



Issue Date: 18 October 2011

Case No.: **2008-LCA-26**

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party

v.

GREATER MISSOURI MEDICAL PRO-CARE
PROVIDERS, INC.,
Respondent

Appearances:

Mary D. Wright, Esq.
Kim Prichard Flores, Esq.
Office of the Solicitor
U.S. Department of Labor
Kansas City, Missouri
For the Prosecuting Party

Brent N. Coverdale, Esq.
Seyferth, Blumenthal & Harris, LLC
Kansas City, Missouri
For the Respondent

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER

This case arises under the Immigration and Nationality Act (“the Act”), as amended,¹ and implementing regulations.² The case involves a complaint filed by the Prosecuting Party, the Administrator, Wage and Hour Division, Employment Standards Administration (“Administrator”), against the Respondent, Greater Missouri Medical Pro-Care Providers, Inc. (“GMMPCPI”), alleging violations of the Act and regulations. The Administrator alleges that GMMPCPI failed to pay the required wages to its H-1B employees during nonproductive periods of employment, illegally withheld final paychecks from employees, illegally deducted fees pertaining to H-1B extensions from

¹ 8 U.S.C. § 1101 and § 1182.

² 20 C.F.R. Part 655, Subparts H and I.

the wages of its employees, and illegally collected or attempted to collect penalties from former employees for early termination of employment prior to an agreed-upon date. The Administrator requests that GMMPCPI be required to pay back wages and interest to H-1B employees for its failure to pay wages during nonproductive periods, for amounts withheld or deducted for fees related to H-1B extensions, and for amounts collected as illegal penalties.

STATEMENT OF THE CASE

On June 22, 2006, Ms. Alena Gay Arat, a therapist and former H-1B employee of GMMPCPI, filed a complaint with the Missouri Department of Economic Development, Division of Workforce Development (“Missouri Department”). Respondent’s Exhibit (“RX”) 431. Ms. Arat informed the Missouri Department that she arrived in the United States on February 21, 2005, but did not begin working as a therapist with GMMPCPI until May 6, 2005. During this nonproductive time period, she studied for her Missouri state therapist license, which she obtained on May 6, 2005. Ms. Arat alleged that she was not paid a salary during this nonproductive period, but was instead only paid an allowance of \$50.00 per week. She also alleged that GMMPCPI made numerous deductions from her salary for H-1B extension fees, attorney fees, and time spent in a company apartment. Ms. Arat reported that she had submitted a letter of resignation on May 10, 2006, with an effective date of July 1, 2006. She alleged that GMMPCPI informed her that she would have to pay between \$4,000.00 and \$5,446.00 for breach of contract. RX 431.

The Missouri Department forwarded Ms. Arat’s complaint to Ms. Erica Simon, an investigator with the Wage and Hour Division of the United States Department of Labor’s Employment Standards Administration (“Wage and Hour Division”). RX 431. On June 26, 2006, Ms. Simon completed a Form WH-4 “H-1B Nonimmigrant Information Form,” which indicates that she received a complaint from Ms. Arat. The Form WH-4 alleged the following H-1B violations: (1) GMMPCPI “failed to pay H-1B worker(s) for ... time needed ... to acquire a license or permit;” (2) GMMPCPI “made illegal deductions from H-1B worker’s wages” for H-1B petition processing; (3) GMMPCPI “required H-1B worker(s) to pay all or any part of [a] \$500/\$1000 filing fee;” and (4) GMMPCPI “imposed an illegal penalty on H-1B worker(s) for ceasing employment with the employer prior to a date agreed upon by the worker and employer.” RX 429.

As a result, Ms. Simon initiated an investigation of GMMPCPI on behalf of the Wage and Hour Division on August 4, 2006. RX 411. Following completion of the investigation, the District Director of the Wage and Hour Division issued his determination on the complaint on May 21, 2008. Based on the evidence obtained during the investigation, the District Director found the following violations of the H-1B provisions of the Act: (1) GMMPCPI failed to pay its employees the required prevailing wages; (2) GMMPCPI required or attempted to require its employees to pay a penalty for ceasing employment prior to an agreed upon date; and (3) GMMPCPI failed to maintain adequate documentation as required under the Act and regulations. The District Director determined that GMMPCPI owed total back wages of \$372,897.93 to

44 H-1B employees and was liable for ongoing violations. He further indicated that GMMPCPI had 15 days from the date of the determination to file a request for a formal hearing. The copy of the determination served on GMMPCPI was sent by certified mail and stamped as having been received on May 23, 2008. RX 419.

On June 5, 2008, the Chief Administrative Law Judge received via facsimile a written request for a hearing from GMMPCPI. The case was assigned to me on June 11, 2008. On September 12, 2008, however, the Administrator filed a Motion to Amend the Determination Letter. In response, I issued an Order granting the Administrator's request on November 7, 2008. The District Director of the Wage and Hour Division issued an amended determination on November 17, 2008. RX 420. The District Director noted that an H-1B employee had been omitted from the violations discussed in the original determination. Based on the evidence regarding the additional employee, the District Director found that GMMPCPI owed an additional \$9,991.94 in back wages for violations of the Act. Accordingly, the District Director determined that GMMPCPI owed total back wages of \$382,889.87 to 45 H-1B employees. Furthermore, the District Director assessed a civil money penalty of \$2,000.00 for GMMPCPI's "willful continued attempts to require a penalty for ceasing employment prior to an agreed date." RX 420. On November 26, 2008, GMMPCPI filed via facsimile a renewed request for a formal hearing.

On February 10, 2009, GMMPCPI filed a Motion for Summary Decision. GMMPCPI first alleged that the Act and regulations limited the Administrator's investigation and enforcement actions to the specific issues raised in the original complaint and the complainant's Labor Condition Application ("LCA"). Second, GMMPCPI argued that the 12-month time limit for filing a complaint under the Act and regulations limited the time frame covered by the Administrator's investigation. Third, GMMPCPI alleged that its employment agreements with H-1B employees contain liquidated damages provisions that are enforceable under Missouri law. Finally, GMMPCPI argued that it did not willfully violate the Act by continuing to litigate a case where the liquidated damages provision was at issue. On February 26, 2009, the Administrator filed a response opposing summary decision on all of the issues raised by GMMPCPI. The Administrator also made a cross-motion for summary decision on two issues: (1) whether the disputed liquidated damages provisions constitute illegal penalties under Missouri law; and (2) whether GMMPCPI willfully violated the Act by pursuing collection of illegal penalties for early termination of employment. In response, I issued an Order on October 22, 2009, denying summary judgment to both parties on all of the issues raised.

In a separate filing on February 12, 2009, the Administrator raised two additional issues in a Motion for Partial Summary Decision. First, the Administrator alleged that GMMPCPI violated the Act and regulations when it failed to pay the required wages to H-1B employees during periods of nonproductive employment. Second, the Administrator argued that GMMPCPI violated the Act and regulations by taking illegal deductions from the wages of its H-1B employees for H-1B extension fees and related attorney fees. On February 25, 2009, GMMPCPI filed a response opposing summary decision on both issues. In response, I issued an Order on October 23, 2009, granting

partial summary judgment to the Administrator on both of these issues. More specifically, I found that there was no genuine issue of material fact that GMMPCPI: (1) failed to pay required wages to its H-1B employees during nonproductive periods of employment from the date each employee arrived in Joplin, Missouri, to the date each obtained their state therapist licenses; and (2) illegally deducted expenses from the wages of its H-1B employees for H-1B extension fees and related attorney fees. In addition, I found that GMMPCPI illegally withheld the final paychecks of some of its H-1B employees. My Order provided that I would take evidence on which employees were affected by the violations and remedies at the hearing.

I conducted a hearing in this matter on July 28-29, 2010, in Springfield, Missouri. Both parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges.³ At the hearing, I admitted Government Exhibits (“GX”) 1-17, 19-28, 30-35, 37-44, 45-54, 56-75, 77-84, 86-106, 108-131, 133-140, 142-154, 156-196 and 199-200, as well as Respondent’s Exhibits (“RX”) 401-422 and 423-428, without objection. Tr. 9-14, 205. The parties entered into stipulations of fact and to the admissibility of some of each others’ exhibits which were admitted as Joint Exhibit (“JX”) 1. Tr. 8. In addition, I admitted GX 18, 29, 36, 45, 55, 76, 85, 107, 132, 141, 155 and 197 over GMMPCPI’s hearsay and foundation objections. Furthermore, I admitted RX 429-431 over the Administrator’s relevancy objections. Ms. Erica Simon and Mr. Kamendra Mishra both testified at the hearing. The record was held open after the hearing for 60 days to allow the parties to submit closing briefs. On September 14, 2010, the parties filed a joint motion requesting a time extension of 30 days to submit closing briefs. In response, I issued an Order on September 17, 2010, granting the request. Both parties timely submitted their closing briefs, and the record is now closed.

ISSUES

Major issues raised in this case were resolved during proceedings on the parties’ motions for summary decision. I denied both parties’ motions for summary judgment on the issue of whether the requirement that H-1B employees pay GMMPCPI damages for early termination of employment constituted liquidated damages or an illegal penalty. But I found that GMMPCPI violated the Act when it failed to pay required wages to its H-1B employees during nonproductive periods of employment from the date each employee arrived in Joplin, Missouri, to the date each obtained a state license (commonly referred to as “benching”). In addition, I found that GMMPCPI illegally deducted expenses from wages for H-1B extension fees and related attorney fees. I also found that GMMPCPI illegally withheld the final paychecks of some H-1B employees to recoup expenses. Identification of affected employees and remedies were left for proof at hearing. The parties’ stipulations found in JX 1 resolve many of the issues of fact regarding back wages owed to affected H-1B employees. Moreover, the Administrator withdrew the issues of whether GMMPCPI willfully violated the Act and whether civil

³ 29 C.F.R. Part 18A (2010); *see also* 20 C.F.R. § 655.825(a) (2010) (incorporating 29 C.F.R. Part 18A by reference).

money penalties should be assessed at the hearing. Tr. 7-8. Accordingly, the following issues remain for adjudication in this case:

1. The amount of back wages due to 11 H-1B employees who were benched until they obtained state licenses;
2. Whether damages GMMPCPI collected or attempted to collect from H-1B employees for early termination of their employment constituted *bona fide* liquidated damages or illegal penalties;
3. Whether GMMPCPI was required to satisfy the elements of 20 C.F.R. § 655.731(c)(9) before collecting damages from its H-1B employees for early termination of employment; and
4. Whether pre- and post-judgment interest should be awarded.

Administrator's Brief at 4, 38, 46; Respondent's Brief at 49, 58.

APPLICABLE STANDARDS

Under the H-1B program, an employer may hire non-immigrant alien workers from "specialty occupations" to work in the United States for prescribed periods of time.⁴ A "specialty occupation" is defined by the Act as an occupation requiring at least bachelor's degree and "application of a body of highly specialized knowledge."⁵ These workers are issued H-1B visas by the United States Department of State upon approval by the United States Department of Homeland Security ("DHS").⁶ An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the United States Department of Labor ("DOL") by filing a Labor Condition Application ("LCA") before the worker is issued an H-1B visa.⁷ An LCA filed by an employer must set forth, *inter alia*, the wage rate and working conditions for the H-1B employee.⁸ In addition, the employer must attest that it is offering, and will offer during the period of employment, the greater of: (1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the prevailing wage level for the occupational classification in the geographic area of employment.⁹

Upon certification of the LCA by the DOL, the employer is required to submit a copy of the certified LCA, along with the alien worker's visa petition, to DHS.¹⁰ Upon

⁴ 8 U.S.C. § 1101(a)(15)(H)(i)(B); 20 C.F.R. § 655.700 (2010).

⁵ 8 U.S.C. § 1184(i)(1).

⁶ 20 C.F.R. § 655.705(b).

⁷ 8 U.S.C. § 1182(n); 20 C.F.R. § 655.700(a)(3).

⁸ See 8 U.S.C. § 1182(n)(1)(D); 20 C.F.R. §§ 655.731 and 655.732.

⁹ 8 U.S.C. § 1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. § 655.730(d).

¹⁰ 8 U.S.C. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700(b)(2).

DHS approval, the alien worker is admitted to the United States on a temporary basis under an H-1B visa.¹¹

Under the Act, an employer is required to pay the wage and implement working conditions set forth in the LCA.¹² The employer must pay H-1B employees the required wage beginning on the date on which the employee “enters into employment with the employer.”¹³ In relevant part, an H-1B employee is considered to “enter into employment” when the employee first makes himself or herself available to work, or otherwise comes under the control of the employer.¹⁴ This includes “waiting for an assignment, *reporting for orientation or training*, going to an interview or meeting with a customer, or *studying for a licensing examination*, and includes all activities thereafter.”¹⁵ Once an H-1B employee has entered into employment, the employer has a continuing obligation to pay the required wage. This obligation continues even when the H-1B employee “is in a nonproductive status due to a decision by the employer [or] *lack of a permit or license*.”¹⁶ The employer is only relieved of its duty to pay the required wage if the H-1B employee enters nonproductive status “due to conditions unrelated to employment” or when there has been a *bona fide* termination of the employment relationship.¹⁷ In my October 23, 2009, summary judgment order, I found that GMMPCPI violated these provisions when it benched employees until they obtained a state license. Back wages and interest due for these violations are addressed in this Decision and Order.

The regulations require that “[t]he required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage.”¹⁸ Authorized deductions are those required by law; those authorized by a collective bargaining agreement, or reasonable and customary in the occupation or area of employment and applicable to all employees; and in an amount that does not exceed the actual cost or fair market value, or exceed the limits set for garnishment of wages (25% of disposable earnings for a week). Deductions for costs connected to H-1B program functions required to be performed by an employer, including preparation and filing of H-1B petitions, are not authorized deductions.¹⁹ 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.²⁰ If the employer depresses the H-1B worker’s wages below the required wage by imposing on the employee any of the employer’s business expenses, that amount will be considered an unauthorized deduction even if the matter is not shown in the employer’s payroll records as a

¹¹ See 20 C.F.R. § 655.700(b)(3).

¹² 8 U.S.C. § 1182(n)(2).

¹³ 20 C.F.R. § 655.731(c)(6) (internal quotation marks omitted).

¹⁴ 20 C.F.R. § 655.731(c)(6)(i).

¹⁵ *Id.* (emphasis added).

¹⁶ 20 C.F.R. § 655.731(c)(7)(i) (emphasis added).

¹⁷ 20 C.F.R. § 655.731(c)(7)(ii).

¹⁸ 20 C.F.R. § 655.731(c)(1).

¹⁹ 20 C.F.R. § 655.731(c)(9)(iii)(C).

²⁰ 20 C.F.R. § 655.731(c)(11).

deduction.²¹ In my October 23, 2009, order, I found that GMMPCPI violated these provisions when it deducted H-1B extension fees and related attorney fees or withheld final paychecks to recoup such expenses. Back wages and interest due for these violations are also addressed in this Decision and Order.

The Act and regulations prohibit an employer from requiring an H-1B employee “to pay a penalty for ceasing employment with the employer prior to a date agreed to by the [H-1B employee] and the employer.”²² The regulations provide that an employer “is not permitted to require (directly or indirectly) that the [H-1B employee] pay a penalty for ceasing employment with the employer prior to an agreed date.”²³ This includes making a “deduction from or reduction in the payment of the required wage to collect such a penalty.”²⁴ An employer, however, is permitted to recover “*bona fide* liquidated damages from the H-1B [employee] who ceases employment with the employer prior to an agreed date.”²⁵ If such damages are collected through a deduction or reduction in the employee’s wages, the employer must first show that the deduction or reduction satisfies a number of regulatory requirements.²⁶ Whether GMMPCPI violated these provisions is also addressed in this Decision and Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary of the Evidence

A. GMMPCPI’s Involvement with the H-1B Program

GMMPCPI was first established in 2001. Tr. 178. In July 2003, control of the company was acquired by Mr. Kamendra Mishra and his wife, Ms. Mary Ann Magsaysay, who became the principal investors and officers of GMMPCPI. Tr. 178; RX 425-7. Mr. Mishra is currently the president and chief executive officer, while Ms. Magsaysay is the vice president. Tr. 178; RX 427-5. In addition, GMMPCPI employs Ms. Linda Castillo as its operations manager. RX 426-6. Since July 2003, GMMPCPI has been involved in the H-1B program, under which it brings alien workers to the United States to work as occupational and physical therapists. RX 425-11. GMMPCPI’s principal place of business for therapists is in Joplin, Missouri. RX 425-10.

Mr. Mishra testified that the majority of GMMPCPI’s H-1B employees come from the Philippines. RX 425-11. Prior to their arrival in the United States, each therapist is required to complete the various requirements for obtaining an H-1B visa, as well as arrange for their travel to the United States. GX 1-11 to 1-12; RX 425-13. These requirements include language testing and educational credentialing. RX 427-6 to 427-

²¹ 20 C.F.R. § 655.731(c)(12).

²² 8 U.S.C. § 1182(n)(2)(C)(I); *see also* 20 C.F.R. § 655.731(c)(10)(i) (finding that an unauthorized deduction or reduction of wages includes a “penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer”).

²³ 20 C.F.R. § 655.731(c)(10)(i)(A).

²⁴ *Id.*

²⁵ 20 C.F.R. § 655.731(c)(10)(i)(B).

²⁶ *See* 20 C.F.R. § 655.731(c)(9)(iii); 20 C.F.R. § 655.731(c)(10)(i)(B).

7. Mr. Mishra described the process as requiring substantial “hand-holding,” which is the principal job duty of Ms. Magsaysay. RX 425-12. She coordinates with each therapist from the initial date of contact in the Philippines to the date of their arrival in Joplin, Missouri, and assists them in the completion of the requirements for obtaining their H-1B visas and legally entering the United States. Tr. 182, 185; RX 425-22, 427-6. This assistance includes conducting initial interviews, helping the therapists apply for and take required language tests, and assisting the therapists with the paperwork and interviews required by both the Filipino and United States governments. Tr. 234-37. Mr. Mishra estimated that this entire process takes approximately two to three years for each individual therapist. RX 425-13. Originally, the therapists were required to pay “for everything relating to their getting their visas or their entry into the United States.” RX 425-19. GMMPCPI’s new policy, however, is to provide \$500.00 for “miscellaneous fees” relating to the various requirements for obtaining an H-1B visa in the Philippines. RX 425-19.

Once the H-1B employees arrive in the United States, GMMPCPI provides various forms of training and orientation. Ms. Castillo identified GX 4 as a list that accurately identifies the date each therapist arrived in the United States, reported to Joplin, and obtained their state occupational license. GX 2-8, 2-16; RX 426-6, 426-11. At his deposition, Mr. Mishra testified that all H-1B employees, regardless of whether they have a Missouri therapist license, come to Joplin for: (1) orientation, training and job shadowing; (2) cultural training; (3) language training; and (4) assistance in obtaining a driver’s license. RX 425-13. He similarly stated at the hearing that GMMPCPI follows a “detailed plan for training of therapist[s],” where each employee is provided instruction and guidance related to driving, the English language, social customs in the workplace, managing and protecting money, and technical aspects of their jobs. Tr. 246-250. For example, GMMPCPI assists its H-1B employees in opening bank accounts, obtaining Social Security cards, dealing with supervisors at work, and completing forms for health insurance. Tr. 247. In addition, GMMPCPI provides job shadowing opportunities, where each new therapist is placed in a facility that is similar to their assigned workplace and is partnered with experienced therapists to begin working with patients. Tr. 250-251. During these training and shadowing periods, GMMPCPI provides apartment housing to H-1B employees in Joplin. Mr. Mishra testified that GMMPCPI considers these efforts to be an “investment” in its H-1B employees and a way to “take[] care of [its] therapists. Tr. 245; RX 425-12.

The majority of the H-1B employees are not paid the salary listed on their LCA when they first report to work for GMMPCPI in Joplin. At his deposition, Mr. Mishra testified that any employee who does not yet have a Missouri therapy license is not paid any salary. RX 425-14. He explained that the employment agreements, which are discussed below, “clearly [state] that the employment starts from the day [the therapists] will have [passed] the NBCOT or NPT exam and have obtained the license.” RX 425-14. Mr. Mishra admitted at the hearing that, even during their job shadowing periods, the H-1B employees are not paid a salary. Tr. 252. Instead, the unlicensed H-1B employees are paid a weekly allowance of \$50.00 while they attend training, perform job shadowing, and study for the state license examination. RX 425-16. At her deposition, Ms. Castillo identified GX 5 as a spreadsheet that accurately lists the

allowances received by each H-1B employee. GX 2-10, 2-16; RX 426-7, 426-11. The therapists begin receiving the allowance when they first report to work in Joplin. RX 425-18. Mr. Mishra explained that since GMMPCPI already provides a furnished apartment with all necessary supplies, the allowance is designed to give each therapist “enough for their groceries.” RX 425-17. While the allowance is typically given on a weekly basis, GMMPCPI is “flexible” and tries to accommodate individual monetary needs. RX 425-18. Mr. Mishra admitted, however, that GMMPCPI does not report the weekly allowances as taxable wages. GX 1-18; RX 425-22. He testified that an H-1B employee begins to receive the salary listed on the LCA on the day that he or she obtains a Missouri therapy license. RX 425-14. He also acknowledged that GX 5 contains an accurate list of allowances paid to GMMPCPI’s therapists, and is the only documentation of expenses related to the H-1B employees that was submitted to the DOL. Tr. 199-200.

