

U.S. Department of Labor

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Issue Date: 31 December 2009

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

Appearances: **SUSAN B. JACOBS**, Esquire
Senior Trial Attorney
U.S. Department of Labor
Office of the Solicitor
For the Prosecuting Party

WILLIAM A. STOCK, Esquire
Klasko, Ruton, Stock, & Seltzer, LLP
For the Respondents

Before: **ADELE HIGGINS ODEGARD**
Administrative Law Judge

DECISION AND ORDER

Background

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. Part 655, Subparts H and I, C.F.R. § 655.700 et seq.¹

¹ Unless otherwise specified, citations to federal regulations are to Title 20, Code of Federal Regulations.

Procedural History

The case involves a complaint filed by the Administrator, Wage and Hour Division (“Administrator”), against Advanced Professional Marketing, Inc. (“APMI”), and Marissa Beck, individually and as the corporation’s president.² On March 10, 2008, the District Director, Employment Standards Division, Wage and Hour Administration, issued the Administrator’s Notice of Determination, listing the following violations under the Act and its regulations:

- Willful failure to pay wages as required;
- Failure to establish valid prevailing wages on Labor Condition Applications (“LCA”s);
- Failure to post notice of the filing of LCAs at the places H-1B nonimmigrants were employed;
- Requiring or attempting to require H-1B nonimmigrants to pay penalties for ceasing employment prior to an agreed-upon date;
- Failure to make LCAs and other necessary documents available for public examination; and
- Failure to cooperate in the investigation as required.

The Administrator determined that the Respondents owed back wages in the aggregate amount of \$2,920,270.37 to 156 H-1B nonimmigrants. In addition, the Administrator assessed civil money penalties in the aggregate amount of \$512,000.00.³

By letter dated March 18, 2008, the Respondents requested a hearing. Hearing was held on February 12, 2009, in New York City.⁴

Documentary Evidence

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

² Collectively, APMI and Ms. Beck will be referred to as the Respondents.

³ The civil money penalties were assessed as follows: \$429,000.00 for willfully failing to pay required wages; \$5,000.00 for requiring or attempting to require H-1B nonimmigrants to pay a penalty for ceasing employment prior to an agreed-upon date; and \$78,000.00 for failing to make required documents available for public examination. No civil money penalties were assessed for the remaining violations.

⁴ Prior to the hearing, on January 7, 2009, the Respondents filed a Motion for Summary Decision. In the Motion, the Respondents asserted that the Administrator was required to seek prevailing wage determinations from the DOL’s Employment and Training Administration [ETA], and that the failure to do so removed the case from the jurisdiction of an administrative law judge. The Respondents requested that the proceedings be dismissed or, in the alternative, that the matter be remanded so that prevailing wage determinations could be made. The Administrator filed a response in opposition to the Motion, and I entertained argument on the Motion (via telephone), at a session held on January 21, 2009. By Order dated January 27, 2009, I denied the Respondents’ Motion.

Exhibit 1 is a copy of the initial letter to Ms. Beck, dated January 10, 2006, informing her that the Department was commencing an investigation to determine compliance with H-1B and Fair Labor Standards Act requirements; JX 2 is a copy of the Administrator's Determination letter of March 10, 2008, summarized above; JX 3 is a Form WH-56, "Summary of Unpaid Wages," listing the 156 H-1B nonimmigrants employed by the Respondents by name, period of employment, and amount of back wages the Administrator determined to be due. I admitted these items into evidence at the hearing. Hearing Transcript ("T.") at 5.

At the hearing, I admitted Respondent's Exhibits ("RX") 1 through 3 and Administrator's Exhibits ("A") A-1 through A-156; A-158 through A-162, and A-164.⁵ T. at 6, 158; T. at 140, 156, 162, 164, 165. The Agency withdrew Exhibit A-163. T. at 164. I did not admit Agency Exhibits A-165 and A-166. T. at 173.

Respondent's Exhibits 1 and 2 are the affidavits of Jimmy Santos and Matthew Lang; RX 3 is an extract from a Department of Labor "Field Operations Handbook" dated 4/17/2006, paragraph 71d, titled "Enforcement Issues."

Exhibits A-1 through A-156 are separate folders; each folder contains documentary evidence relating to one of the 156 H-1B nonimmigrants whose employment is at issue in this case. Each folder contains the following: copies of information pertaining to the LCA (and the LCA itself if available); information received from the United States Citizenship and Immigration Services ("USCIS"), including a copy of I-797 (petition approval document), and the date of the individual's entry into the United States, if available; and a spreadsheet containing the Administrator's calculations of the amount of back wages the Respondents owed to the employee.

Exhibit A-158 is a Form WH-56, "Summary of Unpaid Wages," alphabetically listing the 156 H-1B nonimmigrants employed by the Respondents, and including in each entry the period of employment and gross amount due, as calculated by the Administrator's investigators, principally Ms. Mary Dodds, who testified at the hearing.⁶ Exhibit A-159 is a printout from the website of the Department of Labor's Employment and Training Administration ("ETA"), listing prevailing wages for physical therapists in New York, New York, for the years 2002 through 2005. Exhibit A-160 is a listing of the Employer's payroll deduction codes; A-161 is a spreadsheet containing information obtained from USCIS; A-162 is a copy of the employer's public access files, and contains 44 pages of documents; A-164 is a copy of APMI's brochure advertising employment opportunities for physical therapists in the H-1B program.

⁵ Exhibit A-157 is not identified in the trial transcript. It is a large three-ring binder containing copies of the spreadsheets of back wage computations involving each of the 156 H-1B nonimmigrants (extracted from Exhibits A-1 through A-156, the folders pertaining to each individual). I informed the parties that I would not consider or use the binder, and I did not admit it into evidence. T. at 158-59. At the hearing, I informed the parties that I would consider USCIS [United States Citizenship and Immigration Services] documents included in some of the Administrator's Exhibits, A-1 through A-156, to be of limited value and weight. T. at 162-63.

⁶ Exhibit A-158 is a duplicate of JX 3.

Issues

Based on the assertions the parties made at the hearing and the parties' filings, including their post-hearing briefs, I find the issues to be determined are as follows:

- Were the methods by which the Administrator determined the applicable prevailing wages sufficient, in accordance with the regulation?
- In computing back wages, did the Administrator properly determine the employment availability dates for the H-1B nonimmigrants?
- Was the Administrator's determination that all deductions the Respondents made for loan repayment or recoupment of administrative expenses (such as recruitment fees and loans) should be construed as nonpayment of wages, and thereby included in the assessment of back wages due, in accordance with the regulation?
- Was the Department's assessment of back wages owed to the 156 H-1B nonimmigrant employees, based on the documentary evidence available, in accordance with the regulatory requirements and standards?

Testimonial Evidence

Affidavit of Jimmy Santos. RX 1.

Mr. Santos is the corporate counsel for the Respondent APMI, and has served in that capacity since March 2006. In his affidavit, Mr. Santos stated that he met with Ms. Dodds, the Administrator's investigator, on one occasion, when she and a second DOL [Department of Labor] investigator came to APMI's offices to inspect its public access files. He indicated he also had "a few" conversations with Ms. Dodds and the other investigator.

Mr. Santos stated that, to the best of his recollection, at no time did Ms. Dodds or the other investigator discuss any issue regarding prevailing wages set forth in the LCAs submitted to the DOL during its investigation; nor did they discuss with him any issue regarding the methodology for determining the correct prevailing wage rates for any of the LCAs; nor did they address whether the Respondents would agree or acknowledge that some of the prevailing wage rates on any LCAs were wrong, or that DOL could use OES [Occupational Employment Statistics] surveys to determine correct prevailing wage rates.⁷

Affidavit of Matthew J. Lang. RX 2.

Mr. Lang is an attorney associated with the law firm that represented the Respondents from March 2007 to approximately March 2008. His affidavit was submitted in response to assertions made by Ms. Dodds in an affirmation dated January 2009, submitted in support of the Administrator's position on the Motion for Summary Judgment. According to Mr. Lang, Ms.

⁷ See <http://stats.bls.gov/oes/home.htm> for the Occupational Employment Statistics home page.

Dodds stated in her affirmation that when she brought discrepancies between prevailing wages listed on certain LCAs and the OES wage surveys that Respondents listed as their wage sources to his attention, he acknowledged that the correct prevailing wage was set out in the OES wage surveys, and explained the inconsistency as a “mistake.” In the affidavit, Mr. Lang stated that, contrary to Ms. Dodds’ assertion, to the best of his recollection, he never made any acknowledgment as to correct prevailing wages, nor gave any opinion regarding the accuracy of the prevailing wages listed in LCAs. He also stated he had no recollection of explaining any inconsistency as a mistake. Mr. Lang further stated he disputes an inference that he agreed to or approved the way in which Ms. Dodds computed the prevailing wage or calculation of back wages.

Mary Pat Dodds

Mary Dodds, a retired regional enforcement coordinator of the Wage and Hour Division, U.S. Department of Labor, testified at the hearing on behalf of the Administrator as Prosecuting Party. She stated that she was the principal investigator of the allegations against the Respondents. In that capacity, she stated, she followed the usual procedures, which included meeting with the employer; requesting and examining records; dealing with other agencies as appropriate, principally the fraud detection unit of USCIS; and interviewing employees. T. at 8-10.

Ms. Dodds stated that she received documents from APMI during her investigation. She stated that she did not receive copies of all the LCAs that had been filed, but was able to retrieve copies of some from the Department of Labor’s ETA [Employment and Training Administration] internal website.⁸ Ms. Dodds testified that she received a spreadsheet from USCIS, which indicated for the employees the dates of H-1B status; LCA numbers; dates of entry into the United States; and dates of revocation or denials of LCA petitions. T. at 10-14.

The witness stated that under § 655.760 of the regulation, an employer of H-1B nonimmigrants is required to maintain specific documents for public inspection. In addition, she testified, the regulations require an employer to maintain documents for inspection by the Department of Labor. Ms. Dodds testified that APMI did not maintain all of the required documents. For example, she said, many of the petition packages were missing and there were no public access files. She stated that the only records that APMI was “100 percent on” payroll records. T. at 15-17.

Using the exhibit pertaining to a specific H-1B nonimmigrant, Elsa Arbilo (Exhibit A-11), Ms. Dodds then explained the methods she used to compute back wages. She explained that an intern under her supervision created a spreadsheet form. A separate spreadsheet was created for each individual employee, and data from available records was entered. In addition, a folder was created for each individual employee, and available documents relating to the individual were placed in the folder. Ms. Dodds testified that the spreadsheet contained an entry regarding the availability date, which was the initial date the employee was required to be paid. She stated this date depended on whether the individual was already in the United States when the LCA was

⁸ See <http://www.doleta.gov> for the ETA home page.

approved. Ms. Dodds stated the individual exhibit folders contained copies of each employee's LCA, payroll records, and form I-797 (petition approval document), if available. T. at 17-21.

Regarding the computation of back wages, Ms. Dodds stated that she first established the applicable start date, based on the individual's status; if this start date fell during the middle of a pay period, she presumed that APMI's obligation to pay the individual began with the inception of the next pay period. As to the required wage, Ms. Dodds stated that some of the LCAs cited a correct source on the ETA website, but an incorrect prevailing wage. She remarked: "And it's a dead giveaway to investigators when they see three zeros at the end of a wage ... because there are no even rates." In those cases, she testified, she used the correct prevailing wage, as stated on the ETA's website, at FLCdatacenter.com, for the applicable occupation and year in the appropriate county. T. at 21-24.

Ms. Dodds stated that she discussed incorrect wage rates with APMI representatives Matt Lang and Jimmy Santos and told them back wages owed would be computed based on the correct LCA rates. She said she told them of instances they had used an "obviously incorrect rate based on the source that they had listed on their... LCA ... that we would be computing and using the correct rate because we determined it, and we had also identified LCAs with the same source that had used the correct rate." She stated that they did not dispute her, and never told her that they had used a different source document for prevailing wages, and never brought forth different source documents for prevailing wages. T. at 25.

