For example, in some instances, I affirm prevailing wages the Administrator used in the initial back wage determinations. The "Notes to Appendix" also contains comments about the Administrator's treatment of individual wage payments that appears to represent a departure from the Administrator's usual practice, as discussed at the hearing. In all such instances, I deferred to the Administrator's treatment of the issue.

Based on the adjustments made to prevailing wages for the employees in Appendix D of my initial D&O, I now find that the Respondents' aggregate back wage obligation is \$55,054.10 less than the total of \$2,920,270.37 in the Administrator's initial determinations. See Appendix. Consequently, I find that the Respondents' aggregate back wage obligation to the 156 H-1B employees is \$2,865,216.27.

#### Additional Back Wage Issues

In their opposition, the Respondents also asserted that their back wage obligation should be adjusted with regard to two employees, "to the extent there is a recalculation in this matter." Respondents' Opposition at 6. The Respondents attached payroll information for these two employees, Aimee Lynn Abalos and Dexter Te. Neither of these employees are among the 25 individuals listed by name in Appendix D.

As set forth above, I have affirmed the Administrator's initial determinations as to back wages due for the employees not listed in Appendix D. Consequently, no recalculation of the Respondents' back wage obligations for these employees is in order. Therefore, I find it is not necessary for me to consider the Respondents' submission on this issue.

#### Civil Money Penalties and Interest

In my initial D&O, I affirmed the Administrator's determinations regarding the amount of civil money penalties imposed on the Respondents. D&O at 34-35. On review, I affirm my prior determinations regarding the civil money penalties to be due. As set forth in my prior

D&O, I do not find any authority for the charging of interest on the civil money penalty.<sup>15</sup> D&O at 35; see also Innawalli v. Am. Info. Tech. Corp., ARB No. 05-165 (ARB, Sept. 29, 2006), slip op. at 9 (interest charged on back wages but not on civil money penalty). I re-affirm my prior finding on this issue.

In my initial D&O, I also found that pre-judgment compound interest was due on the Administrator's back pay determinations that I had affirmed, with the rate of interest to be the rate charged on underpayment of federal income taxes prescribed under 26 U.S.C. § 6621(a)(2). D&O at 35. On review, I find that prejudgment compound interest is to be awarded to all individuals to whom back pay is due. See Amtel Group of Fla., Inc. v. Yongmahapakorn, ARB No. 04-087 (ARB Sept. 29, 2006), slip op. at 12-13; Innawalli v. Am. Info. Tech. Corp., ARB No. 05-165 (ARB Sept. 29, 2006), slip op. at 9. Additionally, post-judgment interest (not compounded) is to be assessed on all back pay amounts, until the Respondents have satisfied the judgment.<sup>16</sup> The rate of interest to charge is the rate charged on underpayment of federal income taxes as prescribed under 26 U.S.C. § 6621(a)(2). See Doyle v. Hydro Nuclear Servs., ARB Nos. 99-041, 99-042, 00-012 (ARB May 17, 2000), slip op. at 18-20.

### **Debarment**

In my initial Decision and Order, I found, pursuant to the parties' stipulation, that the debarment of the Respondents for a period of two years was appropriate. Therefore, I affirmed the Administrator's action, recommending debarment for this period. D&O at 36; see also stipulations, para. 16.

On review, I affirm my earlier finding on this issue.

**A**

Adele H. Odegard  
Administrative Law Judge

Cherry Hill, New Jersey

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<sup>15</sup> I note that the Administrator's initial determination stated that both the back wages and civil money penalties were subject to the assessment of interest, as well as administrative fees and penalties. JX 2 at 2. The Administrator did not cite any authority for this statement.

<sup>16</sup> In Doyle, the Administrative Review Board directed that both pre-judgment and post-judgment interest be compounded, quarterly. In Amtel Group and Innawalli, the Administrative Review Board determined that pre-judgment interest on back pay awards be compounded, and cited Doyle, but did not find that post-judgment interest was to be compounded. The Amtel Group and Innawalli cases involve the Department's regulations on Labor Condition Applications (LCAs), whereas Doyle involves a different statute. I infer, therefore, that, based on the Board's determinations in Amtel Group and Innawalli, interpreting the same regulations at issue here, that only pre-judgment interest is to be compounded.

**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-5220, 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).