At his deposition, Mr. Mishra acknowledged that H-1B employees who began working for GMMPCPI between 2003 and 2006 were required to pay both USCIS fees and attorney fees pertaining to extensions of their H-1B visas. GX 1-16 to 1-17; RX 425-19 to 425-20. He testified that these fees were deducted from an individual therapist’s wages. RX 425-20. Ms. Castillo provided similar testimony at her deposition, where she noted that employees were required to pay the USCIS fees for H-1B extensions and attorney fees ranging from \$500.00 to \$800.00. GX 2-19 to 2-25; RX 426-12 to 426-13. She testified that the amounts were deducted from employees’ wages, and identified GX 7, GX 8, GX 9, GX 10 and GX 11 as spreadsheets prepared by GMMPCPI which accurately reflect the amounts advanced by GMMPCPI, and owed or deducted for each H-1B employee. GX 2-19 to 2-25; RX 426-12 to 426-13. At his deposition, however, Mr. Mishra emphasized that GMMPCPI no longer requires its employees to pay for H-1B extension-related expenses. RX 425-50. In addition, he testified that GMMPCPI covers some of the expenses whenever a therapist relocates to a different facility. RX 425-26. He stated that \$500.00 is the typical allowance for in-state moves, while out-of-state relocations are financed on a case-by-case basis. RX 425-26. Furthermore, GMMPCPI employs a driving instructor and human resources coordinator who assist any therapist that relocates to a new facility. RX 425-26. Mr. Mishra testified that this assistance, as well as the weekly allowance, housing and extensive training, are a part of GMMPCPI’s mission to take care of its employees, and be a legal, moral and ethical company. RX 425-15 to 425-16.

B. GMMPCPI’s Employment Agreements with H-1B Employees

1. Overview

Each individual H-1B employee is required to sign a series of employment agreements with GMMPCPI. The therapists first sign an agreement before ever leaving the Philippines. Tr. 222-223; GX 1-19 to 1-20; RX 425-22. At both the hearing and his deposition, Mr. Mishra testified to his belief that this initial agreement is required by Filipino law for an H-1B employee to be able to leave the Philippines. Tr. 222-223; GX 1-19; RX 425-22. If a prospective employee declines to sign the initial agreement, GMMPCPI ceases its efforts to bring the individual to the United States under an H-1B

visa. Tr. 225. Mr. Mishra testified, however, that there are plenty of other opportunities for prospective therapists in the Philippines if they do not want to sign GMMPCPI's employment agreement. Tr. 228.

After arriving in the United States and reporting to Joplin, Missouri, GMMPCPI requires its H-1B employees to sign a second employment agreement. RX 425-23. Mr. Mishra testified that the second agreement is not signed until after the new employees obtain their Missouri occupational licenses. Tr. 270; RX 425-23. At the hearing, he explained that the second agreement is intended to document that the therapists are employed by GMMPCPI, as required by the H-1B visa program. Tr. 229. He also stated that the second agreement helps the H-1B employees obtain loans and credit cards. Tr. 230. Furthermore, he testified that the agreement assures that any dispute is within the jurisdiction of the American judicial system. Tr. 230. Mr. Mishra testified, however, that the second agreement is identical to the contract signed in the Philippines, except to the extent that it makes improvements to an employee's salary or benefits. Tr. 229; GX 1-24; RX 425-24.

The employment agreements at issue in the present case are from the years 2004, 2005, and 2006. These agreements will hereinafter be individually referred to as the "2004 Agreement," "2005 Agreement," and "2006 Agreement." Each agreement provides for a 24-month employment period as either an occupational therapist or physical therapist. GX 12 to 14; RX 415 to 418. In addition, the contracts state that the H-1B employees would begin working for GMMPCPI "[u]pon successful completion of the [NBCOT or NPTE] examination and obtaining [the] appropriate State license." GX 12-1; GX 13-1; GX 14-1; RX 415-1; RX 416-1; RX 417-1; RX 418-1. The agreements submitted into the record state that the H-1B employees would be paid an annual salary ranging from \$36,400.00 to \$39,000.00. GX 12 to 14; RX 415 to 418. Furthermore, all of the agreements provide that GMMPCPI would pay its employees "for reasonable relocation expenses." GX 12-3; GX 13-3; GX 14-3; RX 415-3; RX 416-3; RX 417-3; RX 418-3. At his deposition, Mr. Mishra testified that GMMPCPI pays for all relocation expenses of its employees, including the costs of gasoline, hotels, and food. RX 425-24 to 425-26. In addition to relocation expenses, the 2005 Agreement also states that GMMPCPI would pay the therapists for "help in making down payment to buy their vehicle etc." GX 13-3; RX 416-3, 418-3. The 2006 Agreement similarly provides that GMMPCPI would pay for "expenses towards Reviewer-Review for preparation for their licensure examination, travel to appear for their licensure examination, [and] help in making down payment to buy their vehicle etc." GX 14-3; RX 417-3.

2. Early Termination Provisions

Each employment agreement also contains provisions pertaining to termination of employment. While the contracts contain confidentiality and non-compete clauses, the provisions at issue in this case address the requirements that an employee who terminates employment before the end of the contract term repay GMMPCPI for certain expenses, and pay damages.

a. Repayment of Expenses

The agreements first provide for repayment of expenses by an H-1B employee for early termination of employment. Section 5(c) of the 2004 Agreement provides:

Should employee voluntarily terminate employment within a two (2) year period following the effective date of this Agreement, employee shall reimburse the [Respondent] 100% of all relocation expenses paid by [GMMPCPI].

GX 12-3; RX 415-3. Section 5(c) of the 2005 Agreement also provides for repayment of expenses should an H-1B employee voluntarily terminate employment before expiration of the 24-month employment term. The contract states that “employee shall reimburse the [Respondent] 100% of all relocation *and other expenses* such as down payment for the car etc. paid by [GMMPCPI].” GX 13-13; RX 416-3, 418-3 (emphasis added). Finally, section 5(c) of the 2006 Agreement provides:

Should **EMPLOYEE** voluntarily terminate employment or should **EMPLOYER** terminate employee for just cause as set forth in paragraph 9A within a two (2) year period following the effective date of this Agreement, employee shall reimburse the [Respondent] 100% of all relocation and any other expenses *incurred on behalf of an EMPLOYEE* by [GMMPCPI].

GX 14-3; RX 417-3 (emphasis added). At the hearing, Mr. Mishra explained the broader scope of section 5(c) in the 2006 Agreement. He testified that the additional expenses covered by the 2006 Agreement included GMMPCPI’s guarantee of an H-1B employee’s car payments, as well as the costs of hiring “reviewers” in the United States to help the employees prepare for the Missouri therapy license examinations. Tr. 260-261. Overall, Mr. Mishra testified that the purpose of section 5(c) in each of the agreements was to cover the “identifiable, defined expenses” of bringing in replacement therapists for H-1B employees who terminated their employment contracts early. Tr. 238.

b. Damages

Each of the agreements also contains a provision that requires an H-1B employee to pay damages to GMMPCPI for early termination of employment. In pertinent part, section 9 of the 2004 Agreement provides:

Additionally, **EMPLOYEE** agrees to pay liquidated damages to the Company in the event of early termination of this Agreement by the **EMPLOYEE**, through no fault of the [Respondent], according to the following schedule: \$10,000.00 if **EMPLOYEE** terminates this Agreement before the end of 6 months from the first day of employment; \$7,000.00 if **EMPLOYEE** terminates this Agreement after the first six months of employment but prior to the end of 12 months from the first day of employment; \$4,000.00 if **EMPLOYEE** terminates this Agreement

after the end of twelve (12) months but prior to the end of one and one-half [years] (1 ½ years) from the first day of employment; and \$3,000.00 if **EMPLOYEE** terminates this Agreement after one and one-half years (1 ½ years) but prior to the end of two (2) years from the first day of employment.

GX 12-6; RX 415-6. Section 10 of the 2005 Agreement provides for payment of the same pro-rated damages and contains identical language. GX 13-6; RX 416-6; RX 418-6. Mr. Mishra testified that these damages provisions provide for GMMPCPI's recovery of damages "in addition to the relocation costs ... and any other monetary damages that [GMMPCPI] might find." RX 425-28. He identified three considerations that went into setting the amount of early termination damages. First, he testified at his deposition that GMMPCPI's "main thing was that there's damage to the company, and then that damage has to be compensated, and the amount is such that it's prohibitive for them to beat the agreement." RX 425-28. At the hearing, Mr. Mishra clarified that he considered the damages so that H-1B employees would "think about" their decision to leave, where "they will have to honor their part of the contract." Tr. 203. He testified, however, that the main purpose "is to protect the investment, protect the interest and investment of the company." Tr. 234. He stated that the "gradual nature" of the damages reflects the fact that the longer an H-1B employee works before terminating his or her employment, GMMPCPI suffers decreasing levels of harm from a breach of contract by early termination of employment. Tr. 243.

The second factor considered by GMMPCPI were the costs incurred in bringing the H-1B employees to the United States and the expected profits from their employment. At his deposition, Mr. Mishra testified that he considered the "costs involved and the expected profit, and that would be the cost, time, whatever we have involved with bringing [the H-1B employees] to business perspective." RX 425-28. Regarding expected profits, he testified that damages reflect the expected profit per employee, which he estimated at \$1,000.00 per month beginning in 2004. Tr. 241. As to the costs involved, Mr. Mishra admitted that GMMPCPI already knows of certain "defined" expenses when an employee terminates his or her employment early, including the salaries paid and the cost of a contract with the facility to which the breaching employee was assigned. Tr. 273-274. Mr. Mishra testified, however, that the early termination damages reflect the "direct and indirect" costs of bringing H-1B employees to the United States and training them to be therapists. Tr. 239. He identified the "direct" costs as the actual money that GMMPCPI has spent on each therapist, while the "indirect" costs are the amount of time spent by GMMPCPI per H-1B employee. RX 425-29. He explained that these indirect costs are mainly the time spent by Ms. Magsaysay in "hand-holding" the new employees. Tr. 241. While acknowledging that there is no way of tracking the time spent on each individual therapist, he estimated that these costs equal "how much roughly would have been [Ms. Magsaysay and her staff's] salaries hour per hour given per therapist." RX 425-29. Mr. Mishra concluded that this amounts to investment costs of approximately \$5,000.00 to \$7,000.00 per employee. Tr. 240; RX 425-29.

The third factor considered by GMMPCPI was the “market perspective.” RX 425-28. Mr. Mishra testified that this perspective was based on GMMPCPI’s realization that other employers are willing to pay the damages and hire away the H-1B employees. RX 425-28. At the hearing, he explained that the “demand is increasing for the therapists” because “it has become more and more difficult to bring therapists from overseas, foreign therapists.” Tr. 257. He stated that, as a result, other companies “are willing to pay more when they call you up and talk to you, pay you more for therapists.” Tr. 257. Mr. Mishra provided similar reasoning at his deposition, where he stated that the early termination penalties give GMMPCPI “room to negotiate with the expected [future] employer that you have to pay us so much” to hire away the H-1B employees. GX 1-25; RX 425-30. He explained that the increased demand for therapists has made other employers “willing to pay for the profit and they are willing to grab these people and they do not want to do [the] hard work which we are doing.” GX 1-25; RX 425-30. Furthermore, he stated that, as early as 2004, other employers were willing to pay up to \$8,000.00 to hire away GMMPCPI’s H-1B employees. RX 425-31.

Section 10 of the 2006 Agreement also provides for payment of early termination damages. The provision, however, increased the damages to the following amounts:

\$25,000.00 (Twenty Five Thousand) if **EMPLOYEE** terminates this Agreement before the end of 6 months from the first day of employment; \$20,000.00 (Twenty Thousand) if **EMPLOYEE** terminates this Agreement after the first six months of employment but prior to the end of twelve(12) [sic] months from the first day of employment; \$14,000.00 (Fourteen Thousand) if **EMPLOYEE** terminates this Agreement after the end of twelve (12) months but prior to the end of one and one-half (1 ½) years from the first day of employment; and \$10,000.00 (Ten Thousand) if **EMPLOYEE** terminates this Agreement after one and one-half years (1 ½ years) but prior to the end of two (2) years from the first day of employment.

GX 14-6 to 14-7; RX 417-6 to 417-7. At both the hearing and his deposition, Mr. Mishra testified regarding the reasons why GMMPCPI increased the level of damages. He explained that GMMPCPI was experiencing increased costs per H-1B employee by 2006, and also had better understandings of expected profits and the market value of each employee. Tr. 204; RX 425-34 to 425-35. As to costs, he alleged that GMMPCPI’s expenses had risen to approximately \$12,000.00 to \$13,000.00 per therapist, as compared to costs of \$5,000.00 to \$7,000.00 in 2004. Tr. 204; RX 425-34. Mr. Mishra, however, did not explain how GMMPCPI had obtained a better understanding of expected profits. Regarding the market value, he testified that GMMPCPI had evaluated employment contracts from other companies that contained liquidated damages provisions. Tr. 204, 242. He alleged that some of the companies charged as much as \$36,000.00 for early termination of employment, and that these contracts complied with Missouri law. Tr. 242, 276. He was unable, however, to identify any of these companies. Tr. 276. Mr. Mishra further testified that GMMPCPI considered “what [the] market is paying” for the H-1B employees when it raised the damages in the 2006 Agreement. RX 425-34. He alleged that GMMPCPI had experienced an increased

interest in its therapists, with companies becoming more willing to pay the early termination damages. Tr. 242. He stated that the market is “willing to pay for the profit and they are willing to grab these people” away from GMMPCPI. RX 425-30.

C. The Department of Labor’s Investigation of GMMPCPI

On June 22, 2006, Alena Gay Arat filed a complaint against GMMPCPI with the Missouri Department of Economic Development, Division of Workforce Development (“Missouri Department”). RX 431. Ms. Arat alleged that GMMPCPI failed to pay her a salary during a nonproductive period of employment from when she reported for work in Joplin, Missouri, to the date she obtained her Missouri therapist license. RX 431. She also alleged that GMMPCPI made numerous deductions from her paychecks for USCIS fees and attorney fees related to the extension of her H-1B visa. RX 431. Furthermore, Ms. Arat alleged that, after resigning her employment prior to the end of the term in her employment agreement, GMMPCPI demanded that she pay between \$4,000.00 and \$5,446.00 in damages for breach of contract. RX 431. On June 22, 2006, the Missouri Department forwarded the complaint to Erica Simon, who is an investigator with the Wage and Hour Division of the United States Department of Labor. RX 422-1; RX 431.

On June 26, 2006, Ms. Simon completed a Form WH-4 “H-1B Nonimmigrant Information Form.” RX 429. The form alleges the following violations of the Act and regulations: (1) GMMPCPI “failed to pay H-1B worker(s) for ... time needed ... to acquire a license or permit;” (2) GMMPCPI “made illegal deductions from H-1B worker’s wages” for H-1B petition processing; (3) GMMPCPI “required H-1B worker(s) to pay all or any part of \$500/\$1000 filing fee;” and (4) GMMPCPI “imposed an illegal penalty on H-1B worker(s) for ceasing employment with the employer prior to a date agreed upon by the worker and employer.” RX 429. As a result, Ms. Simon initiated an investigation of GMMPCPI on behalf of the Wage and Hour Division on August 4, 2006. RX 411. In a letter to GMMPCPI, she noted that the “initial period covered by this investigation will be from 6/23/05 to 6/22/06.” RX 411-1. She provided a list of records that GMMPCPI was required to make available for inspection, and stated that she would visit GMMPCPI’s office on Wednesday, August 16, 2006. RX 411-1.

Ms. Simon initially planned to have an opening conference with GMMPCPI’s representatives during her visit on August 16, 2006. Tr. 31. The conference, however, was not held until September 2006. Tr. 32. During the opening conference, Ms. Simon met with Mr. Kamendra Mishra, Ms. Mary Ann Magsaysay, and Ms. Linda Castillo. Tr. 32. She identified Mr. Mishra as GMMPCPI’s president and CEO, Ms. Magsaysay as the owner and secretary, and Ms. Castillo as the operations manager. Tr. 32. At the hearing, Ms. Simon outlined the typical topics that she covers during an opening conference:

In general I sit down with the employer and I request certain information from them. Some of it is identifying information for the company, their tax ID number, the corporate structure.

I ask about the basic records relating in this case to the H-1B provisions, the public access file, anything that was listed within this appointment letter.

Tr. 32. She testified that she also learned about GMMPCPI's business, and confirmed that all of the employees at issue in the investigation were employed through the H-1B program as either physical or occupational therapists. Tr. 33-34. At her deposition, Ms. Simon testified that she also discussed GMMPCPI's failure to pay the required wages to employees during nonproductive periods. RX 424-167. GMMPCPI provided her with copies of the majority of its payroll records, which she had requested in her August 2006 letter. Tr. 33. Ms. Simon noted that GMMPCPI "was unable to provide payroll records dating back from 2004" because they had been lost during a split in ownership in 2003. Tr. 33. She testified at her deposition, however, that GMMPCPI had not attempted to hide or withhold any documents from her, but instead had been open and cooperative during the investigation. RX 424-38, 424-40. In a subsequent letter dated November 8, 2006, Ms. Simon requested that GMMPCPI produce "all payroll or other records ... which reflect deductions to or payments made by H-1B employees for any and all petition fees or attorney fees related to their petition or petition extension." RX 414. She testified at her deposition that the letter was for the purpose of obtaining payroll records from GMMPCPI's former attorney. RX 424-41 to 424-42. The documents were eventually produced with GMMPCPI's full cooperation. RX 424-42.

Following the completion of her investigation, Ms. Simon held a final conference with GMMPCPI on April 9, 2008. RX 422-3. She met with Mr. Mishra, Ms. Magsaysay, Ms. Castillo, and GMMPCPI's in-house counsel. She advised GMMPCPI that, even during periods of nonproductive employment, it was required to pay the H-1B employees the wages specified in each employee's LCA. RX 422-3. She indicated that she "explained that H-1B workers in non-productive status due to a lack of license, among other reasons, must be paid for a full time work week during the non-productive time." RX 422-3. She also advised GMMPCPI of the amount of back wages due to each H-1B employee, and explained her method of computation. RX 422-3. Ms. Simon next informed GMMPCPI that wage deductions "for petition fees and related attorneys fees were illegal deductions," and discussed the difference between illegal deductions and permissible deductions. RX 422-3. She explained that the amounts for illegal deductions were determined by reference to GMMPCPI's payroll records. RX 422-4. Ms. Simon also advised GMMPCPI that any attempt to recoup early termination penalties from former employees could result in additional violations of the Act and regulations. At her deposition, however, Ms. Simon admitted that the DOL had not yet made a finding as to whether GMMPCPI's employment agreements contained illegal penalty provisions for early termination of employment. RX 424-32.

Ms. Simon noted that Mr. Mishra had informed her "that he and his wife ... had tried to run the company according to the law and to help employees." RX 422-4. She also noted that Mr. Mishra "believed the regulations did not account for the medical profession and that it was unfair to have to pay for time in acquiring a license." RX 422-4. This is consistent with Mr. Mishra's deposition testimony, where he described the H-1B wage requirements as "discrimination against the American worker." RX 425-53. He

also stated that GMMPCPI would go bankrupt if it is required to pay “such a large amount of back wages” for benching violations and deductions. RX 422-4. In regard to the early termination damages, Mr. Mishra stated that he “felt that the contracts with early termination penalties were legally binding because USCIS saw them in the employee packet he submitted to them and because they had an attorney in Missouri review them and were told they were legal.” RX 422-4. Ms. Simon noted that GMMPCPI was willing “to comply with the requirements under the H-1B provisions” and “tentatively agreed that [it] would not pursue, or continue pursuing, illegal deductions for early termination penalties or other illegal deductions.” RX 422-4. At her deposition, however, Ms. Simon admitted that she had not instructed GMMPCPI to dismiss its current state lawsuits against former employees. RX 424-31.

Ms. Simon also determined that each of GMMPCPI’s employees at issue had paid fees related to their initial H-1B visas while still in the Philippines. Tr. 34-35. The fees included “things for lawyer’s fees, USCIS fees, premium processing fees, and then some that were miscellaneous fees that the employees were unable to identify.” Tr. 35. She identified a fee of \$895.00 that each of the employees paid directly to GMMPCPI. Tr. 35. Ms. Simon testified that she based her findings on statements and documents obtained during interviews with the H-1B employees, as well as records provided by GMMPCPI. Tr. 35. She estimated that each employee paid between \$3,000.00 and \$5,000.00 in fees related to their H-1B visas before leaving the Philippines. Tr. 36. In addition, she testified that the employees primarily paid for their own travel expenses from the Philippines to Joplin, Missouri. Tr. 37. She stated, however, that none of these fees were included in her calculation of back wages owed to the employees as a result of GMMPCPI’s violations of the Act and regulations. Tr. 37.

1. Illegal Deductions for Fees Related to Extension of H-1B Visas

Ms. Simon discovered that GMMPCPI had also made deductions from employee wages for fees related to the extension of H-1B visas. More specifically, she found that GMMPCPI had “deducted attorney and petition fees for H-1B VISA extensions totaling \$8,160.00 for 17 H-1B workers.” RX 422-2. Each of these employees was in the United States when the extensions and deductions were made. RX 422-2. Ms. Simon concluded that these deductions were impermissible under the Act and regulations. RX 422-2. The parties have stipulated to Ms. Simon’s finding that these illegal deductions were made. JX 1-1-3.