The witness indicated she compared the prevailing wages shown on LCAs that were found or recovered with the proper OES survey, and if the rates did not agree, she used the proper rate, based on the year the LCA was filed. She stated that for some employees she was unable to find the LCA, and APMI was unable to provide a copy. In those cases, she testified, she calculated the prevailing wage based on the availability date of employment, which was computed based on the I-797, and was conservative in her approach.⁹ For example, she stated, for persons who started working early in a calendar year, she used the prevailing wage for the prior year rather than the current year. T. at 26-29.

Ms. Dodds discussed APMI's payroll records, and stated she used the firm's records of payments made to employees and deductions taken. She stated that the firm recorded deductions made for "loans" and "miscellaneous." Ms. Dodds stated that some of the "miscellaneous" deductions were taken for a "recruitment fee," based on information provided by APMI. She stated APMI indicated the recruitment fee was to cover the employer's costs. Ms. Dodds stated the required weekly wage on the spreadsheet was computed by dividing the applicable annual prevailing wage by 52 (based on 52 weeks in a year). T. at 29-31.

"Benching," Ms. Dodds testified, was a period during the employee's employment when the individual was not paid. Ms. Dodds stated that if an individual's availability date fell in the middle of a pay period, and the individual was not being paid, she computed the benching from the inception of the next pay period. Ms. Dodds stated that the employer is liable for paying an

⁹ Ms. Dodds referred to the Form I-797, the LCA petition approval document, as "the 797". T. at 27, 28.

employee, except for periods when the employee has absented himself or herself for non-work reasons, such as a vacation. She stated that an employee's absence for work-related reasons, such as studying for licensing examinations, requires the employer to pay the required wage. She stated she spoke about this issue in a meeting with several representatives of APMI, and was told that some employees requested time off to study for examinations or to travel and did not want to start work immediately. Ms. Dodds testified that she requested documents to establish that the employees had requested time off, and none were provided. T. at 31-34.

Ms. Dodds testified that, prior to March 8, 2005, an employer was required to pay only 95% of the applicable prevailing wage, but after that date the regulations changed and employers were required to pay the full amount. She stated that in circumstances where the employer was deficient in paying employees, she computed the employer's liability to be 100% of the required wage. She stated deductions made for "loans" and "miscellaneous" were added back in when computing the wages due. In circumstances where an individual's H-1B status was revoked but the person remained on the payroll, Ms. Dodds testified, she did not compute any back wages after the revocation date, because the person was no longer covered under the H-1B program. T. at 34-38.

On cross-examination, Ms. Dodds acknowledged that the approval date for the LCA is reflected on the I-797 form, and conceded that it is possible for the date of approval to be before an individual entered the United States.¹⁰ When the individual is not yet in the country, she stated, an employer is not obligated to pay the employee. Regarding persons whose H-1B status had ended, Ms. Dodds stated that APMI's president sent requests for revocations to the appropriate authorities. She also stated that APMI never presented her with any documentation to establish that the prevailing wages it used in some cases were valid prevailing wages. Specifically, she stated, APMI did not indicate that the rate it used was other than an OES rate or that it used a source other than OES. She stated that the field operations handbook permits her to request that ETA determine a prevailing wage when no valid prevailing wage or source has been provided, but does not require it. She testified that APMI provided a valid source for prevailing wage rates, but did not use the correct rate from that source. Ms. Dodds acknowledged that paragraph 71(d)(6)(A) of the handbook states that if the employer refuses or produces a prevailing wage source that does not satisfy the regulatory requirements or refuses to apply the appropriate prevailing wage level, then a prevailing wage rate must be obtained from ETA. She stated that the Respondents never disputed her contention that they used a valid source but an incorrect rate. She also stated: "In this case, it would have been a colossal waste of everyone's time and resources where the employer had just misstated the rate ... where they had stated it correctly on some LCAs and just totally ignored it on others by stating a rate that they got from nowhere and yet claiming it came from a valid source." T. at 38-49.

Ms. Dodds stated that where an employer objects and asserts it used a correct rate, she is willing to go to ETA for a determination whether the rate is correct. She reiterated "there must be a dispute before we go to ETA. And in this case, no dispute issue was ever raised." She stated she was not required to provide any notice to an employer that it had the opportunity to

¹⁰ I permitted cross examination after the witness' direct examination on each illustrative case.

dispute the issue, and she said that she “came up with the wage that should have been listed on the LCA based on the source the firm listed.” T. at 49- 51.

On my questioning, Ms. Dodds stated that, in making back wage calculations, she presumed that an employee might have a voluntary absence of two weeks per year for vacation. She also stated that she did not give credits against wage underpayments in prior or later pay periods in instances where employees were paid more than the required wage in other pay periods, but also remarked that she gave credit in instances where the records indicated the individuals were paid “biweekly” [meaning once every two weeks]. She clarified that the Respondents generally paid the employees once per week. Regarding the source for the prevailing wage, Ms. Dodds said that in most cases APMI used OES, and in some instances used SESA (state employment security agency), and that the SESA wage was the same as the OES wage. She also clarified that all the payroll information used in the spreadsheets came from APMI. T. at 53-58.

Taking a second illustrative exhibit, pertaining to Mary Grace Bagaporo (Exhibit A-16), Ms. Dodds discussed the circumstance where APMI had used the proper prevailing wage from OES on the LCA. She stated this employee had started working for APMI prior to the start of the period under investigation, which was October 2003, and explained she did not compute any liability for back wages before the inception date of the investigatory period. Ms. Dodds indicated the records reflected this employee was paid less often than weekly, so liability for back wages was computed based on the aggregate payments. She stated she discussed this issue with Mr. Lang, who confirmed that some paychecks were intended to cover more than one week. Ms. Dodds stated that she inferred that deductions for \$42.50 or multiples thereof were for insurance, which she determined to be a permitted deduction. She stated that deductions for recruitment fees were generally under the “loan” column in the payroll records, and she identified a listing of deduction codes that the employer provided (Exhibit A-160). She stated APMI did not deny that deductions other than for insurance were for recruitment fees. T. at 67-76.

On cross-examination, the witness was asked about a week in which the employee was paid \$1,057.50, but \$100 was deducted. She conceded the amount paid was more than the prevailing wage of \$825 per week, and conceded the employee’s net pay also exceeded the prevailing wage amount. Ms. Dodds agreed that an employer must compensate at least at the required wage rate, which is at the actual wage or prevailing wage, whichever is higher, and also agreed that deductions which bring an individual below the required wage are unlawful. Ms. Dodds did not agree that the employee in this instance received more than the actual wage, and did not agree that the actual wage and the wages paid were different. She stated: “Here’s what our position is. In cases where the gross pay was less than the prevailing wage, the prevailing wage was the required wage rate. In cases where the actual gross wage was higher than the prevailing wage, that was the required wage rate.” T. at 76-84.

On my questioning, the witness clarified that the employees were paid on an hourly rate, so their weekly pay could vary, depending on how many hours they worked. On re-direct examination, Ms. Dodds clarified that she determined that the recruitment fee was an impermissible deduction, notwithstanding the amount paid the employee. She clarified that she

did not intend to say that, in the case of this employee, \$1,057.50 was the actual wage, but rather the hourly rate at which she earned a total of \$1,057.50 was the actual wage. She also stated that the hourly rate was computed based on the yearly prevailing wage, divided by 2080 [the number of work hours in a standard year]. In addition, she stated that the hourly pay rate for this employee was not entirely consistent. T. at 85-91.

As to the third illustrative case, pertaining to Marciana Berdin (Exhibit A-25), Ms. Dodds testified that most, but not all, of the H-1B nonimmigrant employees of APMI were employed as physical therapists. She stated that some of the "entry dates" [into the United States] were obtained from USCIS. She reiterated that, for persons already in the country when the LCA period started, the availability date was presumed to begin 60 days after the date of the LCA approval. As to this employee, Ms. Dodds testified that APMI did not give any explanation why she did not receive wages beginning at the eligibility date. Ms. Dodds also stated that she prorated a one-time payment of \$2,100 to the employee over three weeks, because deductions taken at the same time appeared to cover three weeks at \$50. Ms. Dodds stated that this employee received a raise to \$770 per week, and she then considered that figure to be the actual wage, and she also determined that APMI continued to owe back wages, to compensate for the recruitment fee deduction. T. at 92-99.

On cross-examination, Ms. Dodds stated that in instances where there is no U.S. worker's wage as reference for the actual wage, the actual wage becomes what is paid to the H-1B worker, without deductions. In this case, where the worker was an accountant, there was no comparable U.S. worker population, so therefore the actual wage was \$770 per week, which APMI paid. On re-direct examination, Ms. Dodds stated that her recollection was that accountants were paid on a salary basis, and that a \$50 deduction from a salary of \$770 would be under the prevailing wage, but would have been within the five percent tolerance permitted under the regulation prior to March 2005. On re-cross examination, Ms. Dodds stated that she considered all miscellaneous deductions as recruitment fees, based on statements from the employer and instances in which the recruitment fee appeared in an employee's contract. She acknowledged that an employee who was paid \$770 and had \$50 deducted was receiving more than 95% of the prevailing wage. T. at 99-106.

Regarding the fourth illustrative case, pertaining to May Crisostomo (Exhibit A-43), Ms. Dodds testified that the employee's LCA was approved in September 2003, but she did not enter the country until July 13, 2004, and this information was obtained from USCIS. In this case, Ms. Dodds stated, she computed the employee's availability date as August 12, 2004, 30 days after her entry. She stated that this employee did not appear on the payroll until September 2004, and the employer's general explanation for failing to pay employees beginning at their availability date was the employees needed time off to study for their licensing examination. Ms. Dodds noted that she did not receive information about the termination of the employee's H-1B status until after she had compiled wage information, and she noted that this employee's H-1B status was revoked before the LCA termination date. T. at 107-113.

On cross-examination, Ms. Dodds conceded she did not receive information on the location at which employees entered the United States, and stated that if she knew the employee was not available for work because the employer had not been contacted, she gave credit for that

time period. However, she also stated, the Department's position is that employees must be paid when they make themselves available for work, or not later than the 30 day or 60 day mark, depending on whether they are in the country on the LCA approval date, unless it is established that they requested not to work. She also acknowledged she is not sure whether an employer knows when an employee enters the country. Regarding the jobs at which employees worked, Ms. Dodds stated the Department would enforce the prevailing wage rate for the job for which the nonimmigrant was to be employed. Ms. Dodds clarified that the revocation date on which she based her computations was the date USCIS considered the employee's H-1B status to be terminated, based on data received from USCIS, and conceded the date the employer received notification of the revocation may not be known. T. at 108-119.

Regarding the next illustrative case, pertaining to Djoanna Enero (Exhibit A-58), Ms. Dodds testified that she was unable to obtain a copy of the LCA. However, because the employee was in the country on the date the LCA was approved, she computed the availability date to be 60 days from the date of approval. Because the individual's status as an APMI employee began in October 2003, Ms. Dodds testified, she presumed the LCA was based on the 2003 rate as a physical therapist, and she used that rate in her calculations. T. at 119-125.

Regarding the next illustrative case, pertaining to Jordan Ignacio (Exhibit A-74), Ms. Dodds testified that the employee was out of the country when the LCA was approved, so the availability date she used was 30 days after the date of entry into the United States, July 2, 2004, which was obtained from USCIS. However, APMI did not pay the employee until January 2005, and did not provide any explanation for nonpayment. Ms. Dodds acknowledged that this employee was paid at a rate higher than the prevailing wage rate, and stated the required wage for this employee was the actual wage, which was "whatever the hourly rate he got that resulted in this amount of money." Ms. Dodds acknowledged that the records before her did not include an hourly rate, and she recalled that the employer's payroll records may not have shown the hourly rate. Ms. Dodds stated that deductions were taken from the employee's wages, and she considered those deductions as back wages due, because they reduced his wage below the actual wage, which was the required wage. She also stated that it appeared that some payments for this employee were intended to cover time periods of more than one week. T. at 125-28.