2. Nonpayment of Required Wages During “Nonproductive” Periods

As a part of her investigation, Ms. Simon also determined that GMMPCPI had failed to pay the required wages to its H-1B employees during nonproductive “benching” periods of employment. As an initial matter, she made findings as to the date on which each individual H-1B employee “reported for work” in Joplin, Missouri. She testified that she primarily relied on a list of employees provided by GMMPCPI, which listed Joplin arrival dates for the majority of employees at issue. Tr. 37-38. For employees with no arrival date listed, she relied on individual employee interviews, payroll documents, and GMMPCPI’s record of arrival dates in the United States. RX 424-52; *see*

also RX 424-52 to 424-55. She testified that the report for work date is relevant because it signals when GMMPCPI is obligated to begin paying its employees the prevailing wages listed on their LCA's. Tr. 82-83. Based on payroll records, as well as statements made at the opening conference, Ms. Simon determined that GMMPCPI did not begin paying its employees the wages required by the LCA's when they arrived in Joplin. Tr. 37. Instead, she found that GMMPCPI gave its employees weekly "allowances" and began paying salaries only after each therapist passed the state licensing examination and obtained a Missouri therapist license. Tr. 37-41. She found that the employees, with a few exceptions, began working and receiving salaries "as soon as they obtained their license." Tr. 41. She determined, however, that GMMPCPI did not report or tax the allowances on its payroll. Tr. 40. Pursuant to the regulations, Ms. Simon did not give GMMPCPI credit for the allowances paid against any back wages owed to individual employees. Tr. 40.

Based on these findings, Ms. Simon concluded that GMMPCPI violated 20 C.F.R. § 655.731 by failing to pay its employees the prevailing wage "for periods of non-work occasioned by the employer (benching which H-1B workers studied for and obtained licensing as therapists)." RX 422-1. She found that "benching" occurred when GMMPCPI failed to provide therapy work upon each H-1B employee's arrival in Joplin. RX 422-2. As a result of the "benching" violations, she found that GMMPCPI owed a total of \$355,112.04 in back wages to 43 H-1B employees. RX 422-2. For the 11 H-1B employees at issue in this case, Ms. Simon found that GMMPCPI owes the following amounts:

<u>Employee</u>	<u>Total Back Wages Due</u>
Marissa Acharon	\$4,886.00
Euphill Juliette Aseniero	\$6,959.50
Ellanie Berba	\$8,500.00
Zadel Cabrera	\$7,561.67
Celeste Cabugason	\$6,274.67
Rinna Daymiel	\$6,351.67
Iris de la Calzada	\$6,122.67
Mary Carmel Elizon	\$6,274.67
Marjorie Ham	\$9,422.50
Angeles Mojica	\$12,632.67
Grethel Ocampo-Dakay	\$4,536.99

GX 199. Ms. Simon based her back wage calculations on the annual prevailing wage listed on each H-1B employee's initial LCA. Tr. 100; RX 422-2; RX 424-56. She then divided the prevailing wage "by 24 pay periods to obtain the amount due in the semi-monthly pay period used by the [Respondent]." RX 422-2. GMMPCPI had two pay periods per month, from the first (1st) through the fifteenth (15th) and the sixteenth (16th) through the thirtieth (30th) or thirty-first (31st). Tr. 100, 105; RX 424-56. Next, Ms. Simon determined the dates of "benching" by "totaling the number of pay periods from the date the employee reported for work ... until the 1st pay period the employee was paid." RX 422-2. As discussed above, Ms. Simon determined each H-1B employee's report for work date using the relevant dates listed in GMMPCPI's records, GMMPCPI's

payroll and allowance documents, and statements obtained during individual employee interviews. Tr. 37-38; RX 424-52. She then multiplied the “salary amount due per pay period” by the “number of unpaid (benched) pay periods” to determine the amount of back wages due to each H-1B employee. RX 422-2. For each of the 11 H-1B employees at issue, Ms. Simon explained the basis for her calculations.

Marissa Acharon

Ms. Simon determined that GMMPCPI owes \$4,886.00 in back wages to Marissa Acharon. GX 15; GX 199. On the Form WH-55, she utilized a prevailing wage of \$36,296.00, GX 15, which is the wage rate listed on Ms. Acharon’s LCA for the period of October 15, 2003 to October 14, 2005. GX 16-19. She found that this equals an average semi-monthly wage rate of \$1,512.33. GX 15. She also translated the prevailing wage into a weekly rate of \$698.00. GX 15. Unlike the other H-1B employees at issue in this case, Ms. Acharon’s benching period was not computed on a pay period basis, but was instead determined on a weekly basis. Tr. 96; GX 15. At the hearing, Ms. Simon testified that she “took a more conservative approach” with the benching period because Ms. Acharon had two separate “report for work” dates of February 1, 2004 and May 4, 2004. Tr. 92, 95-96. She initially reported to Joplin, Missouri, for a one week orientation in February 2004, and then returned to Joplin in May 2004. Tr. 95. Ms. Simon thus found that Ms. Acharon was benched for one week beginning on February 4, 2004, and then for six weeks from May 4, 2004 to June 3, 2004. GX 15. While there are only four calendar weeks from May 4, 2004 to June 3, 2004, Ms. Simon testified that she found six weeks based on the dates that Ms. Acharon received allowance payments from GMMPCPI. Tr. 96; *see also* GX 5-2. Accordingly, she found that Ms. Acharon had been benched for a total of seven weeks. GX 15. Ms. Simon thus multiplied the seven weeks by the weekly prevailing wage of \$698.00, and determined that GMMPCPI owes Ms. Acharon \$4,886.00 in back wages. Tr. 96; GX 15.

Euphill Juliette Aseniero

Ms. Simon determined that GMMPCPI owes \$6,959.50 in back wages to Euphill Juliette Aseniero. GX 32; GX 199. On the Form WH-55, she utilized a prevailing wage of \$37,648.00, GX 32, which is the wage rate listed on Ms. Aseniero’s LCA for the period of December 1, 2003 to November 30, 2005. GX 33-16; *see also* JX 1-8. Ms. Simon found that this equals a semi-monthly wage rate of \$1,568.67. GX 32. Based on Ms. Aseniero’s report for work date and the date she received her Missouri therapist license, Ms. Simon found that she had been benched from April 16, 2004 to June 15, 2004. GX 32. She testified that she had relied on Ms. Aseniero’s interview statement, as well as the date she received her first allowance payment, to find a report for work date of April 16, 2004. Tr. 97. She stated that, after arriving in the United States on April 9, 2004, Ms. Aseniero “visited with her family for five or six days and then traveled to the facility in Joplin.” Tr. 98. GMMPCPI’s records show that Ms. Aseniero first received an allowance of \$100.00 on April 20, 2004. Tr. 99. Ms. Simon also relied on GMMPCPI’s wage records to find that Ms. Aseniero first appeared on the payroll for the pay period of June 16, 2004 to June 30, 2004. Tr. 100; *see also* GX 34. Accordingly, she determined that Ms. Aseniero was no longer benched as of June 16, 2004. GX 32. Based on GMMPCPI’s

system of semi-monthly pay periods, Ms. Simon found that Ms. Aseniero had been benched for a total of four pay periods. Tr. 100; GX 32. She thus multiplied the four pay periods by \$1,568.67, the semi-monthly wage rate, and concluded that GMMPCPI owes Ms. Aseniero \$6,274.67 in back wages for illegal “benching.” Tr. 101; GX 32.

Ms. Simon also found that GMMPCPI had made illegal deductions of \$685.00 from Ms. Aseniero’s wages for USCIS fees and attorney fees related to the extension of her H-1B visa. GX 32. The parties have stipulated to this amount of illegal deductions. JX 1-2-3. Accordingly, Ms. Simon found that GMMPCPI owes Ms. Aseniero total back wages of \$6,959.67. GX 32; GX 199.

Ellanie Berba

Ms. Simon determined that GMMPCPI owes \$8,500.00 in back wages to Ellanie Berba. GX 41; GX 199. On the Form WH-55, she utilized a prevailing wage of \$37,648.00, GX 41, which is the wage rate listed on Ms. Berba’s LCA for the period of December 1, 2003 to November 30, 2005. GX 42-10. Ms. Simon found that this equals a semi-monthly wage rate of \$1,568.67. GX 41. She determined that Ms. Berba had been benched from June 4, 2004 to August 31, 2004. GX 41. She testified that the report for work date of June 4, 2004, was based on Ms. Berba’s interview statement, the date she entered the United States, and the date she first received an allowance from GMMPCPI. Tr. 101. GMMPCPI’s records show that Ms. Berba first received an allowance on June 3, 2004, but also list a date of June 4, 2004. GX 5-2. Ms. Simon did not, however, explain how she reached her determination that Ms. Berba had been benched until August 31, 2004. Instead, GMMPCPI’s wage records indicate a hire date of August 23, 2004, which is the same date that Ms. Berba received her state occupational license. GX 4; GX 44. Nevertheless, Ms. Simon found that Ms. Berba had been benched for a total of six pay periods. GX 41. She thus multiplied the six pay periods by \$1,568.67, the semi-monthly wage rate, and concluded that GMMPCPI failed to pay Ms. Berba \$9,412.00 in wages during her “benching” period. GX 41.

Ms. Simon, however, also gave GMMPCPI credit for a payment of \$912.00 made to Ms. Berba on September 15, 2004. GX 41. She testified that “[s]ubsequent to my investigation, we received additional information regarding a partial check for the pay period ending 9/15/04.” Tr. 101. Accordingly, she gave a credit of \$912.00 to GMMPCPI “for purposes of being reasonable,” and determined that GMMPCPI owes Ms. Berba a total of \$8,500.00 in back wages. Tr. 101; GX 41. The record, however, shows that a deduction of \$202.31 was made from GMMPCPI’s \$912.00 payment. GX 43. Thus, Ms. Berba only received \$709.69 from GMMPCPI. GX 43.

Zadel Cabrera

Ms. Simon next determined that GMMPCPI owes \$7,561.67 in back wages to Zadel Cabrera. GX 52; GX 199. On the Form WH-55, she utilized a prevailing wage of \$36,296.00, GX 52, which is the wage rate listed on Ms. Cabrera’s LCA for the period of October 15, 2003 to October 14, 2005. GX 53-10. Ms. Simon found that this equals a semi-monthly wage rate of \$1,512.33. GX 52. She also determined that Ms. Cabrera had

been benched from December 1, 2003 to February 15, 2004. GX 52. She testified that the report for work date of December 1, 2003, was based on “the interview statement with Ms. Cabrera and with respect to the allowance sheet and the arrival date and summary sheet of the [Respondent].” Tr. 106. After arriving in the United States on November 28, 2003, Ms. Cabrera “was tied up because of a blizzard” in New York and “it took her a couple of days to report to Joplin, Missouri.” Tr. 107. She received an initial allowance payment of \$138.60 on December 16, 2003. GX 5-1. Ms. Simon did not explain how she determined that Ms. Cabrera had been benched until February 15, 2004. GMMPCPI’s wage records, however, indicate that Ms. Cabrera was hired on February 17, 2004, the same day on which she received her state license, and appeared on the payroll for the period of February 16, 2004 to February 28, 2004. GX 4; GX 54. This is contrary to the parties’ stipulation that Ms. Cabrera first appeared on the payroll on February 29, 2004. *See* JX 1-8. Ms. Simon thus found that Ms. Cabrera had been benched for a total of five pay periods. GX 52. She multiplied five pay periods by \$1,512.33, the semi-monthly wage rate, and concluded that GMMPCPI owes Ms. Cabrera \$7,561.67 in back wages for illegal “benching.” Tr. 108; GX 52.

Celeste Cabugason

Ms. Simon next determined that GMMPCPI owes \$6,274.67 in back wages to Celeste Cabugason. GX 56; GX 199. On the Form WH-55, she utilized a prevailing wage of \$37,648.00, GX 56, which is the wage rate listed on Ms. Cabugason’s LCA for the period of March 1, 2003 to February 28, 2005. GX 57-10. Ms. Simon found that this equals a semi-monthly wage rate of \$1,568.67. GX 56. She also determined that Ms. Cabugason had been benched from July 1, 2003 to August 31, 2003. GX 56. Ms. Simon testified that she compared Ms. Cabugason’s arrival date in the United States with the date she obtained her Missouri therapist license, and determined that she reported for work in Joplin on July 1, 2003. Tr. 109-110. She explained that she made this comparison “[b]ecause the information for the other employees through statements and the records that I had indicated that they spent approximately a couple of months in the process of studying and obtaining their license.” Tr. 110. Ms. Cabugason obtained her state license on September 1, 2003. GX 4. Ms. Simon thus found that Ms. Cabugason had been benched for a total of four pay periods. GX 56. She multiplied the four pay periods by \$1,568.67, the semi-monthly wage rate, and concluded that GMMPCPI owes Ms. Cabrera \$6,274.67 in back wages for illegal “benching.” Tr. 110; GX 56.

Rinna Daymiel

Ms. Simon determined that GMMPCPI owes \$6,351.67 in back wages to Rinna Daymiel. GX 77; GX 199. On the Form WH-55, she utilized a prevailing wage of \$37,648.00, GX 77, which is the wage rate listed on Ms. Daymiel’s LCA for the period of December 1, 2003 to November 30, 2005. GX 78-8. Ms. Simon found that this equals a semi-monthly wage rate of \$1,568.67. GX 77. She also determined that Ms. Daymiel had been benched from July 12, 2004 to September 30, 2004. GX 77. She testified that she based the July 12, 2004, report for work date primarily “on when she began receiving allowance payments,” which occurred on July 15, 2004. Tr. 112; GX 5-2. She also noted that Ms. Daymiel arrived in the United States on July 12, 2004. Tr. 113. While Ms.

Simon found that Ms. Daymiel had been benched until September 30, 2004, GMMPCPI's wage records show that she was hired on September 27, 2004, the same day that she received her state license, and appeared on the payroll for the period of September 16, 2003 to September 30, 2003. GX 4; GX 81-2. Nevertheless, Ms. Simon determined that she had been benched for a total of four pay periods. She multiplied the four pay periods by \$1,568.67, the semi-monthly wage rate, and concluded that GMMPCPI failed to pay Ms. Daymiel \$6,274.67 in wages during her "benching" period. GX 77.

Ms. Simon, however, also gave GMMPCPI credit for a payment of \$608.00 made to Ms. Daymiel on September 30, 2004. GX 77. This credit reflects "at least a partial payment" made to her for wages earned during the pay period of September 16, 2004 to September 30, 2004. Tr. 113; GX 81-2. Ms. Simon further found that GMMPCPI had made illegal deductions of \$685.00 from Ms. Daymiel's wages for USCIS fees and attorney fees related to the extension of her H-1B visa. GX 77. The parties have stipulated to this amount of illegal deductions. JX 1-2-3. After factoring in the credit and illegal deductions, Ms. Simon concluded that GMMPCPI owes Ms. Daymiel total back wages of \$6,351.67. GX 77; GX 199.

Iris de la Calzada

Ms. Simon determined that GMMPCPI owes \$6,122.67 in back wages to Iris de la Calzada. GX 82; GX 199. On the Form WH-55, she utilized a prevailing wage of \$37,648.00, which is the wage rate listed on Ms. de la Calzada's LCA for the period of December 15, 2003 to December 14, 2005. GX 83-10. Ms. Simon found that this equals a semi-monthly wage rate of \$1,568.67. GX 82. She also determined that Ms. de la Calzada had been benched from June 2, 2004 to July 15, 2004. GX 82. At the hearing, Ms. Simon testified that she relied on Ms. de la Calzada's sworn affidavit statement, which identified a report for work date of June 3, 2004. Tr. 114; GX 85. Ms. de la Calzada obtained her Missouri therapist license on July 30, 2004. GX 4. Ms. Simon initially found that she had been benched for a total of three (3) pay periods. She testified that these pay periods were "the first pay period for June of '04, the second pay period for June of '04, and then the first pay period of July, 2004." Tr. 116. She multiplied these three periods by \$1,568.67, the semi-monthly wage rate, and determined that GMMPCPI owes Ms. de la Calzada \$4,706.00 in back wages for these three pay periods. GX 82. On the Form WH-55, however, Ms. Simon also noted that Ms. de la Calzada had only been paid \$152.00 for a fourth pay period, from July 16, 2004 to July 31, 2004. GX 82. She explained that GMMPCPI's payroll records revealed a partial payment of \$152.00 during that particular pay period. Tr. 116; *see also* GX 84. Accordingly, while Ms. Simon found that GMMPCPI is liable for an additional \$1,568.67 for failing to pay the prevailing wage during the fourth pay period, she assessed a credit of \$152.00. Tr. 116; GX 82. She subtracted \$152.00 from \$1,568.67, and determined that GMMPCPI owes Ms. de la Calzada an additional \$1,416.67 in back wages. Ms. Simon therefore concluded that GMMPCPI owes Ms. de la Calzada total back wages of \$6,122.67 for illegal "benching." Tr. 116; GX 82.

Mary Carmel Elizon

Ms. Simon next determined that GMMPCPI owes \$6,274.67 in back wages to Mary Carmel Elizon. GX 94; GX 199. On the Form WH-55, she utilized a prevailing wage of \$37,648.00, GX 94, which is the wage rate listed on Ms. Elizon's LCA for the period of December 1, 2003 to November 30, 2005. GX 95-9. Ms. Simon found that this equals a semi-monthly wage rate of \$1,568.67. GX 94. She also determined that Ms. Elizon had been benched for the period of March 31, 2004 to May 31, 2004. GX 94. At the hearing, Ms. Simon testified that she found a report for work date of March 31, 2004, by comparing Ms. Elizon's arrival date in the United States with the date she began receiving allowance payments. Tr. 117. GMMPCPI's records indicate that Ms. Elizon first received an allowance payment on March 31, 2004. GX 5-1. She received her Missouri therapist license on June 4, 2004. GX 4. She also appeared on GMMPCPI's payroll for the pay period of June 1, 2004 to June 15, 2004, with a hire date of June 4, 2004. GX 96. The parties stipulated, however, that Ms. Elizon first appeared on the payroll on June 15, 2004. JX 1-9. Based on this information, Ms. Simon found that Ms. Elizon had been benched for a total of four pay periods. GX 94. She multiplied these four pay periods by \$1,568.67, the semi-monthly wage rate, and determined that GMMPCPI owes Ms. Elizon \$6,274.67 in back wages for illegal "benching." Tr. 117; GX 94.

Marjorie Ham

Ms. Simon next found that GMMPCPI owes \$9,422.50 in back wages to Marjorie Ham. GX 109; GX 199. On the Form WH-55, she utilized a prevailing wage of \$37,690.00, GX 109, which is the wage rate listed on Ms. Ham's LCA for the period of December 1, 2004 to November 30, 2006. GX 110-3. Ms. Simon found that this equals a semi-monthly wage rate of \$1,570.42. GX 109. She also determined that Ms. Ham had been benched for the period of August 6, 2005 to October 31, 2005. GX 109. At the hearing, Ms. Simon testified that she found a report for work date of August 6, 2005, based on Ms. Ham's arrival date in the United States and the date she began receiving allowance payments. Tr. 118. According to GMMPCPI's records, Ms. Ham arrived in the United States on August 6, 2005, but did not receive her first allowance payment until August 12, 2005. GX 4; GX 5-14. She received her Missouri therapist license on November 3, 2005. GX 4. She also first appeared on GMMPCPI's payroll during the pay period of November 1, 2005 to November 15, 2005. JX 1-9; GX 111. Ms. Simon thus found that Ms. Ham had been benched for a total of six pay periods. GX 109. She multiplied these six pay periods by \$1,570.42, the semi-monthly wage rate, and determined that GMMPCPI owes Ms. Ham \$9,422.50 in back wages for illegal "benching." Tr. 118; GX 109.

Angeles Mojica

Ms. Simon determined that GMMPCPI owes \$12,632.67 in back wages to Angeles Mojica. GX 136; GX 199. On the Form WH-55, she utilized a prevailing wage of \$37,898.00, which is the wage rate listed on Ms. Mojica's LCA for the period of January 15, 2005 to January 14, 2007. GX 137-3. Ms. Simon determined that this equals a semi-

monthly wage rate of \$1,579.08. GX 136. She also determined that Ms. Mojica had been benched for the period of July 6, 2005 to October 31, 2005. GX 136. At the hearing, she testified that she found a report for work date of July 6, 2005, based on Ms. Mojica's arrival date in the United States and the date she began receiving allowance payments. Tr. 120. According to GMMPCPI's records, Ms. Mojica arrived in the United States on July 6, 2005, and received her first allowance payment on July 8, 2005. GX 4; GX 5-12. She obtained her Missouri therapist license on November 4, 2005. GX 4. She also first appeared on GMMPCPI's payroll during the pay period of November 1, 2005 to November 15, 2005. JX 1-9; GX 138. Based on this information, Ms. Simon found that Ms. Mojica had been benched for a total of eight pay periods. GX 136. She multiplied these eight pay periods by \$1,579.08, the semi-monthly wage rate, and concluded that GMMPCPI owes Ms. Ham a total of \$12,632.67 in back wages for illegal "benching." Tr. 121; GX 136.