On cross-examination, Ms. Dodds admitted there was no confirmation from USCIS as to where the employee entered the country, and conceded that she did not have a copy of the employee's employment contract. She also conceded that she determined that the wage paid before deductions was the actual wage, and, therefore, deductions were disallowed because they reduced the wages paid below the actual wage. T. at 129-32.

On my questioning, Ms. Dodds clarified that the employee's actual wage was the hourly rate. She stated that once the employees received their licenses and started working as physical therapists, the employer converted them to hourly wages, which then became their actual wage. She stated she inferred when the employees received their licenses based on when they received raises. On re-direct examination, Ms. Dodds reiterated that the employer did not provide any information about why employees were not paid, other than a general statement that the employees took time off to study for their licenses. T. at 132-135.

As to the last illustrative case, pertaining to Jesusa Ramos (Exhibit A-116), Ms. Dodds testified she did not initially have the employee's LCA, but later received it by downloading it from the internal ETA website. Because the employee was in the United States when the LCA was approved, Ms. Dodds stated, she determined the availability date for employment was in May 2004, which was 60 days after the approval date. However, the individual did not appear on the employer's payroll until November 2004, and the employer did not provide any information as to what the employee was doing from May to October 2004. Ms. Dodds stated that the employee's wages increased in April 2005, and she continued to assess back wages, based on reductions for recruitment fees, because she concluded the amount paid to the employee was the actual wage. Ms. Dodds stated that she gave the employer credit for vacation time and did not compute back wages for four weeks. T. at 135-39.

On cross-examination regarding other employees, not previously discussed, Ms. Dodds stated that even if the required wage were based on 95% of the prevailing wage (where the LCA was filed before the regulatory change date), back wages were calculated based on 100% of the prevailing wage. T. at 143-46.

Ms. Dodds stated that the Respondents' violations were classified as willful, because "extreme reckless disregard had been shown in the way employees were paid." Ms. Dodds stated APMI employed hundreds of H-1B employees, and was careless in the way employees were put on the payroll and the way they were paid. In addition, testified Ms. Dodds, at one point APMI was told the deductions taken from the employees were not proper, but these deductions nevertheless continued. Ms. Dodds stated that, to her knowledge, Ms. Beck signed all of the LCAs, and made the attestations that were required on the LCA forms. Regarding the manner in which civil money penalties were computed, Ms. Dodds stated that the maximum penalty for a willful violation is \$5,000, which is interpreted as per affected employee. She stated the department started with a base amount of \$2,500 and then raised it to \$2,750 per employee. T at 140-42.

Regarding the failure to post notice of the LCA filings, Ms. Dodds stated she discussed this violation with APMI, who had no explanation or defense. She said no civil money penalty was assessed for this violation. She stated the employer was assessed a civil money penalty of \$5,000, representing a penalty of \$500 for each instance in which APMI's suits against employees who had ceased employment prior to the agreed-upon termination date were still pending. Ms. Dodds stated that the employer's contracts with the employees stated that a penalty would be assessed for early termination of employment, and indicated such a contract provision was not permitted under the regulation. On cross-examination, Ms. Dodds agreed that a liquidated damages clause could cover losses to the employer. She stated that, in this case, she considered whether the early termination penalties in the contracts could be construed to be permissible liquidated damages clauses, and determined they were not. On re-direct examination, Ms. Dodds confirmed that the penalty clauses in the contracts were flat amounts, and did not take into consideration how much of the contract that had been performed. T. at 142-52.

Ms. Dodds testified APMI did not have any files available for public inspection, as the regulation required, until the end of the investigation. She stated the employer submitted some

sample files. She stated she considered this violation serious enough that a civil money penalty of \$500 per employee, or a total of \$78,000, was assessed. She stated the lack of public access files impeded the department's investigation. On cross-examination, Ms. Dodds stated that there were no public access files for any of the 156 H-1B nonimmigrant employees, and acknowledged there were no LCAs on file for about 39 of them. Ms. Dodds testified that no civil money penalty was assessed for failure to cooperate in the investigation, or for failure to establish valid prevailing wage rates. T. at 152-154.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statutory and Regulatory Framework

The Act's H-1B visa program permits American employers to temporarily employ nonimmigrant aliens to perform specialized occupations in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Act defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. § 1184(i)(1). To hire an H-1B nonimmigrant alien, the employer must first receive permission from the U.S. Department of Labor ("DOL"). To receive permission from the DOL, the Act requires an employer to submit a Labor Condition Application ("LCA") to the DOL. § 8 U.S.C. 1182(n)(1).

The Department has promulgated detailed regulations which provide requirements implementing the statutory provisions. These requirements include provisions covering the determination, payment, and documentation of required wages. 20 C.F.R. Part 655, subpart H. Under the regulation, an employer's LCA must include, among other things, the occupational classification for the proposed employee; the actual wage rate; the prevailing wage rate and the source of such wage data; and the period of employment. §§ 655.730-734.

As defined in the regulation, a wage rate is the compensation an H-1B employee will be paid stated in terms of amount per hour, day, month or year. § 655.715. The regulation requires that an employer pay H-1B nonimmigrants at the "required wage rate." This rate is defined as the greater of: (1) the "actual wage rate," defined as the rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the "prevailing wage," defined as the wage rate for the occupational classification in the area of employment, at the time the LCA is filed. § 655.731(a). If there are other employees with the same qualifications and experience as the H-1B workers, the actual wage is the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage is the wage paid to the H-1B nonimmigrant worker by the employer. § 655.731(a)(1). The employer may obtain prevailing wage information from any of a variety of sources such as the state employment security agency (SESA), an independent authoritative source, or some other legitimate source. Thus, the regulation permits an employer some latitude in determining the source for the prevailing wage rate. § 655.731(a)(2).

The regulation requires that employers pay their H-1B workers, effective on the date on which the worker "enters into employment" with the employer. § 655.731(c)(6). Workers are considered to "enter into employment" when they first make themselves available for work or

otherwise come under the control of the employer, such as by waiting for an assignment or reporting for orientation. § 655.731(c)(6)(i). Even if a worker has not entered into employment as described above, if an LCA has been approved, the employer must pay the required wage beginning 30 days after a worker is first admitted into the U.S. pursuant to the LCA petition; if the worker is already in the U.S. on the date the LCA petition is approved, the employer must pay the required wages starting 60 days after the date the worker becomes eligible to work for the employer. A worker is considered to be “eligible to work for the employer” upon the date of need set out in the approved LCA petition, or the date of the adjustment of the nonimmigrant’s status by DHS, whichever is later. Matters such as the requirement to hold a state license are immaterial to the determination of an eligibility date. § 655.731(c)(6)(ii).

Once the employment period begins, the employer is required to pay an H-1B employee the required wage at the full time rate for any time that is non-productive, due to a decision by the employer. Employer-determined nonproductive time, or “benching,” can result from factors such as lack of available work or lack of the individual’s license or permit. 8 U.S.C. § 1182(n)(2)(C)(vii); § 655.731(c)(7)(i). An employer need not pay wages for H-1B workers in nonproductive status due to conditions unrelated to employment which take them away from work at their own convenience or request (e.g., touring), or which render them unable to work (e.g., maternity leave, temporary incapacitation due to accidental injury). § 655.731(c)(7)(ii).

Once the employment has begun, an employer need not compensate a nonimmigrant after it has effected a “bona fide termination” of the employment relationship. § 655.731(c)(7)(ii). To terminate the obligation to pay an H-1B employee, the employer must notify the Department of Homeland Security (“DHS”), the successor agency to the Immigration and Naturalization Service (“INS”), that it has terminated the employment relationship so that DHS may revoke approval of the H-1B visa. 8 C.F.R. § 214.2(h)(11); § 655.731(c)(7)(ii).¹¹ As the Administrative Review Board has held: “The employer does not effect a ‘bona fide termination’ and, therefore, end its obligation to pay the required wages to the H-1B employee unless the employer has also notified the INS, so that the INS can cancel the H-1B employee’s visa.” Amtel Group of Florida, Inc. v. Yongmahapakorn, Case No. 04-08, (ARB: Sept. 29, 2006), slip op. at 11.

Under § 655.731(c)(2), the required wage must be paid to employees, cash in hand, free and clear, when due, except that certain authorized deductions may reduce the cash wage below the level of the required wage. Authorized deductions are listed in § 655.731(c)(9). Any authorized deduction must meet all the criteria listed in one of the following:

- (i) Is required by law (e.g., tax withholding);
- (ii) Is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (e.g., deduction for retirement fund contribution), except that the deduction may not recoup a business expense of the employer; the deduction must have been revealed to the worker prior to the commencement of

¹¹ Under certain circumstances, the employer also must provide the worker with payment for transportation home. 8 C.F.R. § 214.2(h)(4)(iii)(E).

the employment; and, if there are U.S. workers of the employer, the deduction must also be made against their wages; or

- (iii) Is made in accordance with a voluntary, written authorization by the employee; is for a matter principally for the benefit of the employee; is not a recoupment of the employer's business expense, including expenses related to the employer's responsibilities under the H-1B program; is an amount which does not exceed the fair market value or actual cost of the matter covered, whichever is lower (and the employer must document cost and value); and does not exceed the limits for garnishment of wages under federal law.

The regulation specifically provides that any unauthorized deductions taken from an H-1B worker's wages will be considered as a non-payment of that amount of wages, and will result in back wage assessment. § 655.731(c)(11). An employer who willfully makes unauthorized wage deductions may face civil money penalties and/or debarment from the H-1B program. Id.

The regulation also prohibits employers from imposing penalties for early termination of employment by employees, whether by deduction, reduction in wages, or direct or indirect payment. However, the employer may impose liquidated damages for premature termination, provided the liquidated damages meet the requirements of § 655.731(c)(9)(iii), above. Determinations as to whether a payment constitutes an improper penalty or an allowable liquidated damages provision are made in accordance with applicable state law. § 655.731(c)(10)(i)(C).

The regulation requires that an employer of H-1B nonimmigrants must provide notice of the filing of an LCA. The employer is to post notice of filings in two or more conspicuous locations in the employer's establishment in the area of intended employment. The notice shall indicate that H-1B nonimmigrants are sought; state the number of such nonimmigrants the employer is seeking, the occupational classification, the wages offered, the period of employment, and the locations at which the H-1B nonimmigrants will be employed; and indicate that the LCA is available for public inspection at the H-1B employer's principal place of business in the U.S. or at the worksite. § 655.734. Notification must be given on or within 30 days before the date an LCA is filed and remain posted or available for a total of 10 days. § 655.734(a)(1)(ii)(A). In addition, an H-1B employer must make available for public examination the actual LCA and other specified documents at the employer's principal place of business or worksite, within one working day after the date on which an LCA is filed. § 655.760. This regulatory section lists the documentation that must be available for public examination, which include the following: (1) a copy of the LCA; (2) documentation which provides the wage rate to be paid; (3) a full, clear explanation of the system that the employer used to set the actual wage paid; and (4) a copy of the documentation the employer used to establish the prevailing wage for the occupation(s) for which employment for H-1B nonimmigrants is sought.

The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid; debarment of the employer from future employment of aliens; and civil money penalties. §655.810 and §655.855. Under the regulation, back wages due to H-1B workers are defined as the difference between the amount that they should have been paid and the amount that they were actually paid. § 655.810(a).