Grethel Ocampo-Dakay

Ms. Simon found that GMMPCPI owes \$4,536.99 in back wages to Grethel Ocampo-Dakay. GX 139; GX 199. On the Form WH-55, she utilized a prevailing wage of \$36,296.00, which is the wage rate listed on Ms. Ocampo-Dakay's LCA for the period of April 15, 2003 to April 14, 2005. GX 140-10. Ms. Simon determined that this equals a semi-monthly wage rate of \$1,512.33. GX 139. She also found that Ms. Ocampo-Dakay had been benched for the period of July 15, 2003, to the end of August 2003. GX 139. Ms. Simon recorded a report for work date of July 15, 2003, GX 139, and testified that she relied on Ms. Ocampo-Dakay's interview statement, her date of arrival in the United States, and the date she first received an allowance payment. Tr. 125. Ms. Ocampo-Dakay arrived in the United States on July 1, 2003, but informed Ms. Simon that she had "stayed 2 weeks in San Francisco before [she] went to Missouri." GX 141-1. She received her first allowance payment of \$135.00 on August 2, 2003. GX 5-1. Ms. Simon testified that "the allowance information was consistent with what [Ms. Ocampo-Dakay] had indicated in her statement, that she traveled for two weeks and then reported for work." Tr. 126. She thus determined that Ms. Ocampo-Dakay had been benched for a total of three (3) pay periods. GX 139. She testified that she relied solely on the interview statement because GMMPCPI "did not have or maintain the required payroll records during that time frame." Tr. 126. Ms. Simon therefore credited Ms. Ocampo-Dakay's statement that she began receiving her salary in September 2003. Tr. 126.

GMMPCPI's records, however, indicate that Ms. Ocampo-Dakay continued to receive weekly allowance payments until September 15, 2003, and did not receive her Missouri therapist license until September 17, 2003. GX 4; GX 5-1. While acknowledging that Ms. Ocampo-Dakay did not receive her state license until September 17, 2003, Ms. Simon nevertheless "credited for all of September of '03 that she would have been paid, even though I didn't have a payroll record." Tr. 127. Accordingly, Ms. Simon multiplied the three pay periods by \$1,512.33, the semi-monthly wage rate, and concluded that GMMPCPI owes Ms. Ocampo-Dakay a total of \$4,536.99 in back wages for illegal "benching." Tr. 127; GX 139.

3. Damages for Early Termination of Employment

Ms. Simon further discovered that GMMPCPI's employment agreements contained provisions that required employees to pay damages for early termination of employment. She concluded, however, that these damages constitute illegal penalties prohibited by the Act and regulations, as opposed to valid liquidated damages. In her sworn affidavit dated September 8, 2008, she stated that she "reviewed some employment contracts between [GMMPCPI] and certain H-1B employees" and "received other evidence which led me to conclude that [GMMPCPI] was attempting to collect a penalty and make illegal deductions from the required wage, which is prohibited by 20 C.F.R. 655.731(c)(1)(i)." RX 421-1. More specifically, Ms. Simon focused on "the provisions of [GMMPCPI's] Employment contracts that contained what purported to be Liquidated Damages Clauses, as well as other parts of the Employment Contracts which purported to require, upon the early termination of employment, that the employee reimburse the Employer for certain business expenses." RX 421-2. She noted that she also "became aware of state court lawsuits which had been filed by [GMMPCPI] against former employees." RX 421-1.

As an initial matter, Ms. Simon testified that she understood valid liquidated damages to be "[t]hose that are allowed by state law, and not prohibited under the H-1B provisions of the [Act]." Tr. 154. She stated that she reached her determination regarding GMMPCPI's early termination damages after reviewing the Act and regulations, the language of the contracts themselves, and information obtained from employees affected by the damages provisions. RX 424-11. As to GMMPCPI's employment agreements, Ms. Simon identified section 9 of the 2004 Agreement, and section 10 of the 2005 and 2006 Agreements, as the provisions that raised a red flag for her regarding GMMPCPI's attempts to recover illegal penalties. Tr. 47-49; RX 424-25. She testified that the main factor for her finding of illegal penalty provisions was that "the language in the contract[s] indicated that it was an early cessation penalty." RX 424-21. More specifically, she noted that these damages provisions "specifically tied the amounts [of damages] to how long you left before your agreed two-year" contract date. RX 424-13. In other words, she was concerned that the contracts tied the amounts of damages to specific time frames. RX 424-24 to 424-25. In addition, she found it troublesome that the employment agreements also contained provisions for "repayment of certain expenses." RX 424-13; *see also* Tr. 47-49. Ms. Simon thus testified that the early termination damages appeared to be *both* illegal penalties and "double dipping" for expenses already accounted for elsewhere in the employment agreements. Tr. 159-160. She admitted, however, that no investigation was performed regarding the "double dipping" issue, and that she had no evidence that the early termination damages provisions actually overlapped with the contract paragraphs related to "repayment of certain expenses." Tr. 160, 162.

Ms. Simon testified that, after reviewing the contract provisions, she followed-up with employees affected by the damages provisions and obtained additional information. RX 424-23 to 424-24. This information included GMMPCPI's demand letters, paperwork relating to state lawsuits, and e-mail correspondence between GMMPCPI and affected employees. RX 424-13. Ms. Simon noted that e-mails which

raised red flags contained language “like whatever the dollar amounts were.” RX 424-23. She also relied on employee statements that included “I’m being sued” or “I received a letter demanding payment.” RX 424-23. For example, she noted that Estella Daraway had informed her that GMMPCPI was demanding payment of \$4,000.00 in early termination damages and over \$11,000.00 for expenses related to the relocation, testing and training for Ms. Daraway’s replacement. Tr. 65-66. She expressed similar concern to statements made by Alena Gay Arat. Tr. 60-63. Ms. Simon also found it significant that GMMPCPI actually sent demand letters to employees and requested specific amounts for early termination of employment. RX 424-17. For example, Ms. Simon was concerned that GMMPCPI’s demand letters to both Michael Gonzales and Kahlila Quidlat-Fowler requested a “very high dollar amount” for early termination damages, as well as repayment of thousands of dollars for expenses related to their replacements. Tr. 68, 71-72, 77-78. She admitted, however, that the demand letter to Mr. Gonzales referred to two separate provisions in his employment agreement. Tr. 163.

Ms. Simon further testified to her belief that a number of the H-1B employees had wanted to leave their employment with GMMPCPI, but “finished their contracts to not pay penalties.” RX 424-25. She was unable, however, to identify any employee who was prevented from accepting another job because of the damages provisions. RX 424-25. In addition, she admitted at the hearing that she was unable to identify any employee who was *actually prevented* from leaving their job with GMMPCPI because of the early termination damages. Tr. 158. She also acknowledged that no e-mail or information that she had received constituted a “smoking gun” that conclusively established that the damages provisions are illegal penalties. RX 424-24. Furthermore, she admitted that sending demand letters is proper if they are enforcing a valid liquidated damages provision. RX 424-17.

Nevertheless, Ms. Simon concluded that GMMPCPI’s provisions for early termination damages constitute illegal penalties. RX 421-1; RX 424-11. She testified that she reached this determination after reviewing all of the evidence and consulting with the Wage & Hour Division’s district, regional and national offices, as well as the regional office of the Solicitor of Labor. RX 424-11 to 424-12. Accordingly, in the Amended Determination Letter dated November 17, 2008, the Administrator relied on Ms. Simon’s determination and found that GMMPCPI “required or attempted to require an H-1B nonimmigrant to pay a penalty for ceasing employment prior to an agreed upon date in violation of 20 C.F.R. § 655.731(c)(10)(i).” RX 420-3.

D. The H-1B Employees Affected by GMMPCPI’s Policies

In her amended determination letter, the Administrator alleged that GMMPCPI owes back wages to 45 of its current or former H-1B employees for various violations of the Act and regulations. RX 420. Some employees are due back wages under more than one violation (i.e., for benching, illegal deductions and/or withholding a final paycheck). The parties stipulated to the amounts GMMPCPI deducted for H-1B extension fees from 17 employees; the amounts deducted for H-1B extension-related attorney fees from 10 employees; the amounts withheld from final paychecks of 4 employees; the correctness of the Administrator’s calculations of back wages for benching of 30 employees; the

amounts paid by 5 employees for early termination of their employment; and the prevailing wage, dates of entry into the United States, and date of first appearance on GMMPCPI's payroll for 11 employees. The stipulations completely address the back wages due 26 of the employees as a result of my partial grant of summary judgment to the Administrator. I have addressed the evidence necessary to resolve remaining contested issues regarding the relief due to the other 19 H-1B employees below.

1. Stipulations of Fact

At the hearing, GMMPCPI did not concede that it has violated the Act or regulations, but the parties agreed to joint stipulations of fact regarding the affected H-1B employees. Based on the stipulations, I make the following findings of fact. I have combined and renumbered some of the stipulations where multiple stipulations addressed the same employee's prevailing wage, date of arrival in the United States, and date of first appearance on GMMPCPI's payroll. *See* my findings numbered 10–20 below, numbered 10–43 in JX 1-6–9.

1. The Respondent made the following deductions from its employees' wages for H-1B extension fees from the United States Customs and Immigration Service ("USCIS"):
 - a. \$185.00 from the wages of Rhandie Aloya
 - b. \$190.00 from the wages of Alena Gay Arat
 - c. \$185.00 from the wages of Euphill Juliette Aseniero
 - d. \$185.00 from the wages of Aileen Bausa
 - e. \$190.00 from the wages of Perlas Dang-awan
 - f. \$185.00 from the wages of Estella Daraway
 - g. \$185.00 from the wages of Rinna Daymiel
 - h. \$185.00 from the wages of Ryan de los Reyes
 - i. \$185.00 from the wages of Naomie del Mar
 - j. \$185.00 from the wages of Michael Gonzales
 - k. \$185.00 from the wages of Franklin Herrera
 - l. \$185.00 from the wages of Joshua E. Inventor
 - m. \$190.00 from the wages of Yvette L. Jakosalem

- n. \$185.00 from the wages of Michelle Lumapas
 - o. \$185.00 from the wages of Kahlila Quidlat-Fowler
 - p. \$185.00 from the wages of Jerome Satorre
 - q. \$185.00 from the wages of Roselle Y. Solijon
2. The Respondent made the following deductions from its employees' wages for H-1B extension-related attorney fees:
- a. \$500.00 from the wages of Alena Gay Arat
 - b. \$500.00 from the wages of Euphill Juliette Aseniero
 - c. \$500.00 from the wages of Aileen Bausa
 - d. \$500.00 from the wages of Perlas Dang-awan
 - e. \$500.00 from the wages of Estella Daraway
 - f. \$500.00 from the wages of Rinna Daymiel
 - g. \$500.00 from the wages of Ryan de los Reyes
 - h. \$500.00 from the wages of Naomie del Mar
 - i. \$500.00 from the wages of Franklin Herrera
 - j. \$500.00 from the wages of Kahlila Quidlat-Fowler
3. The Respondent withheld the following amounts from the final paychecks of four H-1B employees:
- a. \$1,964.59 from the final paycheck of Alena Gay Arat
 - b. \$4,166.68 from the final paycheck of Estella Daraway
 - c. \$575.01 from the final paycheck of Michael Gonzales
 - d. \$1,577.95 from the final paycheck of Kahlila Quidlat-Fowler
4. The Administrator correctly calculated the following back wages owed to H-1B employees who did not receive their required wages during nonproductive periods of employment:
- a. \$9,474.50 in back wages for Rhandie Aloya

- b. \$6,316.33 in back wages for Alena Gay Arat
- c. \$7,852.08 in back wages for Aileen Bausa
- d. \$6,188.00 in back wages for Frances Bertulfo
- e. \$7,895.42 in back wages for Karen Gay Bunanig
- f. \$6,281.67 in back wages for Darlene Claud
- g. \$17,369.92 in back wages for Perlas Dang-awan
- h. \$9,765.50 in back wages for Estella Daraway
- i. \$9,474.50 in back wages for Ryan de los Reyes
- j. \$6,281.67 in back wages for Naomie del Mar
- k. \$8,564.50 in back wages for Emmanuel Fernandez
- l. \$4,882.75 in back wages for Allan Roque Fruelda
- m. \$8,564.50 in back wages for Michael Gonzales
- n. \$7,735.00 in back wages for Franklin Herrera
- o. \$5,999.65 in back wages for Darlene Himbing
- p. \$15,790.83 in back wages for Hazel Hofilena
- q. \$18,845.00 in back wages for Joshua Inventor
- r. \$7,101.64 in back wages for Michelle Lumapas
- s. \$6,281.67 in back wages for Charmaine Manuel-Isip
- t. \$6,281.67 in back wages for Lordele Pato
- u. \$9,327.50 in back wages for Kahlila Quidlat-Fowler
- v. \$17,274.58 in back wages for Ian T. Regis
- w. \$5,392.99 in back wages for Jason Sablan
- x. \$6,281.67 in back wages for Jerome Satorre

- y. \$7,852.08 in back wages for Roselle Solijon
 - z. \$7,821.23 in back wages for Maria Elena Soriano
 - aa. \$7,852.08 in back wages for Eva L. Tarce
 - bb. \$7,852.08 in back wages for Caren Grace Uy
 - cc. \$9,991.94 in back wages for Helenber Villaster
 - dd. \$6,188.00 in back wages for Trixy Ypil
5. Darlene Claud paid the Respondent \$1,900.00 due to early cessation of her employment contract.
 6. Estella Daraway paid the Respondent \$268.18 due to early cessation of her employment contract.
 7. Lordele Pato paid the Respondent \$4,000.00 due to early cessation of her employment contract.
 8. Maricon Barba Garingo paid the Respondent \$7,000.00 due to early cessation of her employment contract.
 9. Jaycin Yee paid the Respondent \$500.00 due to early cessation of her employment contract.
 10. The prevailing wage on Marissa Acharon's Labor Condition Application ("LCA") is \$36,296.00. Ms. Acharon entered the United States on December 12, 2003. She first appeared on the Respondent's payroll on June 15, 2004.
 11. The prevailing wage on Euphill Juliette Aseniero's LCA is \$37,648.00. Ms. Aseniero entered the United States on April 9, 2004. She first appeared on the Respondent's payroll on June 30, 2004.
 12. The prevailing wage on Ellanie Berba's LCA is \$37,648.00. Ms. Berba entered the United States on June 3, 2004. She first appeared on the Respondent's payroll on September 15, 2004.
 13. The prevailing wage on Zadel Cabrera's LCA is \$36,296.00. Ms. Cabrera entered the United States on November 28, 2003. She first appeared on the Respondent's payroll on February 29, 2004.
 14. The prevailing wage on Celeste Cabugason's LCA is \$37,648.00. Ms. Cabugason entered the United States on July 1, 2003. She first appeared on the Respondent's payroll on September 15, 2003.

15. The prevailing wage on Rinna Daymiel's LCA is \$37,648.00. Ms. Daymiel entered the United States on July 12, 2004. She first appeared on the Respondent's payroll on October 15, 2004.
16. The prevailing wage on Iris de la Calzada's LCA is \$37,648.00. Ms. de la Calzada entered the United States on June 2, 2004. She first appeared on the Respondent's payroll on July 31, 2004.
17. The prevailing wage on Mary Carmel Elizon's LCA is \$37,648.00. Ms. Elizon entered the United States on March 31, 2004. She first appeared on the Respondent's payroll on June 15, 2004.
18. The prevailing wage on Marjorie Ham's LCA is \$37,690.00. Ms. Ham entered the United States on August 6, 2005. She first appeared on the Respondent's payroll on November 15, 2005.
19. The prevailing wage on Angeles Mojica's LCA is \$37,898.00. Ms. Mojica entered the United States on July 6, 2005. She first appeared on the Respondent's payroll on November 15, 2005.
20. The prevailing wage on Grethel Ocampo-Dakay's LCA is \$36,296.00. Ms. Ocampo-Dakay entered the United States on July 1, 2003.

2. Evidence Regarding 19 Employees with Unresolved Back Wage Issues

Marissa Acharon

Marissa Acharon first arrived in the United States on December 12, 2003. GX 4, JX 1. She is originally from Cebu City, Philippines, and holds a Bachelor of Science degree in Occupational Therapy from a university in the Philippines. GX 16-31; GX 18-1. She signed two employment agreements with GMMPCPI. The first was completed in the Philippines, while the second was signed once she arrived in Joplin, Missouri. GX 18-1. After arriving in the United States, Ms. Acharon visited family in Wyoming before reporting to Joplin in February 2004. GX 18-1. According to the Form WH-55 completed by Erica Simon, the investigator for the Wage & Hour Division, Ms. Acharon first reported for work with GMMPCPI on February 1, 2004. GX 15. The Form WH-55, however, also lists a report for work date of May 4, 2004. At the hearing, Ms. Simon explained that Ms. Acharon had initially reported to Joplin for a one-week training session in February 2004, and then visited family before returning to Joplin in May 2004. Tr. 88-89. This is consistent with Ms. Acharon's interview statement, where she noted that she "had [her] orientation when [she] went to Joplin, in [her] first week" in February 2004. GX 18-1. Ms. Simon testified that the arrival dates are based on the dates Ms. Acharon received \$50.00 allowance payments from GMMPCPI, as listed in GX 5. Tr. 92. She stated, however, that she took the "most conservative approach" in determining the arrival dates. Tr. 92.

After arriving in Joplin, Ms. Acharon was provided housing in one of GMMPCPI's apartments. GX 18-1. She attended a one-week orientation session, where she was "given the company policies, got [a] driving test and opened a bank account." GX 18-1. She alleged that she did not receive any salary or allowances prior to reporting to Joplin in February 2004. GX 18-1. The records submitted by GMMPCPI, however, indicate that she received \$50.00 allowance payments on December 19, 2003, December 26, 2003, January 2, 2004, January 9, 2004, January 16, 2004, and January 23, 2004. GX 5-1; RX 403-1. Once she returned to Joplin in May 2004, Ms. Acharon received additional \$50.00 allowance payments. GX 18-1. She received these payments on May 4, 2004, May 12, 2004, May 17, 2004, May 25, 2004, June 1, 2004, and June 3, 2004. GX 5-2; RX 403-2. Thus, she received a total of \$600.00 in allowance payments. GX 5-1 to 5-2; RX 403-1 to 403-2. Ms. Acharon first took the Missouri therapist license examination in February 2004, but failed her first attempt. GX 4-1, 18-1. She passed her second attempt "sometime" in May 2004 and obtained her state license on June 4, 2004. GX 4-1, 18-1.

Ms. Acharon began working as an occupational therapist for GMMPCPI in June 2004. GX 18-1. She first appeared on GMMPCPI's payroll on June 15, 2004. JX 1; GX 15; GX 17. This is consistent with her interview statement that she "started receiving [salary] checks from the company...in June of 2004." GX 18-1. Ms. Acharon stated that her first work assignment was at a facility in Kirksville, Missouri, where she worked for approximately 8.5 months. GX 18-2. According to the LCA for the period of October 15, 2003 to October 14, 2005, she was initially assigned to work in Springfield, Missouri, with an initial wage rate of \$35,550.00 per year. GX 16-19. During her interview, however, she stated that her starting salary "was somewhere between \$37,000 [and] \$38,000." GX 18-1. She also stated that GMMPCPI paid for her relocation expenses "when they had me at a hotel in Kirksville sometime [in] June-July 2004." GX 18-3. Ms. Acharon was subsequently re-assigned to a facility in Jefferson City, Missouri, where she worked for one to two months. GX 18-2. A second LCA, for the period of October 25, 2004 to October 24, 2006, indicates that she was assigned to work in Licking, Missouri, with a wage rate of \$38,000.00 per year. GX 16-12. Ms. Acharon stated that her salary was increased to \$42,000.00 and \$46,000.00 during her first year, and became \$50,000.00 after one year. GX 18-1. Beginning on April 1, 2005, she worked as a therapist at a facility in Quincy, Illinois. GX 18-2. She received \$500.00 from GMMPCPI for relocation expenses when she transferred to Quincy. GX 18-3. According to her most recent LCA, for the period of October 27, 2006 to October 26, 2009, she was assigned to work in Quincy and earned a wage rate of \$55,000.00 per year. GX 16-2. During her interview, she similarly stated that her current salary was \$55,000.00. GX 18-1.

On September 20, 2004, GMMPCPI filed a petition for an extension of Ms. Acharon's H-1B visa. GX 16-24 to 16-27. The petition was approved on April 28, 2005, and her H-1B visa was extended for the period of October 25, 2004 to October 24, 2006. GX 16-36. During her interview, Ms. Acharon stated that she paid \$350.00 to GMMPCPI's attorney for the extension. GX 18-2. On September 15, 2006, GMMPCPI filed a petition for an additional extension of Ms. Acharon's visa. GX 16-5 to 16-8. Ms. Acharon stated that GMMPCPI paid the filing fees for the petition. GX 18-2. GMMPCPI's records show that Ms. Acharon was scheduled to receive an advance of

\$190.00 for USCIS fees and \$500.00 for attorney fees related to the most recent H-1B visa extension. GX 8.

During her interview, Ms. Acharon acknowledged that her employment agreement contained a damages provision for early cessation of employment. GX 18-2. In an addendum to her interview statement, she noted that the provision contained pro-rated damages ranging from \$3,000.00 to \$10,000.00, depending on when a therapist terminated their employment. GX 18-3. As of October 10, 2006, however, Ms. Acharon was still employed by GMMPCPI as an occupational therapist. GX 18-1.