Under the regulation, a civil money penalty up to \$1,000 per violation may be assessed for early termination penalties paid by employees and for violations of the requirements pertaining to public access (§ 655.760). § 655.810(b)(1). Penalties up to \$5,000 per violation may be assessed for willful failures pertaining to wages or working conditions, or willful misrepresentation of material fact on an LCA. § 655.810(b)(2). Willful failure is defined as “a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sections 212(n)(1)(A)(i) or (ii), or 212(t)(1)(A)(i), or (ii) of the INA, or §§ 655.731 or 655.732.” § 655.805(c); see also McLaughlin v. Richland Shoe Company, 486 U.S. 128, 133-135 (1988). In determining the amount of a civil money penalty to be imposed, the Administrator shall consider the type of violation and other relevant factors and may apply, among other things, the factors listed in § 655.810(c), which include the employer’s previous history; the number of workers affected; the gravity of the violations; the employer’s explanations and efforts at compliance; and the extent to which the employer achieved financial gain due to the violation.

Under 20 C.F.R. § 655.840(b), an Administrative Law Judge has the authority to affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.

Findings of Undisputed Fact

Based on the stipulations of the parties, as well as the documentary and testimonial evidence, I find the following undisputed facts:

1. The Administrator’s investigator, Ms. Dodds, was the principal official who conducted the investigation. Among other things, she gathered documentary evidence relating to the 156 H-1B nonimmigrants on whose behalf back wages were sought, and compiled this documentary evidence into Exhibits A-1 through A-156, each exhibit pertaining to one individual. This evidence contains the complete available record of payment of wages for which the Respondents have been credited, for each employee. Stipulations, paras. 3, 5, 6; T. at 15.
2. The Respondents’ files do not contain LCAs for all of the 156 nonimmigrant employees.¹² T. at 15.
3. The Administrator’s investigator received information regarding the Respondents’ employees from USCIS on their entry dates into the U.S., and the dates that LCAs

¹² The parties stipulated that the Respondents failed to produce records required to be maintained under § 655.760(a) for approximately 39 of the individuals. This regulatory provision includes requirements that other documents, in addition to the LCAs, be maintained. Stipulations, para. 22.

were terminated or revoked. This documentary evidence is the best available evidence of the dates on which each of the 156 H-1B nonimmigrants became available for work and on which the Respondents' obligation to pay the employees terminated (either by revocation or expiration of the LCA). Stipulations, paras. 7, 8; T. at 20-21; 38. See also T. at 113, 117-18.

4. The combination of documentary evidence provided by the Respondents and USCIS provides the best available evidence from which back wages owed to the 156 H-1B nonimmigrants can be computed. Stipulations, para. 9.
5. As the parties stipulated, Respondent Marissa Beck, in her individual capacity, is the sole shareholder, director, and executive of APMI and, as such, she exercised complete dominion and control of the actions of APMI, including actions relating to the hiring of employees, payment of wages, and filing and revoking LCAs. Based on her actions and New York's "alter ego" doctrine of piercing the corporate veil, Ms. Beck can be held jointly and severally liable in her individual capacity for any back wage or civil money penalty assessed against APMI. Stipulations, para. 10.
6. As the parties stipulated, the Respondents failed to produce sufficient evidence they had complied with the requirements of § 655.734, regarding posting of notices pertaining to LCA applications. Stipulations, para. 17.
7. The contracts the employees were required to sign provided that the employees would work for three years and would be liable for between \$5,000 and \$10,000 in the event of early termination.¹³ As the parties stipulated, these contract provisions did not contain a reasonable estimate of the economic loss APMI would suffer because of early termination, and they were labeled "Early Termination Penalty." Stipulations para. 19; T. at 105.
8. As the parties stipulated, APMI filed lawsuits against some of the employees, seeking to enforce the early termination provision in the contracts. Although it dropped some of the suits, 10 suits were still pending at the time the Administrator issued the determination letter in March 2008. Stipulations, para. 19.
9. As the parties stipulated, during the investigation, the Respondents failed to produce sufficient evidence for the Administrator to determine they had complied with the requirement of § 655.760, that records be available for public inspection. Stipulations, para. 21.
10. During the investigation, the DOL requested the Respondents produce many documents related to the employment of the 156 H-1B nonimmigrant employees,

¹³ Based on my review, I find the record does not contain contracts for all of the 156 H-1B nonimmigrants.

including LCAs and supporting prevailing wage data. The Respondents' records were incomplete, and therefore the Respondents were unable to respond fully to the Administrator's investigator.¹⁴ Stipulations, para. 26; T. at 13-15.

11. As the parties stipulated, in preparing LCAs, the Respondents were required to determine a valid prevailing wage, using one of the methods set out in the regulation at § 655.731(a)(2).¹⁵ Stipulations, para. 29.
12. As the parties stipulated, based on the willfulness of the Respondents' violation, and applying the mitigation factors in § 655.810(c), the Administrator's assessment of a Civil Money Penalty of \$429,000, with respect to back wages owed to the 156 H-1B nonimmigrant employees was reasonable.¹⁶ Stipulations, para. 15.
13. As the parties stipulated, based upon the willfulness of the violation, the Respondents should be disqualified from approval of any H-1B petitions for a period of two years. Stipulations, para. 16.
14. As the parties stipulated, based on the Respondents' violation of the regulatory requirement prohibiting assessment of a penalty against employees for early termination of employment, and applying the mitigation factors in § 655.810(c), the Administrator's assessment of a Civil Money Penalty in the amount of \$5,000 was reasonable. Stipulations, para. 20.
15. As the parties stipulated, based on the Respondents' violation of the requirement to maintain documents and files for public inspection, and applying the mitigation factors set out in § 655.810(c), the Administrator's assessment of a Civil Money Penalty in the amount of \$78,000 was reasonable. Stipulations, para. 23.

Discussion of the Evidence, and Additional Findings of Fact

Prevailing Wage Determinations

Prior to the hearing, on January 7, 2009, the Respondents filed a Motion for Summary Decision. In the Motion, the Respondents stated that it was undisputed that the Administrator's investigator, Ms. Dodds, did not go to ETA for prevailing wage determinations for some of the 156 H-1B nonimmigrant employees. The Respondents requested that the proceedings as to these

¹⁴ As the parties stipulated, the Respondents relied on outside counsel to maintain these items, and outside counsel failed to produce them, after repeated requests. Stipulations, para. 26.

¹⁵ As the parties stipulated, the LCAs were prepared by the Respondents' outside counsel, upon whom the Respondents relied, and outside counsel did not provide evidence of how prevailing wage amounts were determined on the LCAs, despite the Respondents' requests. Stipulations, para. 30.

¹⁶ The parties' stipulations mistakenly cite § 655.805(c) as the regulatory provision listing the mitigation factors.

individuals be dismissed. In the alternative, the Respondents requested that the matter be remanded to the Administrator, so that prevailing wage determinations could be made, as mandated by the regulation. The Administrator opposed the Respondents' Motion, and submitted an affidavit from Ms. Dodds. By Order dated January 27, 2009, I denied the Respondents' Motion.

At the hearing, Ms. Dodds testified in greater detail regarding her investigation of the LCAs pertaining to the 156 nonimmigrants at issue in this case.¹⁷ Ms. Dodds stated that the Respondents did not maintain a copy of every LCA, but she was able to retrieve some from the ETA's website. T. at 10-11. Ms. Dodds also testified that some of the LCAs she obtained cited a correct source but what she knew to be an incorrect prevailing wage, and in those cases she used the correct prevailing wage, as stated on the ETA website, for the applicable occupation and year in the appropriate county. T. at 21-24. She also stated that in those instances in which she was unable to find a copy of the applicable LCA, she used the prevailing wage based on the employee's start date, which she took to be the date on the form I-797 indicating approval of the LCA. She stated she was conservative in her approach, in that she generally used the prevailing wage for the year prior to the start date, based on a presumption that was the year the LCA was submitted. T. at 26-29.

At the hearing, Ms. Dodds also testified that she discussed the incorrect wage rates with APMI representatives, Mr. Santos and Mr. Lang, and told them back wage assessments would be computed based on correct rates. She said they did not dispute her, never told her they used a different source document for prevailing wages, and never brought to her a different source document for prevailing wages. T. at 25. The Administrator submitted, as an exhibit, an extract from the ETA website, (www.doleta.gov), showing OES/SOC prevailing wages for physical therapists for "New York NY PMSA" for the calendar years 2002 to 2005. These annual rates are, respectively, \$42,910; \$44,554; \$45,386; and \$46,966.¹⁸ Exhibit A-159.

At the hearing, the Respondents submitted additional evidence pertaining to this issue. Respondents' Exhibits 1 and 2 (RX 1 and 2) are affidavits from attorneys who represented APMI. Both of these individuals, Mr. Santos and Mr. Lang, denied that they conceded that the LCAs contained errors regarding prevailing wage rates, and both stated they did not acquiesce in the process Ms. Dodds used to determine applicable prevailing wages. RX 1, 2.

The Respondents continue to assert that the procedure Ms. Dodds used to determine the applicable prevailing wage was, in some instances, inadequate and inconsistent with the regulation's requirements. Specifically, the Respondents assert that the Administrator failed to follow the procedure required under § 655.731(d) for determining the correct prevailing wages, and they contend the regulation requires that the Administrator go to the Department's

¹⁷ In this Decision, I have relied on Ms. Dodds' hearing testimony and have disregarded her affidavit.

¹⁸ The wages cited are the "level 1 wage." The record does not indicate that any of the 156 nonimmigrants was eligible to be paid at a level higher than level 1. Exhibit A-159 also listed hourly rates. These are as follows: 2002 -- \$20.63; 2003 -- \$21.42; 2004 -- \$21.82; 2005 -- \$22.58.

Employment and Training Administration (ETA) to obtain proper prevailing wage rates, where the documentation is insufficient for the Administrator to determine the appropriate prevailing wages or the Administrator has reason to believe the rates used by the employer on the LCAs vary substantially from the actual prevailing wage.¹⁹ Respondent's brief at 6-7.

In support of this position the Respondents submitted RX 3, an extract from a Department of Labor "Field Operations Handbook," dated 4/17/2006, paragraph 71d, titled "Enforcement Issues." This document states that "If the ER [employer] is unable to provide a valid source [for prevailing wage documentation], WHI [the Wage and Hour Division Investigator] will obtain the PW [prevailing wage] from ETA." RX 3 at 1. The document also states: "If the ER has failed to establish or document a valid PW rate..., the WHI should request that the ER obtain such rate. If the ER refuses, produces a PW source which does not satisfy the regulatory requirements, or refuses to apply the appropriate PW level (from a PW source providing several levels), then a PW rate must be obtained from ETA. In such a case, ETA will be the final arbiter on PW matters." RX 3 at 2.

As the record reflects and I have found, the Respondents' records pertaining to the 156 nonimmigrant employees were incomplete. Upon examination of the entire record, including the documents relating to each of the 156 H-1B nonimmigrant employees at issue here (Exhibits A-1 through A-156), as well as the parties' stipulations, the testimonial evidence, and the affidavits the Respondents submitted, I find that the prevailing wage determinations, upon which the back pay computations were based, fell into the following categories:

- A record of the LCA was available, and a correct prevailing wage, based on occupation, work location, source document, and year of application, was listed. In these circumstances, the Administrator's investigator, Ms. Dodds, used the data in the LCA. T. at 26.
- A record of the LCA was available, and a prevailing wage with an even rate ("ending in three zeros") was listed. In these circumstances, Ms. Dodds determined that the prevailing wage was not correct, and she substituted correct prevailing wage data from the ETA website. T. at 20-25.
- An LCA was available, and a prevailing wage that was not an even rate was listed. However, the Administrator's investigator did not use the prevailing wage listed on the LCA. I find the record is silent as to why the prevailing wage listed on the LCA was not used in making back pay calculations.
- No LCA was available. In these circumstances Ms. Dodds made back wage calculations based on a presumed prevailing wage. In such cases the prevailing wage used was based on information available in the Respondent's records (such as the employee's date of availability, occupation, and work location). T. at 26-29.

¹⁹ I have considered whether this contention conflicts with the stipulation of the parties (see Stipulations, para. 31). However, as I find it is unclear what the parties intended by the term "validity" in the stipulations, I will consider the Respondents' position, as articulated in the brief. See Respondent's brief at 6-7.

As Ms. Dodds testified, where a correct prevailing wage was listed, she made calculations based on that prevailing wage. Based on my review of the record, I find this circumstance applied to 49 of the 156 H-1B nonimmigrant workers. The names of these individuals are listed in Appendix A. I further find that, for these individuals, there is no dispute that the back wage calculations were based on a correct prevailing wage.²⁰ Consequently, I affirm the Administrator's prevailing wage determinations as to these individuals.

In some instances where the LCA was available and an incorrect prevailing wage listed, Ms. Dodds testified that she knew the prevailing wage was wrong and she substituted a correct prevailing wage, because the prevailing wage the Respondents used was an "even rate," and prevailing wages are never even rates. T. at 22. In these instances, the employer submitted an LCA which correctly reflected the parameters upon which a specific prevailing wage is based, but – for reasons that are not clear from the record – did not enter the correct prevailing wage. Based on my review of the record and the documents relating to each of the employees, I find this circumstance applied to 43 of the 156 H-1B nonimmigrant workers. These individuals are listed in Appendix B. The Administrator's action in substituting the correct prevailing wage, based on the same parameters listed in the LCAs, is a purely ministerial task, akin to correcting typographical errors. I find that such actions were reasonable and proper.

I also find, consistent with Ms. Dodds' testimony, that the Respondent's representatives did not impose any objection to the method she proposed for making back wage calculations, including substitution of prevailing wage data. I find it is not entirely clear, from the record before me, whether Ms. Dodds specifically told the representatives that she would substitute prevailing wage data or informed them of the reasons for such actions. In light of the Administrator's broad discretion to determine applicable prevailing wages, I find that the Administrator's actions were reasonable, as to those instances in which the Administrator was merely substituting a correct prevailing wage for an incorrect one, using the parameters set out in the LCAs. Consequently, I affirm the Administrator's prevailing wage determination for these individuals.

More problematic are situations where no LCA was available. Ms. Dodds testified that in such instances she made calculations based on an appropriate prevailing wage. T. at 26-29. Based on my examination of the record, it appears that Ms. Dodds extrapolated prevailing 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). It also appears that Ms. Dodds used the prevailing wage data from OES, even though the record indicates that, in some instances, the Respondent employer used prevailing wage data from other sources.²¹

²⁰ However, it appears that, 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.

²¹ See, e.g., Danilo Alacar, a physical therapist, where PW data from "Economic Research Institute" was used in the LCA. Exhibit A-7. Under the regulation, an employer has some degree of discretion in relying upon the source for a prevailing wage determination. See § 655.731(a)(2).

Under the regulation, the Administrator may contact ETA for prevailing wage determinations in instances where prevailing wage data is either “nonexistent” or “insufficient to determine the prevailing wage” or, based on significant evidence, is believed to vary substantially from the actual prevailing wage in the area of employment. § 655.731(d)(1). The above regulatory subsection does not contain any language requiring the Administrator to contact the ETA. The term “may” is presumed to indicate permissive, as opposed to mandatory, conduct unless the context clearly indicates otherwise. See Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 346 (2005); See also Isle Royale Boaters Ass’n v. Norton, 330 F.3d 777, 784, n.1 (6th Cir. 2003).

Under the regulatory scheme, § 655.800 provides the Administrator with broad discretion to conduct all investigative and enforcement functions listed under Subpart H and Subpart I of the Regulations. Specifically, the Administrator is empowered to “conduct such investigations as may be appropriate” and “gather such information as deemed necessary.” § 655.800(b). I find this delegation of authority includes the discretion to refer matters to ETA when there are issues involving the correct prevailing wage. § 655.731(d). The extract from the operational manual admitted into evidence is not entirely consistent with the regulation, in that it appears to mandate that an investigator refer a case to ETA in certain circumstances, principally where the employer has “failed to establish or document a valid [prevailing wage] rate.” RX-3. In her testimony, Ms. Dodds denied that the “Field Operations Handbook” accurately reflected the Administrator’s practice regarding when prevailing wage controversies are referred to ETA. T. at 49-50.

Under 8 U.S.C. § 1182(n)(2)(A), the Secretary of Labor is required to “establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner’s failure to meet a condition specified in a [labor condition] application.” The regulations set out at part 655 of the Code of Federal Regulations were promulgated to fulfill this statutory mandate. See § 655.0(d). Other than Ms. Dodds’ testimony, there is no evidence regarding the applicability of the “Field Operations Handbook.” The record does not establish the source of the Handbook or explain the relationship, if any, between the Handbook and the regulations at 20 C.F.R. part 655. I find, therefore, that the regulation controls the Administrator’s actions. Because the regulation permits, but does not require, the Administrator’s investigator to refer a prevailing wage dispute to ETA, I also find that the Administrator was not required to contact ETA regarding prevailing wage issues in this case.

The regulation does not explicitly address whether an administrative law judge must accept as final the Administrator’s prevailing wage determinations in circumstances where the Administrator has not consulted ETA, but instead has made prevailing wage determinations based on information of record. See § 655.840(c). Meaningful review of the Administrator’s actions requires examination of the Administrator’s prevailing wage determinations. It follows, therefore, that the Administrator may not unilaterally make prevailing wage determinations by a process in which review of those determinations is impossible. I find, therefore, that under the regulation, I may review the reasonableness of the Administrator’s actions in determining a prevailing wage. In addition, § 655.840(c) states that an administrative law judge may not, under any circumstances, determine the validity of the wage determination. I find this provision prohibits me from assessing whether a prevailing wage is accurate (that is, that it meets the

requirements of § 655.731(a)(2)), but does not relate to the circumstances here, where the issue is the reasonableness of the Administrator's use of existing prevailing wage data, the accuracy of which is not disputed.

As I have found, the Respondents' records are incomplete, and some of the LCAs are not available. Based on my review of the record, I find that LCAs were not obtained for 39 of the 156 H-1B nonimmigrant workers. A listing of these individuals is at Appendix C. I find it is reasonable to presume, as the Administrator's investigators did, that APMI would likely use the same prevailing wage data in LCAs for all workers in the same occupation, location, and year. In such circumstances, I find it is not necessary for the Administrator to obtain prevailing wage data from ETA, as I also find it is reasonable for the Administrator to have extrapolated prevailing wage data from existing LCAs for APMI employees and apply it to other employees.²² I also find, therefore, that the Administrator's actions were adequate, and consistent with the regulatory requirements. Consequently, I affirm the Administrator's prevailing wage determinations for these individuals.²³

For some APMI employees, where the record shows that an LCA existed and the prevailing wage was not an "even rate," it appears that the Administrator's investigator disregarded prevailing wage data on the LCAs and substituted other prevailing wage amounts. I have carefully reviewed the trial testimony. I find these circumstances are distinguishable from those discussed above, where the investigator knew the prevailing wage the Respondents cited was incorrect because it was an "even rate." I further find that there is no testimonial evidence as to why the Administrator's investigator substituted prevailing wage data in these circumstances. The documentary record, which I have reviewed, also does not explain the Administrator's actions.

Based on my review of the records, this type of substitution occurred with regard to 25 of the 156 H-1B nonimmigrant workers. A listing of these individuals is at Appendix D. I find that the record is silent as to the reasonableness of the Administrator's actions in these instances, where the Administrator's investigators substituted prevailing wage data without any explanation as to why the prevailing wage data in the LCAs of record was inadequate. Consequently, I find 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.

²² I also note that for many of these individuals, the investigator presumed the occupation of physical therapist and work location of New York City (Manhattan). In the absence of any evidence contradicting these presumptions, I find that the investigator's actions were reasonable, as the overwhelming majority of the employer's H-1B employees were physical therapists, and the prevailing wage the Respondents used for most of them was the New York City (Manhattan) rate.

²³ The Administrator's investigator did not testify as to why she selected OES as the source of prevailing wage data she used, where the record indicates the Respondents used multiple sources of prevailing wage data in the LCAs. Nevertheless, as the investigator used valid prevailing wage data in cases in which there was no LCA available, I find that these actions were reasonable.

Because the starting point for the Administrator's back wage calculations is the applicable prevailing wage, an error in the establishment of the prevailing wage necessarily affects the entirety of the back wage assessment. Consequently, I reverse the Administrator's determination of the applicable prevailing wage for these individuals. Therefore, it is necessary to remand the cases concerning these individuals, for recalculation of the amount of back wages owed. For these 25 individuals, as listed in Appendix D, I direct that recalculations of back wages owed be based on the prevailing wage data of record in the employees' LCAs.

In prosecutions for enforcement of the statute, it is well established that the Administrator's burden is simply to establish a prima facie case. Then the burden shifts to the employer, to come forward with evidence to negate the reasonableness of the inferences made. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946). It is also well settled that the Department need not present evidence regarding each individual underpaid employee; rather, it is only necessary to present evidence regarding a representative sample of the employees, in order to establish its prima facie case. Reich v. Southern New England Telecomm. Corp., 121 F.3d 58, 66-67 (2d Cir. 1997). However, representational evidence necessarily must cover each clearly defined category of worker. Id., at 68.

In assessing the issue of the Administrator's actions in determining prevailing wages, I find it is also appropriate to comment on the Respondents' role in creating the situation the Administrator's investigator faced. As has been noted, employers are required, under the regulation, to maintain records of all LCAs. § 655.760(c). I note the Administrator's action in calculating back wages based on missing LCAs is directly attributable to the Respondents' failure to maintain adequate records, as the regulation mandates. See § 655.805(a)(15). Additionally, as the regulation recognizes, when an Employer fails to keep adequate records the Administrator has the discretion to find a violation of the requirement to pay the required wage. § 655.731(d)(1).

Conclusion – Prevailing Wage Determinations

To summarize, as set forth above, I affirm the Administrator's actions regarding the prevailing wage rate determinations, upon which back pay calculations were based, in the following situations:

- Where a correct prevailing wage for the appropriate occupation, work location, and year were listed on the LCA (49 of 156 instances)(Appendix A).
- Where the LCA listed a prevailing wage that was clearly incorrect because it was a "even rate" but also listed the applicable occupation, year, and work location data. In these situations the investigator merely substituted a valid prevailing wage for the incorrect prevailing wage (43 of 156 instances)(Appendix B).
- Where there was no LCA, but the records established the applicable year, occupation, and job location. In these situations the investigator extrapolated from other information of record to establish an applicable and valid prevailing wage (39 of 156 instances)(Appendix C).

As to the remaining 25 individuals, the LCA listed a prevailing wage which was not an “even rate” and the Administrator’s investigator substituted a different prevailing wage, without explaining the reason for such action. As to these employees, I find there is no evidence, in the record, for me to assess whether the Administrator’s actions were appropriate, under the regulation. Consequently, I find the cases involving these individuals must be remanded to the Administrator for recalculation of back wages, based on the prevailing wages listed in the LCAs (25 of 156 instances)(Appendix D).

Back Wage Computations

Under the regulation, an employer is required to pay an H-1B nonimmigrant employee the greater of the actual wage, defined as the wage rate the employer pays to all individuals with similar experience and qualifications, or the prevailing wage. This amount is termed the “required wage.” § 655.731(a). Where there are no other employees to which to compare a H-1B nonimmigrant, in terms of qualifications and experience, the wage paid to the H-1B nonimmigrant becomes the actual wage. Thus, under the regulatory scheme, the prevailing wage acts as a “floor,” indicating the absolute minimum level at which an employer must pay its H-1B nonimmigrant employees.