Alena Gay Arat

Alena Gay Arat first arrived in the United States from the Philippines on February 21, 2005. GX 4. According to the Form I-129 Supplement H completed by GMMPCPI, Ms. Arat “graduated with a bachelor’s degree in Physical Therapy from the University of the East in Manila, Philippines.” GX 24-22. She has been licensed to practice physical therapy in the Philippines since 1999. GX 24-22. Ms. Arat signed two employment agreements with GMMPCPI. GX 31. The first agreement was signed on May 1, 2004, while Ms. Arat was still in the Philippines. GX 29-1, 31-1. She stated that she signed the agreement “to show to the U.S. Embassy [in] Manila, Philippines for the consulate interview.” GX 29-1. She signed the second agreement on May 6, 2005, which was after she had arrived in the United States and passed her Missouri licensing examination. GX 29-1, 31-8. Before leaving the Philippines, Ms. Arat was required to make various payments related to her H-1B visa application. GX 29-2. She paid \$1,500.00 for attorney’s fees, \$255.00 for USCIS filing fees and other miscellaneous costs, and \$1,000.00 for a “premium processing” fee. GX 29-2. On February 9, 2005, she paid an additional \$895.00 to GMMPCPI for unknown expenses following her interview with the American embassy. GX 29-2; GX 30. After arriving in the United States, Ms. Arat visited family in Florida for one week before flying into Springfield, Missouri, on February 28, 2005. GX 29-1. She was picked up at the airport by Mr. Mishra and Ms. Magsaysay, who then drove her to Joplin. GX 29-1. According to the Form WH-55 completed by Erica Simon, Ms. Arat reported for work in Joplin on February 28, 2005. GX 23. This is the same date listed in the records provided by GMMPCPI. GX 4.

Upon her arrival in Joplin, Ms. Arat was provided living arrangements in one of GMMPCPI’s apartments. GX 29-1. She then received her review materials for the National Physical Therapy Examination (“NPTE”) and applied for a Social Security card with Linda Castillo’s assistance. She then performed a “self-review” for the NPTE for a period of two months. She also received driving instruction and obtained her driver’s license. During this two-month time period, Ms. Arat was paid a weekly allowance of \$50.00 from GMMPCPI for “food, shampoo and whatever [she] needed.” GX 29-1. According to the records submitted by GMMPCPI, Ms. Arat received allowance payments on March 4, 2005, March 11, 2005, March 17, 2005, March 25, 2005, March 30, 2005, April 7, 2005, April 15, 2005, April 22, 2005, April 29, 2005, and May 6, 2005. GX 5-11; RX 403-11. This amounts to a total allowance of \$500.00. GX 5-11; RX 403-11. In her statement to the DOL on August 19, 2006, Ms. Arat indicated that

GMMPCPI paid for all of the utility bills while she was living in the company apartment. GX 29-1. She stated that “[w]e were not charged anything for that housing during the whole time we were reviewing for our exams.” GX 29-1.

Ms. Arat took the NPTE on April 20, 2005, and learned that she had passed the examination on May 6, 2005. GX 29-1. She also obtained her Missouri physical therapy license on May 6, 2005. GX 4. As stated above, she signed a second employment agreement with GMMPCPI on that date. GX 29-1; GX 31-8. Ms. Arat’s first work assignment was in GMMPCPI’s offices in Joplin. She stated that GMMPCPI “let me stay working in the office because I had no assignment.” GX 29-1. She then obtained a temporary assignment at a facility in Monett, Missouri, where she worked from May 16, 2005 to May 20, 2005. GX 29-1. On May 22, 2005, Ms. Arat was assigned to a facility in Sikeston, Missouri, which was approximately seven hours from Joplin. GX 29-1. She stated that GMMPCPI paid for her relocation expenses, including gasoline for her car, food and groceries, and housing for one week at a hotel. GX 29-1. She then moved into an apartment, where she paid the rent on her own. In Sikeston, Ms. Arat worked five days and 40 hours per week. She “evaluated the patients for their needs of therapy,” “screened them for therapy and got orders from the doctors,” and formulated plans of care for each patient. GX 29-2. She also “supervised 1 or more PTA’s in the hospital and nursing homes” and “actually gave the patients treatment.” GX 29-2. Furthermore, she coordinated with physicians, program coordinators, social workers, and nurses. GX 29-2.

After obtaining her state therapist’s license, Ms. Arat began to receive the salary specified on her LCA. She stated that her beginning salary was \$36,100.00, which is consistent with the wage rate listed on her LCA for the period of November 2004 to November 2007. GX 24-11. She received paychecks “on the 10th and 25th of each month through direct deposit,” and was also paid for the time she spent working in GMMPCPI’s office. GX 29-2. According to records submitted by GMMPCPI, Ms. Arat’s first paycheck featured a gross salary of \$950.04 and a net pay of \$703.31. GX 25. She received several pay increases during her employment with GMMPCPI. Her salary increased to \$42,000.00 after three months of work and \$46,000.00 after six months of work. GX 24-3; GX 29-2. GMMPCPI submitted wage records showing that Ms. Arat earned gross semi-monthly wages of \$1,548.67 on January 10, 2006, and \$1,916.67 on February 10, 2006, March 10, 2006, April 10, 2006, and May 25, 2006. GX 26-1 to 26-5. After one year of work with GMMPCPI, Ms. Arat’s salary increased to \$50,000.00 per year. GX 29-2. As stated in GMMPCPI’s wage records, she earned a gross semi-monthly wage of \$1,964.59 on July 10, 2006. GX 27.

On December 15, 2005, GMMPCPI filed a petition to extend Ms. Arat’s H-1B visa. GX 24-16 to 24-19. In her statement to the DOL, Ms. Arat noted that GMMPCPI deducted H-1B extension fees from her paychecks. GX 29-2. According to GMMPCPI’s records, Ms. Arat was advanced \$500.00 for attorney fees, \$190.00 for USCIS fees, and \$195.00 for derivative USCIS fees. GX 7; GX 8. In addition, GMMPCPI withheld \$100.00 from Ms. Arat’s paycheck on January 10, 2006, and \$90.00 from her paycheck on February 10, 2006, as payment for the \$190.00 USCIS extension fee. GX 9; GX 10. Furthermore, GMMPCPI withheld \$125.00 from Ms. Arat’s paychecks on March 10,

2006, April 10, 2006, May 10, 2006 and May 25, 2006, as payment for \$500.00 of the H-1B extension-related attorney fees. GX 9; GX 10; JX 1.

On May 10, 2006, Ms. Arat tendered her resignation from employment with GMMPCPI, effective July 1, 2006. GX 28-1. She did so in an e-mail that she sent to Kamendra Mishra, Mary Ann Magsaysay, and Linda Castillo. She indicated her understanding that she was obligated to pay \$4,000.00 to GMMPCPI “as a fee for breach of contract” and stated that she would “settle this financial obligation soon.” GX 28-1. On May 24, 2006, Ms. Arat sent an additional e-mail to Ms. Castillo, where she agreed to delay her resignation until July 10, 2006, and stated that she was doing so to avoid paying an additional \$1,446.00 to GMMPCPI for relocation and NPTE expenses. GX 28-2. In a subsequent e-mail, Ms. Castillo informed Ms. Arat that “per our conversation previously you have suggested that we can hold your paycheck to cover the amount that you owe for the breach of [contract].” GX 28-6. She also stated that “per our lawyer it is legal in [Missouri] to withhold from [a] paycheck if you owe money to [the] company.” GX 28-6. In a response dated June 21, 2006, Ms. Arat stated that “nothing has been definite on how much is the amount [that she owed to GMMPCPI] and how it will be paid if ever.” GX 28-6. She therefore expressed her expectation that she would receive her paychecks on June 25, 2006, July 10, 2006, and July 25, 2006. GX 28-6. Subsequent e-mail exchanges between Ms. Arat and Ms. Castillo indicate that the parties continued to disagree as to whether Ms. Arat owed money to GMMPCPI. GX 28-8 to 28-9. In her statement to the DOL, Ms. Arat noted that GMMPCPI withheld her final paycheck dated July 10, 2006. GX 29-2. This is consistent with GMMPCPI’s wage records from July 10, 2006, which include a notation of “[f]inal check withheld.” GX 27. GMMPCPI informed Ms. Arat that the withholding was “for the buy-out and for giving less than 60 days notice [that] I was leaving.” GX 29-2. She stated that GMMPCPI demanded a total of \$5,446.00 in damages: \$4,000.00 for breach of contract and \$1,446.00 for expenses related to relocation and the NPTE. GX 29-2.

Euphill Juliette Aseniero

Euphill Juliette Aseniero first arrived in the United States from the Philippines on April 9, 2004. GX 4, JX 1-8. She holds a Bachelor of Science degree in Occupational Therapy from a university in the Philippines. GX 36-1. She signed two employment agreements with GMMPCPI. The first was completed while she was still in the Philippines. She signed the second contract in October 2004, which was after she passed her Missouri license examination. GX 36-1. After arriving in the United States, Ms. Aseniero was charged \$5,000.00 by GMMPCPI, which was paid by her brother to GMMPCPI’s attorney. GX 36-1 to 36-2. She visited family before reporting to work in Joplin, Missouri. GX 36-1. According to the Form WH-55 completed by Erica Simon, Ms. Aseniero first reported for work on April 16, 2004. GX 32. This is consistent with the information obtained by Ms. Simon during her interview with Ms. Aseniero on October 17, 2006, where she reported that she arrived in Joplin on “April 16th or 17th 2004.” GX 36-1. At the hearing, Ms. Simon testified that she relied on the interview statement to determine Ms. Aseniero’s report to work date. Tr. 97. She also relied on the allowance information provided by GMMPCPI in GX 5. Tr. 99-100.

Upon her arrival in Joplin, Ms. Aseniero was provided housing in one of GMMPCPI's apartments. GX 36-1. She also obtained a Social Security number and prepared for a driver's test. From April 2004 to June 2004, she studied for her Missouri occupational license examination. During this study period, Ms. Aseniero received a \$50.00 weekly allowance from GMMPCPI. According to GMMPCPI's records, she received an initial \$100.00 allowance payment on April 20, 2004, and subsequently received \$50.00 payments on April 23, 2004, May 4, 2004, May 12, 2004, May 17, 2004, May 25, 2004, June 1, 2004, June 3, 2004, June 10, 2004, June 24, 2004, and June 25, 2004. GX 5-1; RX 403-1. Ms. Aseniero took the state license examination on either June 17 or 18, 2004, and found out that she had received a passing score on June 24, 2004. GX 36-1. She obtained her Missouri therapist license on June 30, 2004. GX 4; GX 36-1.

Ms. Aseniero began working as an occupational therapist on June 30, 2004. GX 36-1. She also first appeared on GMMPCPI's payroll on June 30, 2004. JX 1-8. Her first assignment was at a facility in Jefferson City, Missouri, where she worked for one year. GX 36-1. She stated that she was receiving a salary of \$27,500.00 when she left Jefferson City in June 2005. GX 36-1. The applicable LCA for the period of December 1, 2003 to November 30, 2005, however, indicates that she was paid an annual salary of \$36,400.00. GX 33-16. During her interview with Ms. Simon, Ms. Aseniero stated that she transferred to California on either June 24, 2005 or June 27, 2005, where she "worked for several facilities ... on 13 week assignments." GX 36-1. She reported working as an occupational therapist at facilities in Los Angeles, Long Beach, and Madeira. GX 36-1. The Madeira facility was her last assignment before leaving her job with GMMPCPI. GX 36-1. She stated that she was reimbursed for relocation expenses whenever she switched facilities. This included a \$300.00 travel allowance when she transferred to Madeira. GMMPCPI also paid for her apartment in Los Angeles during her assignment in Madeira. Furthermore, she stated that she was given \$1,000.00 for a down payment on a car. GX 36-1. According to the LCA for the period of December 12, 2005 to December 9, 2008, Ms. Aseniero was paid an annual salary of \$58,600.00 while working for GMMPCPI in California. GX 33-3. The wage records submitted by GMMPCPI indicate that she earned gross semi-monthly wages of \$2,291.67 on October 7, 2005, October 25, 2005, November 10, 2005 and December 23, 2005, and \$2,071.67 on December 9, 2005. GX 35.

On October 24, 2005, GMMPCPI filed a petition to extend Ms. Aseniero's H-1B visa. GX 33-35 to 33-40. The petition was approved on January 9, 2006, and her visa was extended for the period of December 12, 2005 to December 9, 2008. GX 33-4. During her interview with Ms. Simon, Ms. Aseniero reported that GMMPCPI deducted a total of \$800.00 for H-1B extension fees from four of her paychecks. GX 36-1. According to GMMPCPI's records, Ms. Aseniero was advanced \$500.00 for attorney fees and \$190.00 for USCIS fees. GX 7; GX 8. GMMPCPI's records also demonstrate, however, that a total of \$685.00 was deducted from four of Ms. Aseniero's paychecks from October 2005 to December 2005. These include deductions of \$185.00 for USCIS fees and \$125.00 for attorney fees on October 25, 2005, \$125.00 for attorney fees on November 10, 2005, \$125.00 for attorney fees on November 25, 2005, and \$125.00 for attorney fees on December 10, 2005. GX 9; GX 10.

Ms. Aseniero resigned from her employment with GMMPCPI effective June 30, 2006. GX 36-2. She stated that she gave 30 days' notice of her resignation, which she communicated to GMMPCPI by letter. Ms. Aseniero acknowledged that her employment agreement contained a "breach clause." GX 36-2. She reported, however, that she had completed the term of her employment contract and was not required to pay any damages. GX 36-2.

Ellanie Berba

Ellanie J. Berba first arrived in the United States from the Philippines on June 3, 2004. GX 4; JX 1-8. She is originally from Cebu City, Philippines, and holds a Bachelor of Science degree in Occupational Therapy from a university in the Philippines. GX 45-1. According to the Form I-129 Supplement H completed by GMMPCPI, Ms. Berba "is a graduate of [an] Occupational Therapy program evaluated to be equivalent to that of a US [sic] program." GX 42-27. Prior to accepting employment with GMMPCPI, she was an occupational therapist "for a hospital, assisting in the supervision of OT interns, as well as providing patient intervention and management." GX 42-27. After arriving in the United States, Ms. Berba stated that she "reported straight to the company in Joplin" and estimated that she reported for work on either June 3 or 4, 2004. GX 45-1. On the Form WH-55 that she completed for Ms. Berba, Erica Simon recorded a report for work date of June 4, 2004. GX 41. She testified at the hearing that this date was based on her interview with Ms. Berba, the list of allowances provided by GMMPCPI, and the list of dates provided by GMMPCPI. Tr. 101. Ms. Berba first appeared on the payroll on September 15, 2004. JX 1-8.

Upon her arrival in Joplin, Ms. Berba was provided housing in one of GMMPCPI's apartments. GX 45-1. While she attended an orientation program sponsored by GMMPCPI, she spent most of her time studying for the Missouri therapist licensing examination from June 2004 to July 2004. GX 45-1. During this study period, she received a \$50.00 weekly allowance from GMMPCPI. She stated that the allowance was primarily used for groceries. GX 45-1. According to GMMPCPI's records, Ms. Berba received a total of \$550.00 in allowance payments, which were given in \$50.00 increments on June 3, 2004, June 10, 2004, June 24, 2004, June 25, 2004, July 6, 2004, July 8, 2004, July 15, 2004, July 26, 2004, July 30, 2004, August 6, 2004, and August 24, 2004. GX 5-2; RX 403-2. Ms. Berba took the state licensing examination in July 2004, and learned that she had passed the test on either August 19 or 20, 2004. GX 45-1. Prior to receiving the examination results, she "helped out" in GMMPCPI's office, where she responded to e-mails requesting information about visas. GX 45-1. She received her Missouri therapist license on August 23, 2004. GX 4.

Ms. Berba began working as an occupational therapist in August 2004. GX 45-1. She first shadowed another therapist in Monett, Missouri, for one week. She then received a one-month assignment to a facility in Anderson, Missouri, where she worked in September 2004. This was followed by a two-year assignment at a facility in New Madrid, Missouri, where she remained until September 2006. According to the LCA for the period of December 1, 2003 to November 30, 2005, Ms. Berba was initially paid an

annual salary of \$36,400.00. GX 42-10. Her salary increased to \$50,000.00 per year pursuant to the terms of an LCA for the period of September 5, 2005 to September 4, 2008. GX 42-3. On August 31, 2005, GMMPCPI filed a petition to extend Ms. Berba's H-1B visa. GX 42-15 to 42-18. The petition was granted on December 20, 2005, and her visa was extended for the period of September 5, 2005 to September 4, 2008. GX 42-30. Ms. Berba stated that GMMPCPI charged her for the fees relating to both her initial H-1B petition and the extension. GX 45-1. She was unable to provide the specific amounts paid, but recalled that she had been charged \$800.00 for her H-1B extension. Following her assignment in New Madrid, Ms. Berba relocated to Sikeston, Missouri, where she worked at several different facilities in the area. GX 45-1. As of October 10, 2006, the date of her interview with Erica Simon, Ms. Berba was still employed by GMMPCPI and was receiving an annual salary of \$55,000.00. GX 45-1 to 45-2.

Zadel Cabrera

Zadel Cabrera first arrived in the United States on November 28, 2003. GX 4; JX 1-8. She is originally from Cebu City, Philippines, and holds a Bachelor of Science degree in Occupational Therapy from a university in the Philippines. GX 55-1. According to the Form I-129 Supplement H completed by GMMPCPI, Ms. Cabrera "has a bachelor's degree in Occupational Therapy from the Philippines" and was a licensed therapist in the Philippines, with nearly six years of practice experience. GX 53-18. Prior to leaving the Philippines, Ms. Cabrera was required to pay the USCIS fees for her H-1B visa, a premium processing fee, and related attorney fees. GX 55-1. After arriving in the United States, Ms. Cabrera stayed in New York with family for approximately two days because of a blizzard. GX 55-1. She then reported to Joplin, Missouri. According to the Form WH-55 completed by Erica Simon, Ms. Cabrera first reported for work on December 1, 2003. GX 52. At the hearing, Ms. Simon testified that she relied on the interview statement to determine Ms. Cabrera's report to work date. Tr. 107, 137-138. She also relied on the allowance information provided by the Respondent in GX 5. Tr. 108.

Upon her arrival in Joplin, Ms. Cabrera was provided housing with one other therapist in one of GMMPCPI's apartments. GX 55-1. GMMPCPI paid for both the apartment and the utilities. Ms. Cabrera stated that she spent between four and six weeks studying for the Missouri therapist licensing examination. GX 55-1. During this study period, she received a \$50.00 weekly allowance from GMMPCPI "for food to sustain myself." GX 55-1. According to GMMPCPI's records, Ms. Cabrera received allowance payments of \$138.60 on December 16, 2003, and \$168.00 on February 10, 2004. GX 5-1; RX 403-1. She took the state licensing examination on January 23, 2004, and then waited "a couple of weeks" for the results. GX 55-1. She learned that she had achieved a passing score and obtained her state license on February 17, 2004. GX 4-1.

Ms. Cabrera began working for GMMPCPI as an occupational therapist "as soon as [she] got [her] license." GX 55-1. During her interview with Ms. Simon, she identified February 10, 2004, as her first day of work. As stated above, however, she did not obtain her license until February 17. She first appeared on GMMPCPI's payroll on February 29, 2004. JX 1-8. Her initial assignment was at a facility in Joplin, where she worked for one month. She then transferred to Kennett, Missouri, where she worked at two

different facilities. She also occasionally traveled to Sikeston, Missouri, to assist other therapists. GX 55-2. Ms. Cabrera stated that her initial salary was approximately \$39,000.00. GX 55-1. According to the LCA for the period of October 15, 2003 to October 14, 2005, her initial wage rate was \$35,550.00 per year. GX 53-10. A subsequent LCA, for the period of October 26, 2004 to October 25, 2006, indicates that Ms. Cabrera was scheduled to receive \$42,000.00 per year. As of December 12, 2006, the date of her interview with Ms. Simon, Ms. Cabrera's salary was approximately \$50,000.00 per year. GX 55-1. She stated that was also paid incentives for extra work, such as helping new therapists prepare for the state licensing examination. GX 55-1. At the time of her interview, Ms. Cabrera had filed for an H-1B extension, but her application was still pending. She stated, however, that GMMPCPI had paid the fees for her visa extension. GX 55-1. She acknowledged that her employment agreement was for two years and contained a damages provision for early termination of employment. GX 55-2. As of December 12, 2006, however, Ms. Cabrera had completed her contract and was continuing to work for GMMPCPI without a contract. GX 55-2.

Celeste Cabugason

Celeste Cabugason first arrived in the United States on July 1, 2003. GX 4; JX 1-8. According to the Form I-129 Supplement H completed by GMMPCPI, Ms. Cabugason "has a bachelor's degree in Occupational Therapy (OT) from the Philippines, evaluated to be ... equivalent to that of a US [sic] program." GX 57-16. She also was a licensed occupational therapist in the Philippines prior to accepting employment in the United States. GMMPCPI's records indicate that Ms. Cabugason received her Missouri therapist license on September 1, 2003. GX 4. The Form I-129 Supplement H states that she is also a licensed therapist in Oklahoma. GX 57-16. The Form WH-55 completed by Ms. Simon lists a report for work date of July 1, 2003. GX 56. At the hearing, Ms. Simon testified that she relied on a comparison of Ms. Cabugason's arrival date in the United States and the date she obtained her Missouri therapist license. Tr. 109. She explained that this comparison supported a July 1, 2003 report for work date "[b]ecause the information for the other employees through statements and the records that I had indicated that they spent approximately a couple of months in the process of studying and obtaining their license." Tr. 110. Ms. Cabugason first appeared on the payroll on September 15, 2003. JX 1-8.