The regulation notes that employers may pay employees a salary or an hourly rate, but requires that the prevailing wage listed on LCAs be expressed in the same form (salary or hourly wage) that the employer will pay its employees. § 655.731(a)(2)(vi). In this case, it appears that the Respondents disregarded this regulatory provision. The payroll records did not consistently reflect whether employees were paid by the hour. In addition, in many instances where the number of hours was recorded in the payroll records, the hourly rate was not listed.²⁴ T. at 29, 59.

The regulation clearly states that H-1B workers who are designated as full time employees be paid the wages required for a 40-hour work week. § 655.731(c)(7). Upon my examination of the documentary exhibits, I find all of the H-1B nonimmigrants for whom LCAs are in the record were designated as full-time employees. I find that the Administrator’s inference that all of the H-1B nonimmigrant employees were hired as full time employees is, therefore, reasonable.

Ms. Dodds testified that the Respondents generally paid the employees weekly; consequently, in determining the amount due to the employees, Ms. Dodds testified, she converted the prevailing wage from an annual amount to a weekly amount. T. at 30. I find this action to be reasonable, and – given the Respondents’ use of both weekly and hourly wage rates in the payroll records – to comply with the regulation. See generally § 655.731(a)(3)(vi).

As Ms. Dodds testified, the amount the employees earned may have varied from pay period to pay period, because the number of hours worked also varied. T. at 85-86. The payroll

²⁴ This created additional complications in determining what back wages were due, as the Respondents were also under investigation for violation of Fair Labor Standards Act (overtime) violations. See JX 1 and Stipulations, para. 1.

records the Respondents maintained showed the amount paid to the employees each pay period, but did not consistently indicate an hourly wage rate. T. at 59. In addition, based on my examination of Exhibits A-1 through A-156, I find that the employer occasionally noted the number of hours for which employees were paid, but this was the exception rather than the norm. Consequently, it is difficult to ascertain whether the Respondents paid the employees the full hourly wage for 40 hours of work, as required under the regulation. For this reason, Ms. Dodds testified, for pay periods where an employee was paid less than the prevailing wage, she “was conservative” and, for purposes of back pay computation, determined that only the difference between the prevailing wage and the wages paid were unpaid wages. T. at 89.

Ms. Dodds’ testimony was that the Department of Labor’s position was as follows: “In cases where the gross pay was less than the prevailing wage, the prevailing wage was the required wage rate. In cases where the actual gross wage was higher than the prevailing wage, that was the required wage rate.” T. at 84. She also stated that the required wage was what employees were paid on an hourly basis. T. at 81. However, as Ms. Dodds also recognized, the payroll records provided an incomplete picture, in that they often did not indicate the number of hours worked or the hourly wage rate. See T. at 90-91. I find that, for any specific pay period, any determination that the required wage was more than the prevailing wage must be based on evidence that includes at least the employee’s hourly wage or the number of hours worked. As the testimony established, not only were the payroll records often incomplete on one or both of these parameters, but the hourly wage and the number of hours an employee worked also were subject to change. T. at 129, 132-33.

Based upon Ms. Dodds’ testimony, and upon examination of the Administrator’s back pay calculations, I find the Administrator’s back wage calculations presumed that the prevailing wage was the equivalent of the required wage. Because the prevailing wage provides a minimum amount that must be paid, I find that the Administrator acted reasonably in this determination.²⁵ I also find that the Administrator acted reasonably, in inferring that an employee was paid for two or more weeks of work, in those instances in which payroll data showed unusually large earnings in one week, but no earnings the prior week.²⁶ See T. at 70-72.

The Administrator also recognized the regulatory provision that, prior to March 2005, permitted an employer to pay an employee 95% of the prevailing wage. § 655.731(d)(4)(2004).²⁷ See T. at 34. However, as this regulatory provision also indicated, if

²⁵ Contrary to the Administrator’s investigator’s contention at the hearing, I also find it is close to impossible, based on the payroll records of the Respondents’ employees, to conclude that the required wage is more than the prevailing wage in any specific instance. As a rule, the information before me does not verifiably establish the hourly wage rates paid to the employees. Nor, in many cases, were the number of hours for which the employees were paid recorded.

²⁶ Because the Respondents’ normal practice was to pay employees weekly, the Respondents may have been in violation of the regulation under such circumstances, regarding hourly-wage employees. See § 655.731(c)(5). However, the Administrator did not cite the Respondents for a regulatory violation for this practice.

²⁷ This provision is absent from the regulation in years 2005 to the present. See, e.g., § 655.731(d)(2005). See also Labor Certification for Permanent Employment in the United

the employer failed to pay 95% of the prevailing wage, an assessment of violation for the full amount up to 100% of the prevailing wage would be made. T. at 42. I find that the Administrator's actions regarding the application of this regulatory provision in making back pay calculations were adequate. It appears, based on the record, that the Administrator did not assess the Respondents for back pay obligations, in cases where the net pay equaled or exceeded 95% of the prevailing wage, up to March 2005. It also appears that, if the Respondents did not pay the employee at least 95% of the prevailing wage, a back wage assessment for the entire amount (up to 100% of the prevailing wage) was made.

Under the regulation, the employer's obligation to pay a worker begins, in general, on the date that the H-1B nonimmigrant presents himself or herself for employment or otherwise "enters into employment" with the Employer. § 655.731(c)(6). The regulation also states that, in any event, the Employer's requirement to pay the H-1B nonimmigrant at the required wage will commence as of 30 days after the worker's entry into the country pursuant to an approved LCA. Or, if the H-1B nonimmigrant is already in the United States when the LCA is approved, an employer's requirement to pay begins on the 60th day after the date the nonimmigrant becomes eligible to work for the employer. In such circumstances, the date an H-1B nonimmigrant is considered to be eligible for work is the date of need set out in the petition, or the date of adjustment of the nonimmigrant's status by DHS, whichever is later. § 655.731(c)(6)(ii).

Also, the regulation specifically states that H-1B nonimmigrants who are not working and are in "nonproductive" status due to a decision by the employer (for example, due to lack of work), or due to a lack of permit or license, or any other reason other than the nonimmigrants' voluntary request and convenience, as specified in § 655.731(c)(7)(ii), must be paid the required wage. For a full time worker paid on an hourly basis, the employer must pay the rate for a 40-hour workweek. § 655.731(c)(7).

In addition, the employer's obligation to pay the employee in accordance with the regulation's requirements ends if there has been a bona fide termination of the employment relationship. An employer is required to notify immigration authorities if the employment relationship has terminated, so the petition may be canceled. § 655.731(c)(7)(ii).

The Respondents have asserted that "in many cases where the Administrator calculated pre-hire 'benching' for time between a nonimmigrant's arrival in the United States and the time they [sic] first appeared on APMI's payroll, there is no evidence in the record that the employee had presented him- or herself for employment, or even communicated with APMI at all." Respondent's brief at 11. The Respondents contend that the Administrator should bear the burden to establish when employees first entered the country, and when they first made themselves available for work. Id.

States; Implementation of New System, 69 Fed. Reg. 77,326, at 77,386 (Dec. 27, 2004), regarding implementation of the change in the regulation. The effective date for this change is March 28, 2005, not March 8, 2005, as Ms. Dodds testified. See 69 Fed. Reg. at 77,326. This change is mandated by statute. 8 U.S.C. § 1182(p)(3)(2005); see also 69 Fed. Reg. at 77,367.

The regulation, at § 655.731(c)(6), has two requirements: first, the obligation to pay an employee begins when the employee first presents himself or herself for work; and second, in any event the obligation to pay begins either 30 or 60 days after the employee's entry into the U.S. (depending on whether the employee entered before or after the LCA petition was approved). These requirements recognize that in not every case will an employee present himself or herself for work immediately upon arrival into the U.S. However, the regulatory requirement that the employer's obligation to pay an employee begins within 30 or 60 days after the employee enters the country provides a clear financial incentive for the employer to communicate with employees, and to ensure that work is available for them at the earliest possible time.

I find the Respondents' assertion that the burden should be on the Administrator to establish the date that employees become available for work is mistaken. Under § 655.731(c)(6), an employee's availability is presumed, within a set time period after entry into the U.S. This time period is generous enough to permit H-1B nonimmigrants time to find suitable housing, take care of personal needs, and contact the employer. In cases where an employee has entered the country but has not yet contacted the employer, the regulatory requirement to begin to pay the employee should motivate the employer to contact the employee and put him or her to work. In cases where the employee fails to contact the employer, and the employee's whereabouts are not known, the employer has a remedy in that the employer may contact immigration authorities to revoke the LCA petition.

At the hearing, Ms. Dodds testified that she obtained information about the entry dates into the U.S. of the 156 H-1B nonimmigrants from the "USCIS." T. at 13; Exhibit A-161. These dates are also listed in the spreadsheets the Administrator has compiled for each of the individuals. Exhibits A-1 through A-156. The parties have stipulated that the documentary evidence compiled by the Administrator represents the best available evidence regarding the dates on which each of the individual H-1B nonimmigrants "became available for work" and the dates on which the Respondents' obligation to pay them under the regulation ended, either by termination of the LCA or the termination of employment. Stipulations, paras. 5, 7, 8, 13. Ms. Dodds also testified that she did not make any calculations for wages owed prior to October 2003, because that was beyond the scope of the Administrator's investigation, and remarked that "you have to start somewhere" in calculating back wages. T. at 68-69.

Consistent with the parties' stipulations, I find that the documentary evidence the Administrator gathered, including dates obtained from USCIS, constitutes the "best available evidence" of the dates on which each of the individuals became eligible for work.²⁸ Stipulations, para. 7. I also find, consistent with the parties' stipulations, that the documentary evidence the Administrator gathered, including data obtained from USCIS, constitutes the best available evidence on the dates on which the Respondents' obligation to pay each of the 156 H-1B nonimmigrants, based on H-1B status, terminated. See stipulations, para. 8.

²⁸ At the hearing, based on the Respondents' relevance objection, I informed the parties that I would give little weight to supplemental documents the Administrator received from USCIS. T. at 160-62. Such documents are included in some of the exhibits pertaining to individual employees.

These dates create the starting point for the Administrator's calculations of back pay owed, based on the standards set out in § 655.731(c)(6) as to when an employer's obligation to pay H-1B nonimmigrants begins and ends. I have examined the records pertaining to each of the 156 H-1B nonimmigrants in this case. In most circumstances, the Administrator properly applied the regulation, and reasonably determined the inception and termination dates of the Respondents' obligation to pay wages. As the payroll records reflect, many of the employees were subjected to "benching," either at the outset of the employment or during the term of the H-1B employment, or both. As the regulation indicates, "benching" is not permissible, and an employer is required to pay the employee throughout the term of employment, unless the employee is absent for reasons of personal convenience. In virtually all instances, the record does not contain any information as to why employees were absent based on their convenience. Therefore, I affirm the Administrator's determination that APMI's practice of "benching," during the employees' term of employment, was improper. Consequently, the employees are owed back pay for periods of "benching."

Based on Ms. Dodds' testimony, I find back pay calculations do not extend back beyond October 2003, and the Administrator has waived any back wages due for periods prior to that date. I find the Administrator's action to be reasonable, and I note that the Administrator's investigation did not commence until after January 2006. JX 1.

In some circumstances, based on APMI payroll records, it appears that employees continued to be employed at APMI, notwithstanding the termination of their LCAs. T. at 36-41; 113-115. The regulation does not specifically address this situation. However, as Ms. Dodds conceded, there are certain circumstances whereby a noncitizen may be lawfully eligible to work, other than in H-1B status. T. at 41-42. She stated that she did not make any back wage calculations for periods after an employee's LCA expired or was revoked. I find the Administrator's actions to be reasonable. I find, therefore, that no back wages are due, under the regulation, for periods when an employee's LCA was no longer in effect.

In numerous instances, evidence indicates an employee's LCA was "revoked" or "denied" on a date later than the termination date of the approved LCA of record. As Ms. Dodds testified, the record of LCA petitions the Respondents filed is not complete. T. at 15. I have presumed, therefore, that such instances relate to a petition for extension that was denied or to a subsequent approved petition that was revoked, even in the absence of specific documentary evidence of record pertaining to such petitions. See T. at 117-22.

Because the Administrator is the Prosecuting Party in this case, the Administrator bears the burden to establish the appropriateness of all back wage determinations. I have examined all the Administrator's calculations of back wages, in light of the evidence of record pertaining to the dates LCAs were in effect, and the dates the employees entered the United States. See Exhibits A-1 through A-156; A-161. In instances where the record data is incomplete or conflicting, I have resolved all discrepancies in favor of the Respondents.²⁹ With regard to the

²⁹ Ms. Dodds acknowledged there was often a lag time between the date a petition was revoked and the date the employer was informed of the revocation. However, she testified, back pay calculations were halted as of the date of the revocation. She noted that in many cases

Respondents' obligation to pay their employees throughout the term of the LCA, I have presumed that, unless there is evidence the LCA was revoked, the LCA remained in effect until its termination date.³⁰ Where there is no record the employee was paid, I presumed, based on Ms. Dodds' testimony that APMI's payroll records were complete, that APMI engaged in "benching" and did not pay the employee. This presumption is consistent with my observation, based on the documentary evidence, that APMI regularly "benched" employees.

Conclusion – Period of Back Wage Calculations

Based on these standards, I find, as to 84 of the H-1B nonimmigrant employees, the Administrator's determination as to the period for which back wages are due, based on the inception and termination date of APMI's back wage obligations, is affirmed. These individuals are listed in Appendix E.

As to the remaining 72 of the 156 nonimmigrant employees, I find that either the inception or termination date of Respondents' back wage calculation contain errors and therefore cannot be affirmed.³¹ These employees are listed in Appendix F. As to these individuals, the Administrator's determination as to the period for which APMI's back wage obligation is due, is reversed.

The Appendices contain brief comments containing my rationale for my conclusion, as to each individual.

APMI's deductions

The regulation specifies that an employer may take certain deductions, as set out in detail in § 655.731(c)(9). These are "authorized deductions" for purposes of an employer's satisfaction of the required wage obligation. Under the regulation, authorized employer deductions, made in accordance with § 655.731(c)(9), may lower the net amount an employee receives in hand below the amount of the required wage. § 655.731(c). The regulation also clearly states that any "unauthorized deduction taken from wages" is considered to be non-payment of that amount of wages, and will result in a back wage assessment. § 655.731(c)(11). The regulation also states that where an employer makes deductions for loans or advances or other business expenses of the employer, the Department will require the employer to establish the legitimacy and purposes

employees continued to be employed after the date of a revocation or denial of extension. T. at 113. I find this is not unexpected, based on the lag time between USCIS action and notification to an employer.

³⁰ In some instances, the record does not contain the Form I-797 (LCA approval document). This document lists the time period for which the LCA was approved. In such cases, I relied on data from Exhibit A-161, a compilation of data from USCIS, to determine the applicable LCA term.

³¹ Some of these instances seem to be related to cases in which important data, such as the date of the employee's date of entry, is unknown. Other instances seem to be related to conflicting data regarding the date APMI's wage obligation terminated, such as when it is unclear whether an employee's H-1B status was renewed.

of the loans or advances, with regard to the standards set out in paragraph (c)(9)(iii). These require, among other things, the employee's written authorization.

The record establishes that the Respondents took various deductions from the employees, and the payroll deduction codes the Respondents used were introduced as an Exhibit. Exhibit A-160. Among other things, Ms. Dodds testified, the Respondents took deductions for recruitment fees, which appeared in the payroll records under miscellaneous deductions, and also took deductions for loan reimbursements. T. at 72-74; 139. Ms. Dodds testified that the Administrator determined that all the employer's 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. T. at 30; 72-75.

Consistent with Ms. Dodds' testimony, the Administrator contends the Respondents' deductions (except for insurance) are wholly improper, and should be construed to constitute non-payment of wages. Administrator's brief at 13-17. To the contrary, the Respondents contend 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. The Respondents also point out: "It this case, the Administrator incorrectly assumes that the actual wage always is calculated before deductions; the Administrator's position does not allow for an actual wage system that builds in certain deductions." Respondents' brief at 9 (emphasis in original).

Under the Respondents' analysis, deductions are permissible so long as the employee's in-hand wage, the amount received after all deductions are taken, equals or exceeds the required wage. In their brief, Respondents cite the Department of Labor's Comments to the most recent substantive revision of § 655.731, in December 2000. Interim Final Rule, Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110 (Dec. 20, 2000).³² At that time, the Department commented:

At the outset, the Department wants to clarify an apparent misconception by some commentators regarding the restrictions placed upon employers in assessing the employer's own business expenses to H-1B workers. An H-1B employer is prohibited from imposing its business expenses on the H-1B worker – including attorney fees and other expenses associated with the filing of an LCA and H-1B petition – only to the extent that the assessment would reduce the H-1B worker's pay below the required wage, i.e., the higher of the prevailing wage and the actual wage....The Department also wishes to emphasize, as provided in § 655.731(c)(9) of the existing [2000] regulations (renumbered in the Interim Final Rule at § 655.731(c)(12)) that where a worker is required to pay an expense, it is in effect a deduction in wages which is

³² The Final Rule was implemented in 2005 without substantive changes on this issue. See Labor Certification Process for Permanent Employment of Aliens in the United States, New System Implementation, 69 Fed. Reg. 77,325 at 77,384 (Dec. 27, 2004).

prohibited if it has the effect of reducing an employee's pay (after subtracting the amount of the expense) below the required wage...."³³

65 Fed. Reg. 80,199.

Based on the foregoing, I find that the Respondents are correct that an employer is precluded from deducting business expenses from employees only when the deduction has the effect of depressing the employees' salary below the required wage. As noted above, because the Respondents' pay records did not consistently indicate the rate at which employees were paid, the Administrator made back wage calculations based only on the difference between the wages that were actually paid and the prevailing wage. Consequently, the Administrator determined, for purposes of calculating back wages, that employees were underpaid only when their gross wages were less than the prevailing wage. As noted above, I have affirmed the Administrator's determination as to this issue.

As the Department's comments to the regulation indicate, when an employee's gross earnings exceed the required wage, deductions which do not reduce the net earnings below the required wage are permissible. Contrary to the Administrator's assertion, the regulation does not prohibit all deductions to recoup the employer's business expenses, but only those deductions that depress an employee's pay below the required wage.

As the regulation specifically states, "The required wage must be paid to the employee, ... except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage." § 655.731(c)(1)(emphasis added). Paragraph (c)(9) defines "authorized deductions" and states that business expenses of the employer may not be deducted under this provision. A reading of § 655.731(c)(1) and § 655.731(c)(9) together indicates that deductions, whether for business expenses of the employer or otherwise, that do not reduce the employee's wage below the required wage are not addressed.³⁴

Under the regulation, as discussed above, deductions that do not reduce pay below the required wage are permitted.³⁵ With regard to APMI's employees, I have found that the required wage is the prevailing wage, and I also have noted that the Administrator's practice was to use the prevailing wage as the basis for all back pay determinations. I also find, therefore, that the

³³ The Interim Final Rule was codified at the subsection noted in the quotation in the current regulations. § 655.731(c)(12)(2008).

³⁴ This interpretation of the regulation is also consistent with § 655.731(c)(12), which states that where an employer depresses an employee's wages below the level of the required wage by imposing on the employee any of the employer's business expenses, the Department will consider the amount to be an unauthorized deduction from wages.

³⁵ The leading case on this issue, Yano Enterprises, Inc., v. Administrator, Wage & Hour Division, Case No: 01-050 (ARB: Sept. 26, 2001), holds that authorizations for deductions must be in writing, but does not distinguish between deductions that reduce the net wage received below the level of the required wage and those that do not. I find, therefore, that the holding of Yano is not applicable to the facts in this case, where the issue is limited to deductions that do not decrease the wage below the required wage.

Administrator's determination that all deductions from pay for the 156 H-1B immigrants were unauthorized and, thus, to be considered as non-payment of wages, was not in accordance with the regulation. I find that deductions that do not reduce the employee's gross pay below the prevailing wage should have been permitted. Therefore, I reverse the Administrator's determination that such deductions constituted non-payment of wages.

Deductions that reduce pay below the required wage must meet the requirements of § 655.731(c)(iii). These circumstances are listed in § 655.731(c)(9)(ii) and (iii). These subsections prohibit recoupment of an employer's business expenses, including expenses relating to H-1B program functions, but permit recoupment of other expenses which are principally for the benefit of the employee and are made in accordance with a voluntary written authorization. See § 655.731(c)(9)(iii).

I find that deductions for loan repayment, when made pursuant to a written agreement in the employee's contract for employment, would meet the requirements for "authorized deductions" under § 655.731(c)(9)(iii), as items that are principally for the benefit of the employee. Therefore, notwithstanding that the deduction may reduce the employee's net wage below the required wage, it would be permissible. The spreadsheets pertaining to the employees indicate that many of the employees had deductions taken for loan repayment. Additionally, the record establishes that the Respondents had a specific payroll code for loan repayments. Exhibit A-160. The records contain copies of employment agreements for a number of the 156 H-1B nonimmigrant employees. None of these employment agreements contain provisions on employer deductions for repayment of loans. I find that there is no evidence in the record of any loan deductions made in accordance with the regulation's requirement for a written agreement. Consequently, because there is no evidence that the requirements of § 655.731(c)(9) were met, I find that the Administrator's determination that back wages were owed, based on deductions for loan repayments that reduced employees' net pay below the prevailing wage, was correct.

For some employees, employment agreements contained provisions permitting the employer to take deductions from pay.³⁶ These employment agreements authorized APMI to deduct "sponsorship fees," generally in consideration for APMI's submission of an immigration petition on the employee's behalf.³⁷ The issue of reimbursement for expenses relating to the submission of immigration petitions presents an extremely close question regarding whether this

³⁶ These employees are as follows: Dexter Abiera (Exhibit A-3); Homer Adalla (A-4); Minelee Arriescado (A-14); Harvey Labung (A-78); Janice Lachica (A-79); Francisca Lazaro (A-82); Juallasper Mangalindan (A-95); Carlos N. Monterroyo (A-101); Earl Nicolas Ramos (A-115). Generally, the employment agreements authorized payment of \$3,000 or \$4,000 for "sponsorship fees." In addition, the records pertaining to three employees had copies of two different employment agreements, covering substantially the same time periods, of which one agreement authorized deductions for sponsorship fee and one agreement was silent on the subject. These employees were as follows: Nina Marie Delavan (Exhibit A-50); Carlo Hipol (A-72); Leovigildo Zuniga (A-156).

³⁷ At the hearing, Ms. Dodds consistently characterized the purpose of deductions as "recruitment fees." See, e.g., T. at 30, 34, 72-73, 87.

matter is principally in the interest of the employee or the employer.³⁸ Under the regulation, deductions principally for the interest of the employee are permitted. An individual clearly has a personal interest in the submission of an immigration petition on his or her behalf. If granted, the individual has the opportunity to remain in the United States indefinitely, as opposed to the limited time period permissible under the H-1B program. However, an employer who submits an immigration petition on behalf of its employee also has an interest. A granted immigration petition changes the employee's status, and the employment is no longer controlled by the statutory and regulatory requirements of the H-1B program. Thus, not only will the employer be able to continue to keep its employee for an indefinite period, but the employer also reaps additional benefits, because it is no longer required to abide by the strict constraints of the H-1B program.