The record does not contain any evidence that Ms. Cabugason was interviewed by Erica Simon as a part of the DOL investigation. There is also no evidence that she was paid a salary or the \$50.00 weekly allowance from July 1, 2003 to September 1, 2003. Furthermore, while GMMPCPI filed a petition to extend Ms. Cabugason's H-1B visa on January 13, 2004, GX 57-14 to 57-15, there is no evidence that she has been charged by GMMPCPI for the USCIS fees or related attorney fees. According to the LCA for the period of March 1, 2003 to February 28, 2005, Ms. Cabugason was assigned to work at a facility in West Plains, Missouri. GX 57-10. Her initial wage rate for this period was \$35,766.00. GX 57-10. A subsequent LCA, for the period of March 10, 2004 to March 9, 2007, indicates that she was assigned to a facility in Miami, Oklahoma. GX 57-3. Her initial wage rate for this period was \$36,400.00. GX 57-3. There is no evidence in the

record regarding Ms. Cabugason's current employment status. Nor is there any additional documentation pertaining to her overall employment with GMMPCPI.

Darlene Claud

Darlene Claud first arrived in the United States on November 24, 2004. GX 4. According to the Form I-129 Supplement H completed by GMMPCPI, Ms. Claud is originally from the Philippines and "is a graduate of [an] occupational therapy program evaluated to be equivalent to that of a US [sic] program." GX 59-19. In addition, she worked in child care and emergency medical services prior to her participation in the H-1B visa program. GX 59-19. The record does not contain any evidence that she was interviewed by Erica Simon as a part of the DOL investigation. According to the Form WH-55 completed by Ms. Simon, Ms. Claud reported for work in Joplin, Missouri on December 12, 2004. GX 58. This is the same date listed in GMMPCPI's records. GX 4; GX 5-3.

Upon her arrival in Joplin, Ms. Claud was paid a \$50.00 weekly allowance from December 2, 2004 to February 11, 2005. GX 5-3; RX 403-3. According to GMMPCPI's records, she received \$50.00 allowance payments on December 2, 2004, December 10, 2004, December 17, 2004, December 23, 2004, January 7, 2005, January 14, 2005, January 21, 2005, January 28, 2005, February 4, 2005, and February 11, 2005. GX 5-3; RX 403-3. She also received a payment of \$48.00 on December 31, 2004, for a total of \$498.00 in allowance payments. GX 5-3; RX 403-3. Ms. Claud obtained her Missouri therapist license on February 8, 2005. GX 4.

Ms. Claud first appeared on GMMPCPI's payroll on February 15, 2005. GX 58; GX 60. According to the LCA for the period of October 1, 2004 to September 30, 2006, she was assigned to a facility in Belleview, Missouri. GX 59-10. She worked as an occupational therapist and her initial wage rate was \$38,000.00. GX 59-10. GMMPCPI's wage records indicate that Ms. Claud earned gross wages of \$943.67 from February 8, 2005 to February 15, 2005. GX 60. A subsequent LCA, for the period of October 1, 2005 to September 30, 2006, states that Ms. Claud was reassigned to a facility in Poplar Bluff, Missouri, with an initial wage rate of \$46,000.00. GX 59-3. The record indicates that Ms. Claud resigned from her employment with GMMPCPI at some point between October 1, 2005 and August 15, 2006. *See* GX 59-3; GX 63. There is no evidence of the precise date of her resignation. However, an e-mail exchange between Ms. Claud and Linda Castillo, dated October 11, 2006 and November 26, 2006, suggests that she was held liable for \$3,000.00 in early termination damages. GX 63.

According to a revised Form WH-55 completed by Ms. Simon, Ms. Claud has paid \$1,900.00 to GMMPCPI as damages for her early termination of employment. GX 61. She paid \$1,000.00 in a check dated August 25, 2006. GX 62-1. She paid an additional \$500.00 on April 27, 2007, \$200.00 on April 2, 2007, and \$200.00 on June 6, 2007. GX 62-2 to 62-4.

Estella Daraway

Estella Daraway first arrived in the United States on December 29, 2004. GX 4. She holds a Bachelor of Science degree in Physical Therapy from a university in the Philippines. GX 76-1. She signed two employment agreements with GMMPCPI. The first was completed while she was still in the Philippines and was for the purpose of her embassy interview. GX 76-1. She signed the second contract in April 2005, which was after she passed her state license examination. GX 4; GX 76-1. Prior to her departure from the Philippines, Ms. Daraway paid GMMPCPI's attorney \$3,650.00 for "the processing of my VISA, a premium processing fee, attorney fees and a courier." GX 76-2. She also paid \$895.00 directly to GMMPCPI for "miscellaneous fees." GX 76-2. After arriving in the United States, Ms. Daraway reported directly to Joplin, Missouri. Both GMMPCPI's records and the Form WH-55 completed by Erica Simon list a report for work date of December 29, 2004. GX 4; GX 73.

Upon her arrival in Joplin, Ms. Daraway was provided housing in one of GMMPCPI's apartments. GX 76-1. She also obtained a Social Security number after her first week in Joplin. GX 76-1. During her interview with Ms. Simon, Ms. Daraway stated that she "immediately" began studying for the Missouri therapist licensing examination. GX 76-1. She studied for approximately two months before taking the test, but failed on her first attempt. GX 76-1. After an additional two-month study period, she retook the examination and obtained a passing score in April 2005. GX 76-1. During both of her study periods, Ms. Daraway received a \$50.00 weekly allowance from GMMPCPI. GX 76-1. According to GMMPCPI's records, she received \$50.00 payments on December 31, 2004, January 7, 2005, January 14, 2005, January 21, 2005, January 28, 2005, February 4, 2005, February 11, 2005, February 18, 2005, February 25, 2005, March 4, 2005, March 11, 2005, March 17, 2005, March 25, 2005, and March 30, 2005. GX 5-5; RX 403-5. Thus, she received a total of \$700.00 in allowance payments. GX 5-5; RX 403-5. After passing the state license examination in April 2005, Ms. Daraway obtained her Missouri therapist license on April 11, 2005. GX 4; GX 76-1.

Ms. Daraway began working as a physical therapist on April 11, 2005. GX 76-1. During her interview with Ms. Simon, she reported that she was initially assigned to a facility in Jefferson City, Missouri, on April 19, 2005. GX 76-1. She was paid an initial salary of \$38,000.00. GX 76-1. According to the LCA for the period of November 1, 2004 to October 31, 2007, Ms. Daraway was supposed to work in Bowling Greene, Missouri, at a wage rate of \$37,110.00. GX 69-10. She stated that \$179.00 was deducted from her initial paycheck, but GMMPCPI's wage records do not show that this deduction was made. GX 70; GX 76-1. Ms. Daraway stated that she had anticipated working in Bowling Greene, but later learned that she had been hired as a traveling therapist. GX 76-1. She worked at the Jefferson City facility for approximately 2 to 2.5 months. She then worked for one week at a facility in Poplar Bluff, Missouri, "to cover a vacation." GX 76-1. She stayed in a hotel for the week, which was paid for by GMMPCPI. She then worked for three weeks at a facility in Monett, Missouri, where GMMPCPI instructed her "to cover a therapist's vacation." GX 76-1. She informed Ms. Simon that she was paying for two apartments at this time, "one in Monett and one in Jeff City." GX 76-1. Ms. Daraway remained in Monett for three months and covered four facilities. GX 76-1.

She stated that her salary increased to \$42,000.00 per year after three-to-four months. GX 76-1. This is consistent with the LCA for the period of November 2, 2005 to November 1, 2008, which states that Ms. Daraway was receiving a wage rate of \$42,000.00 per year. GX 69-3. GMMPCPI's wage records indicate that she earned gross semi-monthly wages of \$1,750.00 on October 25, 2005, \$1,966.67 on November 23, 2005, \$2,104.17 on December 9, 2005, \$1,916.67 on December 23, 2005, \$1,916.67 on January 10, 2006, and \$1,929.17 on January 25, 2006. GX 71. After one year of work for GMMPCPI, her salary increased to \$46,000.00. GX 76-1. As of July 2, 2006, GMMPCPI's wage records indicate that Ms. Daraway earned gross wages of \$2,083.34. GX 72.

On October 27, 2005, GMMPCPI filed a petition to extend Ms. Daraway's H-1B visa. GX 69-15 to 69-18. The petition was approved on January 25, 2006, and her visa was extended for the period of November 2, 2005 to November 1, 2008. GX 69-27. During her interview with Ms. Simon, Ms. Daraway stated that she had a "verbal agreement" with GMMPCPI for deductions from her pay, which included fees for her H-1B extension and green card application. GX 76-1 to 76-2. According to GMMPCPI's records, Ms. Daraway was advanced \$500.00 for attorney fees and \$190.00 for USCIS fees relating to her H-1B extension. GX 7; GX 8. The records also show that a total of \$594.09 was deducted from five of Ms. Daraway's paychecks from October 2005 to December 2005. These include deductions of \$185.00 for USCIS fees on October 25, 2005, \$125.00 for attorney fees on November 10, 2005, \$34.09 for attorney fees on November 25, 2005, \$125.00 for attorney fees on December 10, 2005, and \$125.00 for attorney fees on December 25, 2005. GX 9; GX 10.

On July 6, 2006, Ms. Daraway resigned from her employment with GMMPCPI. GX 76-2. She stated that she gave GMMPCPI two months' notice. Pursuant to the breach of contract provision of her employment agreement, she was held liable by GMMPCPI for \$4,000.00 in damages. GX 76-2. During her interview with Ms. Simon, she stated that GMMPCPI "got their money by withholding [my] last 2 checks" from the second week of June and the first week of July. GX 76-2. According to an e-mail from Linda Castillo to Ms. Daraway on September 6, 2006, GMMPCPI withheld the following amounts: \$1,517.73 in wages on July 10, 2006, \$1,109.23 in wages on July 25, 2006, \$984.08 in unpaid "paid time off" on July 25, 2006, and \$120.78 in unpaid "paid time off" on August 10, 2006. GX 75-1. Thus, GMMPCPI collected \$3,731.82 in damages from Ms. Daraway by withholding her paychecks and other compensation. Ms. Daraway paid the remaining \$268.18 on March 20, 2007. GX 74. She stated, however, that GMMPCPI also demanded that she pay \$11,300.00 "to pay for the re-location and salary of my replacement." GX 76-2.

Rinna Daymiel

Rinna Daymiel first arrived in the United States on July 12, 2004. GX 4; JX 108. According to the Form I-129 Supplement H completed by GMMPCPI, Ms. Daymiel "has a Bachelor's Degree in Occupational Therapy from [the] Philippines." GX 78-19. She was also a licensed therapist in the Philippines with work experience prior to her involvement in the H-1B program. GX 78-19, 78-24. The record does not contain any

evidence that she was interviewed by Erica Simon as a part of the DOL investigation. According to the Form WH-55 completed by Ms. Simon, Ms. Daymiel first reported for work with GMMPCPI in Joplin, Missouri, on July 12, 2004. GX 77-1. At the hearing, Ms. Simon testified that she primarily relied on when Ms. Daymiel first began receiving allowance payments from GMMPCPI. Tr. 112. GMMPCPI's records indicate that she first received an allowance payment on July 15, 2004. GX 5-2. The records also list, however, a date of July 6, 2004, which precedes Ms. Daymiel's arrival date in the United States. GX 5-2.

Upon her arrival in Joplin, Ms. Daymiel received weekly allowance payments from GMMPCPI from July 15, 2004 to September 30, 2004. GX 5-2; RX 403-2. According to GMMPCPI's records, she received \$50.00 payments on July 15, 2004, August 6, 2004, August 13, 2004, August 24, 2004, September 1, 2004, September 9, 2004, September 16, 2004, September 22, 2004, and September 30, 2004. GX 5-2; RX 403-2. She also received two \$100.00 payments on July 30, 2004. GX 5-2; RX 403-2. Thus, Ms. Daymiel received a total of \$650.00 in allowance payments. GX 5-2; RX 403-2. She received her Missouri therapist license on September 27, 2004. GX 4.

The parties stipulated that Ms. Daymiel first appeared on GMMPCPI's payroll on October 15, 2004. JX 1-8. According to GMMPCPI's records, however, Ms. Daymiel first appeared on the payroll on September 30, 2004. GX 81-2. According to the LCA for the period of December 1, 2003 to November 30, 2005, she was assigned to work at a facility in Poplar Bluff, Missouri, at a wage rate of \$36,400.00. GX 78-8. GMMPCPI's wage records indicate that Ms. Daymiel earned gross wages of \$608.00 from September 27, 2004 to September 30, 2004, and gross wages of \$2,191.34 from October 1, 2004 to October 15, 2004. GX 81-1 to 81-2. The records also show that she earned gross semi-monthly wages of \$2,016.67 on October 7, 2005, \$2,390.84 on October 25, 2005, \$2,173.34 on November 10, 2005, \$2,383.34 on November 23, 2005, and \$2,433.34 on December 9, 2005. GX 79. According to the LCA for the period of November 30, 2005 to November 29, 2008, Ms. Daymiel was assigned to a facility in Cassville, Missouri, at a wage rate of \$49,600.00. GX 78-3.

On November 16, 2005, GMMPCPI filed a petition to renew Ms. Daymiel's H-1B visa. GX 78-14 to 78-16. The petition was granted on February 7, 2006, and her visa was extended for the period of November 30, 2005 to November 29, 2008. GX 78-28. According to the Form WH-55 completed by Ms. Simon, GMMPCPI deducted a total of \$685.00 from Ms. Daymiel's pay for H-1B extension-related expenses. GX 77. This is consistent with GMMPCPI's records, which indicate that Ms. Daymiel was advanced \$185.00 for USCIS fees and \$500.00 for attorney fees. GX 7; GX 8. The records also show that a total of \$685.09 was deducted from five of Ms. Daymiel's paychecks from October 2005 to December 2005. These include deductions of \$185.00 for USCIS fees on October 10, 2005, \$125.00 for attorney fees on October 25, 2005, \$125.00 for attorney fees on November 10, 2005, \$125.00 for attorney fees on November 25, 2005, and \$125.00 for attorney fees on December 10, 2005. GX 9; GX 10. The record does not contain any evidence, however, as to whether Ms. Daymiel is still employed by GMMPCPI or terminated her employment early.

Iris de la Calzada

Iris de la Calzada first arrived in the United States on June 2, 2004. GX 4; JX 1-8. According to the Forms I-129 Supplement H and I-192W completed by GMMPCPI, Ms. de la Calzada is originally from Bacoor, Philippines, and “graduated from [an] Occupational Therapy program evaluated to be equivalent to that of a US [sic] program.” GX 83-17, 83-23. On the Form WH-55, Erica Simon listed a report for work date of June 2, 2004. GX 82. In a sworn affidavit dated January 21, 2010, however, Ms. de la Calzada stated that she arrived in Los Angeles, California, on June 2, 2004, but missed her flight to Joplin. GX 85. She was forced to stay overnight in Los Angeles and therefore reported “for orientation and training in Joplin, Missouri on June 3, 2004.” GX 85. At the hearing, Ms. Simon acknowledged that the correct report for work date was June 3, 2004, based on the sworn affidavit. Tr. 114.

Upon her arrival in Joplin, Ms. de la Calzada was paid a weekly allowance by GMMPCPI. GX 85. GMMPCPI’s records indicate that she received a \$100.00 payment on June 24, 2004, followed by \$50.00 payments on June 25, 2004, July 6, 2004, July 8, 2004, July 15, 2004, July 26, 2004, July 30, 2004, August 6, 2004, and August 13, 2004. GX 5-2; RX 403-2. This amounts to a total of \$500.00 in allowance payments. GX 5-2; RX 403-2. In her sworn affidavit, however, Ms. de la Calzada stated that she “was not paid a salary until after [she] received [her] state occupational therapist license.” GX 85. GMMPCPI’s records show that she received her Missouri therapist license on July 30, 2004. GX 4.

Ms. de la Calzada first appeared on GMMPCPI’s payroll as an occupational therapist on July 31, 2004. JX 1-9; GX 82; GX 84. According to the LCA for the period of December 15, 2003 to December 14, 2005, she was initially assigned to a facility in Poplar Bluff, Missouri. GX 83-10. Her initial wage rate was \$36,400.00 per year. GX 83-10. As of February 7, 2005, she was paid a salary of \$38,000.00. GX 83-15. Her wage rate was increased to \$42,000.00 per year effective February 25, 2005. GX 83-15. A subsequent LCA, for the period of February 14, 2005 to February 13, 2005, indicates that Ms. de la Calzada was reassigned to a facility in Stillwater, Oklahoma, where she was paid at the rate of \$42,000.00 per year. GX 83-3.

On February 7, 2005, GMMPCPI filed a petition to extend Ms. de la Calzada’s H-1B visa. GX 83-14 to 83-15. The petition was granted on May 26, 2005, and her visa was extended for the period of February 14, 2005 to February 13, 2008. GX 83-25. The record, however, contains no evidence that GMMPCPI deducted any amounts from Ms. de la Calzada’s paychecks for USCIS or attorney fees related to the H-1B extension. There is also no evidence as to whether she terminated her employment early or is still employed by GMMPCPI.

Mary Carmel Elizon

Mary Carmel Elizon first arrived in the United States on March 31, 2004. GX 4; JX 1-8. According to the Forms I-129 and I-129 Supplement H completed by GMMPCPI, Ms. Elizon is originally from Cebu City, Philippines, and “has a bachelor’s degree in

Occupational Therapy from Velez College, Cebu, Philippines.” GX 95-15, 95-20. Prior to her participation in the H-1B program, she was a licensed occupational therapist practicing in the Philippines. GX 95-20. The record does not contain any evidence that she was interviewed by Erica Simon as a part of the DOL investigation. According to the Form WH-55 completed by Ms. Simon, however, Ms. Elizon first reported for work with GMMPCPI in Joplin, Missouri, on March 31, 2004. GX 94. At the hearing, Ms. Simon testified that she relied on Ms. Elizon’s arrival date in the United States and the date she began receiving allowance payments. Tr. 117.

Upon her arrival in Joplin, Ms. Elizon was paid a weekly allowance by GMMPCPI. GX 5-1; RX 403-1. GMMPCPI’s records indicate that she received her first \$50.00 payment on March 31, 2004. GX 5-1; RX 403-1. She then received a \$100.00 payment on April 13, 2004, and \$50.00 payments on April 23, 2004, May 4, 2004, May 12, 2004, May 17, 2004, May 25, 2004, June 1, 2004, and June 3, 2004. GX 5-1; RX 403-1. This amounts to a total of \$450.00 in allowance payments. GX 5-1; RX 403-1. Ms. Elizon received her Missouri therapist license on June 4, 2004. GX 4.

Ms. Elizon first appeared on GMMPCPI’s payroll as an occupational therapist on June 15, 2004. JX 1-9; GX 94; GX 96. According to the LCA for the period of December 1, 2003 to November 30, 2005, she was initially assigned to a facility in Poplar Bluff, Missouri. GX 95-9. Her initial wage rate was \$36,400.00. GX 95-9. GMMPCPI’s wage records indicate that Ms. Elizon earned gross wages of \$1,127.34 from June 4, 2004 to June 15, 2004. GX 96. A subsequent LCA, for the period of November 30, 2005 to November 30, 2008, shows that she was reassigned to a facility in Vienna, Missouri, at a wage rate of \$50,000.00 per year. GX 95-3.

On November 9, 2005, GMMPCPI filed a petition to extend Ms. Elizon’s H-1B visa. GX 95-14 to 95-17. The petition was approved on February 6, 2006, and her visa was extended for the period of December 1, 2005 to November 30, 2008. GX 95-30. The record, however, contains no evidence that GMMPCPI deducted any amounts from Ms. Elizon’s paychecks for USCIS or attorney fees related to the H-1B extension. There is also no evidence as to whether she terminated her employment early or is still employed by GMMPCPI.

Maricon Barba Garingo

Maricon Barba Garingo first arrived in Joplin, Missouri, from the Philippines on October 6, 2006. GX 197-1. According to the Form I-129 Supplement H completed by GMMPCPI, Ms. Garingo holds a bachelor’s degree in physical therapy from a university in the Philippines. GX 193-10. She had already passed the NPTE and obtained her Missouri therapist license when she arrived in Joplin. GX 193-10; GX 197-1. In her signed and sworn affidavit dated August 13, 2010, she stated that she “paid for all [of her] expenses relating to studying and taking [the NPTE] examination, obtaining [her] state license and traveling to Joplin, Missouri.” GX 197-1. Ms. Garingo was required to sign two employment agreements with GMMPCPI. GX 197-1. She signed the first agreement before leaving the Philippines and was required to submit it “to the Philippines Overseas Employment Authority in order to be cleared to leave the

Philippines.” GX 197-1. After arriving in Joplin on October 6, 2006, Ms. Garingo signed the second employment agreement. The contract required her to pay “\$25,000.00 if [she] terminated the Agreement before the end of 6 months from the first day of employment and \$20,000.00 if [she] left after the first 6 months of employment but before the end of 12 months from the first day of employment.” GX 197-1. Ms. Garingo noted that she had discussed the damages with other therapists, but was “not aware of anyone discussing the new contract with Mary Ann [Magsaysay], Ken [Mishra] or Linda [Castillo].” GX 197-2. She stated that she “was afraid to say anything” about the damages provision because she “had just come to the United States and ... did not know the laws or what the employer could do.” GX 197-2.