Based on the foregoing, I find that APMI's submission of an immigration petition on an employee's behalf is not an action that is "principally for the benefit of the employee," as the regulation requires. In making this finding, I am mindful that the record reflects that APMI retained a number of its employees after their H-1B status terminated, a practice which suggests that APMI intended to retain H-1B nonimmigrant employees on the payroll if immigration petitions on their behalf were granted. As to these employees, I affirm the Administrator's determination that, to the extent deductions reduced their net pay below their prevailing wage, those deductions were improper, and constituted non-payment of wages in that amount.

Conclusion – Deductions

I have reviewed the records pertaining to the 156 nonimmigrant employees. In some instances, the employer's deductions reduced the employee's net (cash-in-hand) wage below the level of the prevailing wage.³⁹ I find that the Administrator's determination that these deductions were improper and should be considered as unauthorized deductions and, consequently, construed as non-payment of wages under § 655.731(c)(11), was reasonable, and in accordance with the regulations. I affirm the Administrator's calculations on back wages due, based on deductions taken by APMI, as to those individuals.

Where APMI's deductions did not reduce the employee's net pay below the prevailing wage, I find the Administrator's determination that the deductions were improper to be incorrect, under the standards enunciated in the regulation. I reverse the Administrator's back pay calculations based on deductions taken by APMI as to these individuals. A listing of employees

³⁸ As Ms. Dodds testified, APMI had a number of codes it used for payroll deductions. T. at 73; A-160. None of these codes were for reimbursement of a filing fee. Ms. Dodds testified that most of the deductions were for "recruitment fees." T. at 29-30; 71.

³⁹ As Ms. Dodds testified, prior to March 2005, an employer who paid 95% of the applicable prevailing wage would not be in violation of the regulation. T. at 34. However, if an employer paid less than 95% of the prevailing wage, back pay assessments would be based on 100% of the PW. § 655.731(d)(4)(2004). When the regulation was revised in December 2004, the 5% tolerance was eliminated, effective in March 2005. See 69 Fed. Reg. 77,325, at 77,374-35 (Dec. 27, 2004). It is not entirely clear whether the Administrator fully considered this provision when determining whether deductions were permitted.

for whom back wage assessments were improperly calculated, and specifying the payroll dates concerned, is at Appendix G.⁴⁰

Civil Money Penalties

Under the regulation, a civil money penalty of up to \$5,000 per violation may be assessed for willful failure to pay required wages. § 655.810(b)(2)(i). The regulation defines “willful” as a knowing failure or reckless disregard with respect to whether the conduct was contrary to the Act, or to § 655.731 (regarding required wages). § 655.805(c). The Administrator assessed a civil money penalty of \$2,750 for the Respondents’ violation of the wage requirement as to each of the 156 employees, for a total of \$429,000. The parties stipulated that, based on the willfulness of the violation, the amount of civil money penalty assessed was reasonable. Stipulations, para. 15. Notably, the amount assessed is far less than the maximum that could have been levied.

Based on the parties’ stipulation that an assessment of \$429,000 in civil money penalties with respect to this violation was reasonable, and noting this amount is well under the maximum authorized under the regulation, I find that the Administrator’s assessment of a civil money penalty of \$429,000 was appropriate, and I affirm the Administrator’s determination. See Stipulations, para. 15.

The parties stipulated that the Respondents required the H-1B employees to enter into employment contracts providing that the employees would be liable to pay between \$5,000 and \$10,000 in the event of early termination.⁴¹ Stipulations, para. 19. The regulation permits a civil money penalty of up to \$1,000, where the employer has required an employee to pay an early termination penalty. § 655.810(b)(1)(iv). I find, based on my examination of the record as well as the parties’ stipulations, that the “early termination” penalty the Respondent included in the employment contracts was not a liquidated damages clause, but rather was an improper penalty, as defined in the regulation. In this case, the Administrator imposed a civil money penalty of \$10,000, based on 20 instances where the Respondent pursued lawsuits against former employees who terminated their employment, in advance of the agreed-upon date. The parties stipulated that the assessment of this penalty was reasonable, based on this violation and applying the regulation’s mitigation factors. Stipulations, paras. 19 and 20. I find, therefore, that the civil money penalty for this violation was appropriate, and I affirm the Administrator’s determination in this regard.

⁴⁰ For each individual listed in Appendix G, I have listed the pay dates for which recalculation is necessary. Those individuals who are also listed in Appendix D are noted with asterisks (***). For these persons, determinations of whether deductions reduced net pay below the level of the prevailing wage must be recomputed for each payroll date, based on the prevailing wage in the LCAs, as noted above.

⁴¹ The regulation permits an employer to receive bona fide liquidated damages from an employee who ceases employment prior to an agreed-upon date. However, in such instances the requirements of § 655.731(c)(9)(iii) must be fully satisfied. The distinction between a liquidated damages payment, which is permitted, and a penalty, which is not permitted, are based on state law. § 655.731(c)(10)(i).

The regulation also permits a civil money penalty of up to \$1,000 for each violation of the provisions regarding the public access and examination files, set forth in § 655.760, “where the violation impedes the ability of the Administrator to determine whether a violation of sections 212(n) or (t) of the INA has occurred or the ability of members of the public to have information needed to file a complaint” is compromised. § 655.810(b)(vi). Ms. Dodds testified that the Respondents did not maintain any public access files. T. at 15. She also stated that the Respondents’ actions made the Administrator’s investigation more difficult because of the difficulty in finding and obtaining relevant records. T. at 152-53. The parties stipulated that the Respondents failed to produce documents required to be maintained under § 655.760(a) [specifically, the LCA petitions], with respect to approximately 39 of the 156 nonimmigrant employees. The parties also stipulated that the total amount of the civil money penalty imposed violation of this provision, \$78,000, was reasonable, based on the violation and the regulatory mitigation factors. Stipulations, paras. 21-23.⁴² Based on the evidence of record, including documentary evidence, hearing testimony and the parties’ stipulations, I find that the Respondents did not maintain adequate public examination files, as required under the regulation. Consistent with the parties’ stipulation that the civil money penalty of \$78,000 was reasonable, and based on the violation and the regulation’s mitigation factors, I find that the Administrator’s assessment of a civil money penalty of \$78,000 for this violation was appropriate, and I affirm the Administrator’s determination.

Interest

The Administrator’s initial determination, that the Respondent was liable for a total of \$2,920,270.37 in back wages and \$512,000 in civil money penalties, also stated that both these amounts were subject to the assessment of interest and administrative fees and penalties. JX 2 at 2. As of the date of the Administrator’s initial determination, in March 2008, the rate of interest to be assessed on any delinquent payment was 5%, and a penalty at the rate of 6% was to be assessed on any portion of debt remaining after 90 days. Id.

The Administrative Review Board has held that, notwithstanding that the Immigration and Nationality Act does not specifically authorize an award of interest on back pay, interest shall be paid on awards of back pay, with compound interest to be paid prejudgment. Innawali v. Am. Info. Tech. Corp., Case No. 05-165 (ARB: Sept. 29, 2006), slip op. at 8-9; Amtel Group of Florida, Inc., v. Yongmahapakorn, Case No. 04-087 (Sept. 29, 2006), slip op. at 12-13.⁴³ The Board also has set the rate of interest at the rate charged on underpayment of federal income taxes prescribed under 26 U.S.C. § 6621(a)(2).⁴⁴ Mao v. Nasser, Case No. 06-121 (ARB: Nov. 26, 2008), slip op. at 11-12.

⁴² The stipulations erroneously referred to § 656.760(a).

⁴³ I do not find any authority for the charging of interest on the civil money penalty. See, e.g., Innawali, slip op. at 9.

⁴⁴ For the ARB’s discussion on why interest on back pay awards is appropriate, see Doyle v. Hydro Nuclear Servs., Case Nos. 99-041, 99-042, 00-012 (ARB: May 17, 2000)(ERA case).

Based on the foregoing, I find that prejudgment compound interest is due on the Administrator's back pay determinations that I have affirmed.⁴⁵ I also find that post-judgment interest on all amounts I find to be due in back pay, until paid or otherwise satisfied.

Debarment

The Administrator recommended that Respondent should be debarred from participating in the H-1B program for two years. Under 20 C.F.R. § 655.810(d), an employer who willfully fails to comply with the wage requirements of § 655.731 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. The parties have stipulated that, due to the willfulness of the Respondents' violation of the requirements of § 655.731, the Respondents, including both APMI and Marissa Beck, should be disqualified from approval of any H-1B petitions for a period of two years. Stipulations, para. 16.

I, therefore, find, pursuant to the parties' stipulation, that it is appropriate that the Respondents be disqualified from approval of any H-1B petitions for a period of two years, and I affirm the Administrator's action.

ORDER

1. I **AFFIRM** the Administrator's determination that back wages are due to the H-1B nonimmigrant employees of the Respondents. With regard to specific aspects of the Administrator's back wage assessments, I find as follows:

- a. I find the Administrator's determination of prevailing wage was reasonable and adequate with regard to those individuals listed in Appendix A, B, and C. As to those employees, I affirm that portion of the Administrator's back wage calculations based on those prevailing wage determinations.
- b. For those individuals listed in Appendix D, I find the Administrator's substitution of the prevailing wages listed in the LCAs was not supported by evidence of record. As I find no basis to affirm the Administrator's determination, I reverse it. I remand to the Administrator the determinations involving these listed individuals for modification of the amounts owed by re-calculation of back wages due, to be based on the prevailing wages listed in the LCAs.

⁴⁵ My finding applies to those individuals in which none of any of the Administrator's prevailing wage or back pay determinations have been reversed or remanded. For individuals listed in Appendices A, B, and C, this finding applies to those weeks of back wages determined to be due that are not affected by my findings set forth in Appendices F (beginning and ending dates of back wage calculations) and G (deductions).

- c. I affirm the Administrator's calculations regarding back wages due, based on the inception and termination date of APMI's obligation to pay wages, as to those employees listed by name in Appendix E.
- d. As to the employees listed by name in Appendix F, I reverse the Administrator's determination regarding the beginning or ending dates of the back wage calculations, or both, as specified in my comments relating to each individual set forth in the Appendix. I remand these matters to the Administrator for modification of the amounts owed by recalculation of the back wages due, based on the comments listed next to the name of each individual.
- e. I affirm the Administrator's determination that the Respondents improperly deducted money from employees, where the amounts deducted reduced the employees' net (cash-in-hand) wages below the prevailing wage. In instances where the Respondents' deductions did not reduce employees' net wages below the prevailing wage, I reverse the Administrator's determination that the deductions were improper, because it is inconsistent with the regulation, for the reasons stated above. Based on my review of the record, the Administrator's determinations were improper for 106 of the 109 individuals listed by name in Appendix G.⁴⁶ I remand these matters to the Administrator for modification of the amounts owed by recalculation of the back wages due, based on my analysis in this Decision, for the dates specified in the entry for each individual in Appendix G. For those employees not listed in Appendix G, I affirm the Administrator's determinations regarding non-payment of wages based on deductions taken by the Respondents.

2. In accordance with Department of Labor Administrative Review Board precedent, I FIND the Respondents are responsible for pre-judgment compound interest on the back wage assessments I have affirmed. I also find they are responsible for post-judgment interest on all amounts due, until satisfied.

3. I **AFFIRM** the Administrator's determinations regarding civil money penalties, in the aggregate amount of \$512,000.

⁴⁶ Exception is made for the three employees listed in Appendix D for whom no deductions from wages were taken. These employees are as follows: Dorothy Demo (Exhibit A-52); Emmanuel Luna (A-90); Joan Sulay (A-138).

4. I **AFFIRM** and adopt the Administrator's recommendations regarding debarment, and **DIRECT** disqualification of the Respondents, APMI and Marissa Beck, for a period of two (2) years, from approval of any LCA petitions filed by either of them.

A

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).