Upon arriving in Joplin, Ms. Garingo was not able to begin working as a physical therapist because she had not yet received her driver’s license or Social Security number. GX 197-2. She stated, however, that she was paid her salary during this time period. According to the LCA for the period of October 1, 2006 to September 30, 2009, Ms. Garingo received an annual salary of \$39,000.00. GX 193-3. She stated that she was unaware that she would be a “traveling therapist,” where she worked at various locations for three (3) months at a time. GX 197-2. She was initially assigned to facilities in Missouri, but was subsequently transferred by GMMPCPI to Illinois. GX 197-2.

In an e-mail dated June 24, 2007, Ms. Garingo submitted her resignation from employment to GMMPCPI. GX 194. She indicated that she was getting married on September 15, 2007, and was permanently relocating to Chula Vista, California. She requested, however, that her termination become effective on October 7, 2007, which was one year after her initial start date on October 6, 2006. GX 194. In her sworn affidavit, Ms. Garingo stated that while her employment contract provided for a 24-month term, her H-1B visa expired on September 30, 2007. GX 197-2. This statement is consistent with the expiration date listed on her Form I-129 application, which states that her H-1B visa expired on September 30, 2007. GX 193-6. Ms. Garingo alleged that GMMPCPI did not renew her H-1B visa, so she did not work for the company after September 30, 2007. GX 197-2.

On February 12, 2008, Ms. Garingo received a letter from an attorney for GMMPCPI, which notified her that she had only worked for one year from October 6, 2006 through September 30, 2007. GX 195. Accordingly, the letter found Ms. Garingo to be in breach of her employment agreement because she had failed to complete her two-year term of employment. She was informed that “[u]nder the employment agreement you are therefore liable for liquidated damages of \$14,000.00,” with a set-off of \$2,540.00 by GMMPCPI. GX 195. Thus, the letter demanded that Ms. Garingo “make immediate arrangements” to pay damages of \$11,060.00 and threatened to commence litigation in the Missouri courts if she did not respond by February 29, 2009. GX 195. In her sworn affidavit, Ms. Garingo alleged that GMMPCPI had also contacted her about the damages and that “Linda Castillo threatened to report me to the immigration services.” GX 197-3. On March 25, 2008, however, Ms. Garingo paid \$7,000.00 to GMMPCPI “to settle the employment contract dispute.” GX 196; GX 197-3.

Michael Gonzales

Michael Gonzales first arrived in the United States on November 22, 2004. GX 4. He is originally from Davao City, Philippines, and holds a Bachelor of Science in Physical Therapy from a university in the Philippines. GX 107-1. He signed two employment agreements with GMMPCPI. The first was completed while he was still in the Philippines and was used for his embassy interview. GX 107-1. He signed the second contract after he obtained his Missouri therapist license on March 1, 2005. GX 107-1. Prior to leaving the Philippines, Mr. Gonzales paid \$3,000.00 to GMMPCPI and GMMPCPI's attorney for fees related to his H-1B visa. GX 107-1. These included expenses for the USCIS fees, premium processing fees, and attorney fees. GX 107-1. During his interview with Erica Simon, Mr. Gonzales stated that he spent "a couple of weeks with my Aunt in New Orleans" after arriving in the United States. GX 107-1. He estimated that he reported to Joplin, Missouri, on either December 5 or 6, 2004. GX 107-1. This is consistent with GMMPCPI's records and the Form WH-55 completed by Ms. Simon, which both list a report for work date of December 6, 2004. GX 4; GX 100.

Upon his arrival in Joplin, Mr. Gonzales was provided housing with four other therapists in one of GMMPCPI's apartments. GX 107-1. He stated that he lived in the apartment for three months, during which time he studied for his state licensing examination. GX 107-1. GMMPCPI paid the utilities for the apartment and provided Mr. Gonzales a weekly allowance of \$50.00 from December 6, 2004 to March 4, 2005. GX 5-4; GX 107-1; RX 403-4. He received \$50.00 payments on December 6, 2004, December 13, 2004, December 17, 2004, December 23, 2004, December 31, 2004, January 7, 2005, January 14, 2005, January 21, 2005, January 28, 2005, February 4, 2005, February 11, 2005, February 18, 2005, February 25, 2005, and March 4, 2005. GX 5-4; RX 403-4. This amounts to a total of \$700.00 in allowance payments. GX 5-4; RX 403-4. During his interview, Mr. Gonzales stated that GMMPCPI "didn't want us to work until we got a full license," so he studied for the license examination from December 2004 to February 2005. GX 107-1. He took the test on either February 15, 2005 or February 16, 2005. After learning that he had achieved a passing score, Mr. Gonzales received his Missouri occupational license on March 1, 2005. GX 107-1.

Mr. Gonzales stated that he began working as a physical therapist for GMMPCPI on March 9, 2005. GX 107-1. He first appeared on GMMPCPI's payroll on March 15, 2005. GX 100; GX 102. According to the LCA for the period of October 15, 2004 to October 14, 2007, Mr. Gonzales was assigned to work in Kahoka, Missouri, at a wage rate of \$34,258.00. GX 101-10. He informed Ms. Simon, however, that he never worked in Kahoka, but was instead "placed 300 miles away [from] there in Poplar Bluff, MO." GX 107-1. He did not identify his wage rate, but noted that he was "always salaried but it varied from check to check the amount." GX 107-1. He stated his belief, however, that the wage rate in Poplar Bluff was higher than Kahoka. GX 107-2. GMMPCPI's wage records show that he earned semi-monthly gross wages of \$2,340.17 on September 23, 2005, and \$1,935.42 on October 7, 2005. GX 103. Mr. Gonzales stated that he worked in Poplar Bluff for six months until he "moved to Kirksville to live and [he] worked in Macon and Clarence MO until [he] resigned." GX 107-1. He left Poplar Bluff after GMMPCPI lost its contract with the facility and he was without an assignment from

September 21-27, 2005. GX 107-1 to 107-2. A subsequent LCA for the period of October 15, 2005 to October 14, 2008, indicates that Mr. Gonzales was re-assigned to work in Macon, Missouri. GX 101-3. His wage rate was \$46,000.00. GX 101-3. During his interview, however, Mr. Gonzales stated that his last rate of pay was \$42,000.00 per year. GX 107-1.

On October 12, 2005, GMMPCPI filed a petition to extend Mr. Gonzales' H-1B visa. GX 101-15 to 101-19. The petition was approved on January 18, 2006, and his visa was extended for the period of October 16, 2005 to October 14, 2008. GX 101-28. Mr. Gonzales stated that he paid for the expenses related to his H-1B extension, which were deducted from his paychecks at the rate of \$200.00 per month. GX 107-1. He also paid for the extension-related attorney fees. He informed Ms. Simon, however, that he "didn't agree to the extension deduction." GX 107-1. GMMPCPI's records indicate that Mr. Gonzales was advanced \$190.00 for USCIS fees, \$195.00 for derivative USCIS fees, and \$800.00 for attorney fees. GX 7; GX 8. The records also show that a total of \$1,180.00 was deducted from 10 of Mr. Gonzales' paychecks from October 2005 to February 2006. GX 11; GX 104. These include deductions of \$185.00 for USCIS fees on October 10, 2005, \$195.00 for derivative USCIS fees on October 25, 2005, and \$100.00 for attorney fees on November 10, 2005, November 25, 2005, December 10, 2005, December 25, 2005, January 10, 2006, January 25, 2006, February 10, 2006, and February 25, 2006. GX 11; GX 104.

On March 15, 2006, Mr. Gonzales submitted a letter of resignation to GMMPCPI. RX 405. He stated that he was resigning his employment effective three weeks from the date of the letter. RX 405. His last day of work with GMMPCPI was on April 5, 2006, and he subsequently went to work for another therapy provider. GX 107-2. GMMPCPI withheld his final paycheck, which reflected gross earnings of \$1,327.80. GX 106; GX 107-2. Mr. Gonzales stated that he was not given a reason for the withholding. GX 107-2. On May 16, 2006, Mr. Gonzales received a letter from GMMPCPI's attorney notifying him that he had violated his employment agreement dated March 1, 2005. GX 105-1. GMMPCPI held Mr. Gonzales liable for the following expenses:

- A. For giving three weeks [sic] notice instead of 90 days notice:
 - 1. Hotel Expense for Replacement \$2,829.00
 - 2. Relocation for Replacement \$200.00
 - 3. Salary for Replacement \$10,133.36

- B. Other Expenses:
 - 4. Misc. Expense for NPTE Test & Relocation \$1,964.00

- C. Breach of Contract
 - 5. Breach of Contract \$4,000.00

GX 105-1. The hotel expenses reflect charges for a 69-day stay by Mr. Gonzales' replacement at a hotel in Macon, Missouri. GX 105-1. The salary expenses reflect payment of the replacement's wages for two months and nine days. GX 105-1.

GMMPCPI sought \$4,000.00 for breach of contract because Mr. Gonzales terminated his employment agreement “after the end of twelve (12) months but prior to the end of one and one-half [years] (1 1/2 years) from the first day of employment.” GX 105-2. Mr. Gonzales indicated that his new employer “paid for the replacement and they paid [GMMPCPI] for my salary.” GX 107-2.

GMMPCPI subsequently filed a “Petition for Damages, Preliminary Injunction, and Permanent Injunction” against Mr. Gonzales in the Jasper County Circuit Court in Missouri. RX 407. In the petition, of unknown date, GMMPCPI sought an injunction to prevent Mr. Gonzales from violating the terms of his employment agreement, damages for use of confidential information, and breach of contract damages for solicitation of GMMPCPI’s customers. RX 407-5 to 407-7. On November 19, 2007, GMMPCPI filed an amended petition for damages and injunctive relief, and alleged the same theories of recovery. RX 408. GMMPCPI did not, however, seek damages in either petition for early termination of employment. The case was subsequently transferred to the Adair County Circuit Court, where it was dismissed by the court without prejudice.

Marjorie Ham

Marjorie Ham first arrived in the United States on August 6, 2005. GX 4; JX 1-8. According to the Forms I-129 and I-129W completed by GMMPCPI, Ms. Ham is from the Philippines and has a bachelor’s degree in occupational therapy, but resided in Abu Dhabi, United Arab Emirates, before becoming involved in the H-1B program. GX 110-8 to 110-10. The record does not contain any evidence that she was interviewed by Erica Simon as a part of the DOL investigation. According to the Form WH-55 completed by Ms. Simon, however, Ms. Ham first reported for work with GMMPCPI in Joplin, Missouri, on August 6, 2005. GX 109. At the hearing, Ms. Simon testified that she relied on the date Ms. Ham arrived in the United States, as well as the date on which she first received allowance payments from GMMPCPI. Tr. 118.

Upon her arrival in Joplin, Ms. Ham was paid a weekly allowance by GMMPCPI. GX 5-14; RX 403-14. GMMPCPI’s records indicate that she received \$50.00 allowance payments on August 12, 2005, August 19, 2005, August 23, 2005, September 2, 2005, September 9, 2005, September 16, 2005, September 23, 2005, September 30, 2005, October 14, 2005, October 17, 2005, October 21, 2005, and October 28, 2005. GX 5-14; RX 403-14. Thus, she received a total of \$600.00 in allowance payments. GX 5-14; RX 403-14. According to GMMPCPI’s records, Ms. Ham received her Missouri therapist license on November 3, 2005. GX 4.

Ms. Ham first appeared on GMMPCPI’s payroll as an occupational therapist on November 15, 2005. JX 1-9; GX 109; GX 111. According to the LCA for the period of December 1, 2004 to November 30, 2006, she was assigned to work in Belleview, Missouri. GX 110-3. Her initial wage rate was \$38,000.00 per year. GX 110-3. GMMPCPI’s wage records indicate that Ms. Ham earned gross wages of \$1,295.46 for the pay period of November 1, 2005 to November 15, 2005. GX 111. GMMPCPI’s records also show that Ms. Ham was advanced both filing fees and attorney fees for an extension of her H-1B visa. GX 8. As of March 1, 2006, GMMPCPI had paid \$190.00 for USCIS

fees on her behalf. GX 8. She was also scheduled to be advanced \$195.00 for derivative USCIS fees and \$800.00 for attorney fees. GX 8. The record, however, does not contain any evidence that Ms. Ham's H-1B visa was ever extended. Nor is there documentation that GMMPCPI deducted any amounts from her paychecks. Finally, there is no evidence as to whether Ms. Ham terminated her employment early or is still employed by GMMPCPI.

Angeles Mojica

Angeles Mojica first arrived in the United States on July 6, 2005. GX 4; JX 1-8. According to the Form I-129W completed by GMMPCPI, Ms. Mojica is from Bacolod City, Philippines, and holds a bachelor's degree in physical therapy. GX 137-11. The record does not contain any evidence that she was interviewed by Erica Simon as a part of the DOL investigation. According to the Form WH-55 completed by Ms. Simon, however, Ms. Mojica first reported for work with GMMPCPI in Joplin, Missouri, on July 6, 2005. GX 136. At the hearing, Ms. Simon testified that she relied on the date Ms. Mojica arrived in the United States, as well as the date on which she first received allowance payments from GMMPCPI. Tr. 120-121.

Upon her arrival in Joplin, Ms. Mojica was paid a weekly allowance by GMMPCPI. GX 5-12; RX 403-12. GMMPCPI's records indicate that she received \$50.00 allowance payments on July 8, 2005, July 15, 2005, July 22, 2005, July 28, 2005, August 5, 2005, August 12, 2005, August 19, 2005, August 23, 2005, September 2, 2005, September 9, 2005, September 16, 2005, September 23, 2005, September 30, 2005, October 7, 2005, October 14, 2005, October 21, 2005, October 28, 2005, and November 4, 2005. GX 5-12; RX 403-12. Thus, she received a total of \$900.00 in allowance payments. GX 5-12; RX 403-12. According to GMMPCPI's records, Ms. Mojica received her Missouri therapist license on November 4, 2005. GX 4.

Ms. Mojica first appeared on GMMPCPI's payroll as a physical therapist on November 15, 2005. JX 1-9; GX 136; GX 138. The LCA for the period of January 15, 2005 to January 14, 2007, indicates that she was assigned to work in Salem, Missouri. GX 137-3. Her initial wage rate was \$38,000.00 per year. GX 137-3. According to GMMPCPI's wage records, Ms. Mojica earned gross wages of \$1,151.52 for the pay period of September 1, 2005 to September 15, 2005. GX 138. As of March 1, 2006, GMMPCPI's records show that she was also advanced expenses pertaining to an extension of her H-1B visa. GX 8. More specifically, she was advanced \$190.00 for USCIS fees and \$500.00 for attorney fees. GX 8. The records, however, do not indicate that GMMPCPI withheld these amounts from Ms. Mojica's wages. See GX 10. There is also no documentation that her H-1B visa was ever extended. Furthermore, there is no evidence as to whether Ms. Mojica terminated her employment early or is still employed by GMMPCPI.

Grethel Ocampo-Dakay

Grethel Ocampo-Dakay first arrived in the United States on July 1, 2003. GX 4; JX 1-8. Ms. Ocampo-Dakay holds a bachelor's degree in occupational therapy from a

university in the Philippines. GX 141-1. According to the Form I-129 Supplement H completed by GMMPCPI, she worked as a “part time home health therapist” prior to her involvement in the H-1B program. GX 140-21. Prior to her departure from the Philippines, Ms. Ocampo-Dakay paid for both an initial one-year visa and a renewal. GX 141-1. She stated that she paid \$4,500.00 for the initial visa. During her interview with Erica Simon, she noted that, after arriving in the United States, she “stayed 2 weeks in San Francisco before I went to Missouri.” GX 141-1. She stated that she arrived in Joplin, Missouri, in “mid July.” GX 141-1. This is consistent with the Form WH-55 completed by Ms. Simon, which lists a report for work date of July 15, 2003. GX 139. At the hearing, Ms. Simon testified that she relied on Ms. Ocampo-Dakay’s interview statements, her date of arrival in the United States, and the date she began receiving allowance payments from GMMPCPI. Tr. 121, 125.

After arriving in Joplin, Ms. Ocampo-Dakay had “to wait for a scheduled exam date for [her] licensure.” GX 141-1. She was provided housing in a “staff house” and studied for her state license examination until August 2003. GX 141-1. She stated that it took three weeks for her to obtain her examination results, during which time she was “given some orientation and worked in the office helping with some filing.” GX 141-1. While studying for the examination and waiting for the results, Ms. Ocampo-Dakay received a weekly allowance from GMMPCPI. GX 141-1. GMMPCPI’s records indicate that she received an initial allowance payment of \$135.00 on August 2, 2003. GX 5-1; RX 403-1. She then received \$50.00 on August 11, 2003, \$85.00 on August 18, 2003, \$50.00 on August 25, 2003, \$50.00 on September 2, 2003, \$100.00 on September 11, 2003, and \$50.00 on September 15, 2003. GX 5-1; RX 403-1. Thus, she received a total of \$520.00 in allowance payments. GX 5-1; RX 403-1. After passing the state examination, Ms. Ocampo-Dakay received her Missouri therapist license on September 17, 2003. GX 4.

Ms. Ocampo-Dakay stated that she “pretty much started working as an occupational therapist [in] September 2003.” GX 141-1. The record does not contain any evidence as to when she first appeared on GMMPCPI’s payroll. She informed Ms. Simon, however, that she “was always salaried” after she obtained her license and began working as an occupational therapist. GX 141-1. According to the LCA for the period of April 15, 2003 to April 14, 2005, Ms. Ocampo-Dakay was initially assigned to work in Republic, Missouri, with an initial wage rate of \$35,550.00 per year. GX 140-10. She stated that she “worked at 4 or more facilities” in Missouri. GX 141-1. In February 2005, Ms. Ocampo-Dakay transferred to a facility in Orlando, Florida. GX 141-1. A subsequent LCA, for the period of April 25, 2005 to April 24, 2008, indicates that she was assigned to work in Winter Park, Florida. GX 140-3. Her wage rate was increased to \$55,000.00 per year. GX 140-3. This is consistent with her statement to Ms. Simon that she “was making around \$55,000.00 a year when I left.” GX 141-3. Ms. Ocampo-Dakay stated that she was “employed for 2 straight years” by GMMPCPI before leaving in October 2005. GX 141-1.

Ms. Ocampo-Dakay’s initial H-1B visa was only for one year and expired on April 14, 2004. GX 140-26. On April 14, 2004, however, she was granted a one-year extension of her H-1B visa until April 24, 2005. GX 140-25. She stated that she paid the renewal

fees directly to GMMPCPI. GX 141-1. The record, however, does not contain any evidence of the amounts paid to GMMPCPI. On April 8, 2005, GMMPCPI filed a petition for a second extension of Ms. Ocampo-Dakay's H-1B visa. GX 140-13 to 140-16. The petition was approved on May 17, 2005, and her H-1B visa was extended for the period of April 25, 2005 to April 24, 2008. GX 140-24. Ms. Ocampo-Dakay did not allege, and the record does not show, that GMMPCPI withheld amounts from her paychecks for expenses related to the second extension.

Ms. Ocampo-Dakay resigned from her employment with GMMPCPI in October 2005. GX 141-1. During her interview with Ms. Simon, she stated that she "resigned voluntarily at the end of my contract." GX 141-2. While acknowledging that her employment agreement provided for early termination damages, she noted that "I finished my contract so I didn't pay anything" to GMMPCPI. GX 141-2.

Lordele Pato

Lordele Pato first arrived in the United States on January 18, 2005. GX 4. According to the Forms I-129 and I-129W completed by GMMPCPI, Ms. Pato is originally from Cebu City, Philippines, and holds a bachelor's degree in occupational therapy. GX 143-8, 143-12. According to a letter from GMMPCPI's attorney to Ms. Pato, she signed an employment agreement with GMMPCPI on November 30, 2004. GX 146-1. The record does not contain any evidence that she was interviewed by Erica Simon as a part of the DOL investigation. According to GMMPCPI's records, as well as the Form WH-55 completed by Ms. Simon, Ms. Pato reported for work in Joplin, Missouri, on January 25, 2005. GX 4; GX 142.

Upon her arrival in Joplin, Ms. Pato was paid a weekly allowance by GMMPCPI. GX 5-8; RX 403-8. GMMPCPI's records show that she received an initial payment of \$72.50 on January 28, 2005. This was followed by \$50.00 payments on February 4, 2005, February 11, 2005, February 18, 2005, February 25, 2005, March 4, 2005, March 11, 2005, March 17, 2005, March 25, 2005, and March 30, 2005. GX 5-8; RX 403-8. Thus, she received a total of \$522.50 in allowance payments. GX 5-8; RX 403-8. GMMPCPI's records indicate that Ms. Pato received her Missouri therapist license on April 17, 2005. GX 4. The records also show, however, that she first appeared on GMMPCPI's payroll on April 15, 2005, with a hire date of April 7, 2005. GX 144. Ms. Pato therefore began to receive a salary on April 7, 2005.

According to the LCA for the period of December 1, 2004 to November 30, 2006, Ms. Pato was assigned to work as an occupational therapist in Belleview, Missouri. GX 143-3. Her initial wage rate was \$38,000.00 per year. GX 143-3. GMMPCPI's wage records indicate that she earned gross wages of \$1,049.85 from April 7, 2005 to April 15, 2005. GX 144. According to a February 2008 letter from GMMPCPI's attorney to Ms. Pato, she resigned from her employment on April 15, 2006. GX 146-1. Thus, she did not work for GMMPCPI for a full two-year period, as required by her employment agreement. GMMPCPI held her liable "for liquidated damages of \$4,000.00 of which [she] paid \$200.00." GX 146-1. Accordingly, GMMPCPI demanded that Ms. Pato "make immediate arrangements" to pay \$3,800.00 for early termination of her employment.

GX 146-1. On February 29, 2008, Ms. Pato's husband paid the \$3,800.00 to GMMPCPI. GX 145; GX 147.

Kahlila Quidlat-Fowler

Kahlila Quidlat-Fowler first arrived in the United States on December 26, 2004. GX 4. Ms. Quidlat-Fowler is from Iligan City, Philippines, and holds a five-year bachelor's degree in occupational therapy from a university in the Philippines. GX 149-17; GX 155-1. She signed two employment agreements with GMMPCPI. The first was completed on August 20, 2004, while she was still in the Philippines. GX 153-1 to 153-7; GX 155-1. She signed the second contract on April 4, 2005, which was after she passed her state license examination. GX 153-8 to 153-14; GX 155-1. Prior to her departure from the Philippines, Ms. Quidlat-Fowler paid for her H-1B visa and related fees. GX 155-1. During her interview with Erica Simon, she stated that she paid a total of \$3,650.00. GX 155-1. After arriving in the United States, she stayed with family "for a little while" and reported to Joplin, Missouri, on January 6, 2005. GX 4; GX 148; GX 155-1.

After arriving in Joplin, Ms. Quidlat-Fowler was driven to GMMPCPI's offices, where she set up an email account on the company computers. GX 155-1. She also obtained a Social Security number. She was provided housing in one of GMMPCPI's apartments with six other therapists. GX 155-1. She then studied for her Missouri therapist licensing examination until March 3, 2005, when she took the test. GX 155-1. Ms. Quidlat-Fowler received a weekly allowance from GMMPCPI from the time she arrived in Joplin to the date she began working as an occupational therapist. GX 155-1. GMMPCPI's records indicate that she received \$50.00 payments on January 7, 2005, January 14, 2005, January 21, 2005, January 28, 2005, February 4, 2005, February 11, 2005, February 18, 2005, February 25, 2005, March 4, 2005, March 11, 2005, March 17, 2005, March 25, 2005, and March 30, 2005. GX 5-7; RX 403-7. This amounts to a total of \$650.00 in allowance payments. GX 5-7; RX 403-7. In a signed addendum to her interview statement on February 4, 2008, Ms. Quidlat-Fowler stated that she obtained her certification from the National Board of Occupational Therapy on March 9, 2005, and immediately applied for a Missouri therapy license. GX 155-3. She learned that her license card would not be released "until the first week of April 2005," and was therefore sent by GMMPCPI "to Monett Health Care Center in Monett, MO to help Mr. David Egessah, an OT." GX 155-3. She assisted Mr. Egessah for two or three days. GX 155-3.

While there is no evidence regarding the date she received her Missouri license, Ms. Quidlat-Fowler began working for GMMPCPI as an occupational therapist on April 7, 2005. GX 155-1. She first appeared on GMMPCPI's payroll on March 31, 2005, which reflects gross earnings of \$95.00. GX 150. This is consistent with her addendum statement, where she noted that she was paid \$95.00 by GMMPCPI for her work with Mr. Egessah. GX 155-3. According to the LCA for the period of October 1, 2004 to November 30, 2006, Ms. Quidlat-Fowler was assigned to work in Poplar Bluff, Missouri. GX 149-11. Her initial wage rate was \$38,000.00 per year. GX 149-11. During her interview with Ms. Simon, Ms. Quidlat-Fowler did not comment on her assignment in Poplar Bluff. However, a subsequent LCA for the period of October 11, 2005 to October 10, 2008, indicates that she was reassigned to work in Ada, Oklahoma. GX 149-3. Her

wage rate was increased to \$42,000.00 per year. GX 149-3. During Ms. Quidlat-Fowler's relocation to Ada, GMMPCPI paid for a seven-day hotel stay. GX 155-2. She was subsequently transferred to a facility in Endid, Oklahoma, and GMMPCPI provided \$225.00 in relocation expenses. GX 155-3. According to GMMPCPI's wage records, Ms. Quidlat-Fowler earned the following semi-monthly gross wages: (1) \$1,916.67 for the period of October 1, 2005 to October 15, 2005; (2) \$1,916.67 for the period of October 16, 2005 to October 31, 2005; (3) \$1,997.92 for the period of November 1, 2005 to November 15, 2005; and (4) \$1,577.95 for the period of November 16, 2005 to November 30, 2005. GX 1-151. On November 22, 2005, she ceased working at the Endid facility after experiencing "some problems with the manager." GX 155-1.

On September 26, 2005, GMMPCPI filed a petition for an extension of Ms. Quidlat-Fowler's H-1B visa. GX 149-16 to 149-20. The petition was approved on October 25, 2005, and her H-1B visa was extended for the period of October 11, 2005 to September 30, 2008. GX 149-30. In her interview statements, Ms. Quidlat-Fowler indicated that GMMPCPI had deducted \$500.00 from her paychecks for extension-related expenses. GX 155-2 to 155-3. GMMPCPI's records show that Ms. Quidlat-Fowler was advanced \$185.00 for USCIS fees and \$500.00 for attorney fees. GX 7; GX 8. The records also show that GMMPCPI deducted a total of \$685.00 from five of her paychecks. These deductions include \$185.00 for USCIS fees on October 10, 2005, \$125.00 for attorney fees on October 25, 2005, \$125.00 for attorney fees on November 10, 2005, \$125.00 for attorney fees on November 25, 2005, and \$125.00 for attorney fees on December 10, 2005. GX 9; GX 10.

In a letter dated December 10, 2005, Ms. Quidlat-Fowler resigned from her employment with GMMPCPI. GX 155-2 to 155-3. In her interview statements, she stated that GMMPCPI had withheld her final paycheck, which was for the period of November 16, 2005 to November 30, 2005. GX 155-2 to 155-3. The amount withheld was \$1,577.95 in gross wages and \$1,012.46 in net wages. GX 152. Ms. Quidlat-Fowler subsequently accepted employment with Coal County General Hospital in Coalgate, Oklahoma. GX 155-2. On March 1, 2006, her new employer's attorney received a letter from GMMPCPI's attorney. GX 154. The letter states that Ms. Quidlat-Fowler was being held liable for the following amounts: (1) \$250.00 for picking up her replacement from the airport; (2) \$300.00 for her replacement's three (3) month stay in an apartment; (3) \$450.00 for nine weeks of allowance payments to the replacement; (4) \$550.00 for hotel and deployment expenses related to the replacement's facility relocation; (5) \$1,416.67 for the replacement's salary "to finish contract with the facility"; (6) \$2,108.00 for the replacement's review and training prior to deployment; and (7) \$7,000.00 for breach of contract resulting from early termination of employment. GX 154. Thus, GMMPCPI held Ms. Quidlat-Fowler liable for \$12,074.67 in total damages. GX 154. While acknowledging that it "owes wages to Ms. Quidlat of \$1,012.46," GMMPCPI concluded that this "debt is more than offset by her liability" for early termination of employment. GX 154.

On or about June 29, 2007, GMMPCPI filed a "Petition for Damages, Preliminary Injunction, and Permanent Injunction" against Ms. Quidlat-Fowler in the Jasper County Circuit Court in Missouri. GX 155-3 to 155-4; RX 409. The petition alleged that she

violated her employment agreement “by unlawfully resigning her employment with [GMMPCPI].” RX 409-4. GMMPCPI sought an injunction to prevent Ms. Quidlat-Fowler from violating the terms of her employment agreement, damages for use of confidential information, and breach of contract damages for solicitation of GMMPCPI’s customers. RX 409-5 to 409-7. GMMPCPI, however, did not seek damages for early termination of employment. Ms. Quidlat-Fowler hired an attorney in July 2007, GX 155-4, and filed an answer to GMMPCPI’s petition on September 21, 2007. GX 410. In addition to disputing GMMPCPI’s allegations, she also raised counterclaims for breach of contract, fraudulent misrepresentation, and fraudulent inducement. GX 410-7 to 410-10. At present, the case is still pending before the Jasper County Circuit Court.

Jaycin Yee

Jaycin Yee is from Bacolod City, Philippines, and holds a bachelor’s degree in occupational therapy from a university in the Philippines. GX 189-7 to 189-8. There is no evidence in the record as to when Ms. Yee arrived in the United States. Her initial H-1B visa, however, was approved on August 11, 2004, for the period of October 1, 2004 to September 30, 2006. GX 189-6. The record also contains no evidence that Ms. Yee was interviewed by Erica Simon as a part of the DOL investigation. Furthermore, there is no evidence as to when Ms. Yee arrived in Joplin, Missouri, obtained her Missouri therapist license, or began working for GMMPCPI. A letter from GMMPCPI’s attorney to Ms. Yee, however, indicates that she signed an employment agreement on December 11, 2006. GX 190-1.

According to the LCA for the period of October 1, 2004 to September 30, 2006, Ms. Yee was initially assigned to work at a facility in Raytown, Missouri. GX 189-3. Her initial wage rate was \$38,000.00 per year. GX 189-3. On April 3, 2006, GMMPCPI filed a petition for an extension of Ms. Yee’s H-1B visa. GX 189-25. The petition was approved on October 26, 2006, and her visa was extended for the period of October 26, 2006 to November 30, 2009. GX 189-25. There is no evidence, however, that GMMPCPI deducted any amounts from Ms. Yee’s paychecks for extension-related fees. According to a new LCA for the period of October 1, 2006 to September 30, 2009, Ms. Yee was reassigned to a facility in Saint Joseph, Missouri. GX 189-22. Her wage rate was increased to \$39,000.00 per year. GX 189-22. There is no evidence as to when Ms. Yee terminated her employment with GMMPCPI.

On February 12, 2008, Ms. Yee received a demand letter from GMMPCPI’s attorney. GX 190. In relevant part, the letter informed her that “[u]nder the terms of your employment agreement and the promissory note of \$20,000.00 signed on February 20, 2007, you are liable in the amount of \$19,500.00.” GX 190-1. The letter demanded that Ms. Yee “make immediate arrangements to pay that amount.” GX 190-1. The letter did not, however, indicate the basis for GMMPCPI’s contention that Ms. Yee was liable for \$19,500.00. On August 30, 2007, Ms. Yee submitted a payment of \$500.00 to GMMPCPI. GX 191. There is no evidence that she has made any additional payments.

II. Discussion and Analysis

A. Back Wages Due for “Benching” Violations

Under the Act and regulations, an employer is required to pay an H-1B employee the wage listed on the employee’s LCA beginning on the date the employee “enters into employment with the employer.”²⁷ An H-1B employee is deemed to have entered into employment when he or she reports for orientation or training, or studies for a licensing examination.²⁸ The employer’s obligation to pay the wages specified in an LCA continues even if it “benches” its H-1B employees by placing them in nonproductive status.²⁹ It is a violation of the Act, however, when the employer places an H-1B employee “in nonproductive status due to a decision by the employer ... or due to the [employee’s] lack of a permit or license” and fails “to pay the [employee] full-time wages” in accordance with the terms of the LCA.³⁰ Thus, if an H-1B employee reports for orientation or training, or is studying for a licensing examination, the employer violates the Act if it fails to pay the wages specified in the employee’s LCA.

If an employer fails to pay the required wages, the Administrator “shall assess and oversee the payment of back wages ... to any H-1B nonimmigrant who has not been paid ... as required.”³¹ Back wages under the regulations are defined as “the difference between the amount that should have been paid and the amount that was actually paid.”³² While the Administrator is granted the authority to assess back wages, an Administrative Law Judge has broad discretion to “affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.”³³

In this case, I have already found that GMMPCPI violated the Act by failing to pay the required wages to 41 of its H-1B employees during “benching” periods. *See* Order Granting Partial Summary Decision at 3. More specifically, I found that GMMPCPI failed to pay the required wages from the time each H-1B employee reported for work in Joplin, Missouri, until the date on which each employee received his or her occupational license. *See* Order Granting Partial Summary Decision at 3. The parties have stipulated as to the amount of back wages due to 30 of the employees at issue. *See* JX 1-4 to 1-6. The parties continue to dispute, however, the amount of back wages due to the following 11 H-1B employees: Marissa Acharon, Euphill Juliette Aseniero, Ellanie Berba, Zadel Cabrera, Celeste Cabugason, Rinna Daymiel, Iris de la Calzada, Mary Elizon, Marjorie Ham, Angeles Mojica, and Grethel Ocampo-Dakay.

In their briefs, the parties agree that each of the H-1B employees in this case first entered into employment with GMMPCPI on the date they arrived in Joplin, Missouri.

²⁷ 20 C.F.R. § 655.731(c)(6) (internal quotation marks omitted).

²⁸ 20 C.F.R. § 655.731(c)(6)(i).

²⁹ 20 C.F.R. § 655.731(c)(7)(i).

³⁰ 8 U.S.C. § 1182(n)(2)(C)(vii)(I).

³¹ 20 C.F.R. § 655.810(a).

³² *Id.*

³³ 20 C.F.R. § 655.840(b). *See also Administrator v. Itek Consulting, Inc.*, 2008-LCA-00046, slip op. at 18 (ALJ May 6, 2009).

See Administrator’s Brief at 39; Respondent’s Brief at 54. As to the 11 H-1B employees at issue, the Administrator contends that it has produced “sufficient evidence to establish the employees’ report to work dates ‘as a matter of just and reasonable inference.’” Administrator’s Brief at 40-41. In response, GMMPCPI argues that the Administrator “lacks sufficient evidence” regarding the “dates [these] eleven individuals became available to work, for calculating nonproductive time.” Respondent’s Brief at 54. While acknowledging that the arrival dates of the 11 employees are unknown, GMMPCPI contends that the Administrator “has tried several different avenues to point to a specific date, but each approach is flawed.” Respondent’s Brief at 54. First, GMMPCPI notes that the Administrator “points to a multitude of data to fill in its lack of information regarding when these individuals arrived in Joplin, such as the date they first received allowances and the date they became licensed.” Respondent’s Brief at 54. GMMPCPI contends that this approach is inconsistent with the “binding [deposition] testimony” of Erica Simon, who testified as the Administrator’s representative that “the dates of arrival for these individuals came primarily from their date of arrival in the United States.” Respondent’s Brief at 54-55. Second, GMMPCPI contends that the Administrator erred by rejecting “the most obvious method of proof—presenting testimony from [the employees] themselves.” Respondent’s Brief at 55. GMMPCPI alleges that the Administrator instead relied on employee statements that are inadmissible hearsay, were not disclosed until “well after the close of discovery in this matter,” and contain no specific information on arrival dates. Respondent’s Brief at 56. For all of these reasons, GMMPCPI argues that the Administrator “has not met its burden of proof” regarding the arrival dates of the 11 H-1B employees at issue.

As an initial matter, I find GMMPCPI’s hearsay argument to be without merit. While the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (“Rules of Practice and Procedure”) have adopted the Federal Rules of Evidence pertaining to hearsay,³⁴ the regulations relating to the adjudication of H-1B claims under the Act specifically allow consideration of hearsay evidence.³⁵ The regulations provide that “any oral or documentary evidence may be received in proceedings under this part” and the “Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure ... *shall not apply.*”³⁶ Accordingly, I reject GMMPCPI’s argument that the Administrator relied on inadmissible hearsay statements of the 11 H-1B employees.

I also find that GMMPCPI has produced inadequate records regarding the Joplin arrival dates for all of its H-1B employees. The regulations require an employer to maintain sufficient and accurate documentation regarding the wage rates paid to H-1B employees and the hours worked by those employees.³⁷ During the course of the DOL investigation, GMMPCPI produced a document listing the date each H-1B employee arrived in the United States, reported to Joplin, Missouri, and obtained their state therapy license. See GX 4. Linda Castillo, GMMPCPI’s operations manager, identified GX 4 as an accurate list of these arrival and license dates. GX 2-8, 2-16; RX 426-6, 426-

³⁴ See 29 C.F.R. §§ 18.801–18.806 (2008).

³⁵ See 20 C.F.R. § 655.825(b) (2010).

³⁶ *Id.* (emphasis added).

³⁷ See 20 C.F.R. § 655.731(b)(1).

11. The document, however, does not list the Joplin arrival dates for the 11 H-1B employees at issue. Ms. Castillo admitted at her deposition that if the arrival dates were not listed on GX 4, she “didn’t know at that time when they arrived in Joplin.” RX 426-7. In addition, she admitted that GX 4 was the only source of information that GMMPCPI had for determining when the H-1B employees arrived in Joplin. Tr. 38; GX 2-16; RX 426-11. GMMPCPI has not produced any additional records that document the Joplin arrival dates for its employees. I thus find that GMMPCPI has failed to produce adequate documentation of the Joplin arrival dates for its H-1B employees.

The Supreme Court of the United States has expressly addressed the situation where an employer fails to provide accurate or adequate records in a wage-and-hour case. In *Anderson v. Mt. Clemens Pottery Co.*,³⁸ the Court held that when an employer fails to provide adequate records, a prosecuting party meets its initial burden of proving that employees performed work for which they were not properly compensated if “he proves that [an employee] has in fact performed work for which [the employee] was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.”³⁹ The burden then shifts to the employer to present evidence “to negative the reasonableness of the inference to be drawn from the [prosecuting party’s] evidence.”⁴⁰ If the employer fails to produce this evidence, “the court may then award damages to the [prosecuting party], even though the result be only approximate.”⁴¹ The Court reasoned that an employer “cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [statutory] requirements.”⁴² While *Mt. Clemens* involved a wage-and-hour case under the Fair Labor Standards Act, the principles of the Court’s decision have been adopted by the Administrative Review Board in analogous prevailing wage claims,⁴³ and the Board has applied a similar burden-shifting framework in LCA cases.⁴⁴ Accordingly, I find the principles of *Mt. Clemens* to be applicable to the present case.

1. Individual Calculations

I will now individually address the Administrator’s determinations regarding the Joplin arrival dates, and the amount of back wages due, for the 11 H-1B employees for whom relief for benching is still at issue. I have reviewed the evidence and the

³⁸ 328 U.S. 680 (1946), *superseded on other grounds by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, *as recognized in IBP, Inc. v. Alvarez*, 546 U.S. 21, 41 (2005).

³⁹ *Id.* at 687–88.

⁴⁰ *Id.* at 688.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See Pythagoras Gen. Contracting Corp. v. Administrator*, ARB Nos. 08-107, 09-007, slip op. at 5 (ARB Feb. 10, 2011) (DBA) (applying the *Mt. Clemens* framework to a prevailing wage claim under the Davis-Bacon Act).

⁴⁴ *See Administrator v. Ken Techs., Inc.*, ARB No. 03-140, slip op. at 4 (ARB Sept. 30, 2004) (LCA). *See also Administrator v. Pegasus Consulting Group, Inc.*, ARB Nos. 03-032, 03-033 (ARB June 30, 2005) (LCA) (holding that testimony by an employee regarding hours worked and wages paid satisfies the prosecuting party’s initial burden); *Administrator v. Law Offices of Sergio Villaverde, PLLC*, 2009-LCA-00019, slip op. at 10-13 (ALJ Nov. 4, 2010) (applying the *Mt. Clemens* framework to an LCA case).

calculations made by Erica Simon, who performed the investigation on behalf of the DOL. In a number of instances, however, I find inconsistencies between Ms. Simon's calculations and the evidence in the record. Accordingly, I have recalculated the back wages due to 8 of the 11 H-1B employees contested by GMMPCPI. In making these calculations, I have relied upon GMMPCPI's records and wage documents, as well as the statements of the employees themselves.

Marissa Acharon

Arrival Dates in Joplin

Ms. Simon determined that Marissa Acharon first reported for work in Joplin on February 1, 2004, and subsequently returned to Joplin on May 4, 2004. GX 15. These dates were based on Ms. Acharon's interview statement, as well as the dates she first received \$50.00 allowances from GMMPCPI, as listed in GX 5. Tr. 92. The initial arrival date of February 1, 2004, is consistent with Ms. Acharon's interview statement, where she stated that she "had [her] orientation when [she] went to Joplin, in [her] first week" in February 2004. GX 18-1. Ms. Acharon provided a signed supplement to her interview statement, in which she made corrections and provided additional information. GX 18-3. She confirmed, however, that she initially reported to Joplin in the first week of February 2004. GX 18-1, 18-3. I can find no reason to question the credibility of Ms. Acharon's statement. I therefore find that Ms. Simon reasonably determined that Ms. Acharon first arrived in Joplin on February 1, 2004. While GMMPCPI's records indicate that allowance payments were made prior to February 2004, GX 5-1, Ms. Simon testified that she took the "most conservative approach" in setting the initial arrival date of February 1, 2004. Tr. 92. I note that this "conservative approach" actually favors GMMPCPI. As to the second arrival date of May 4, 2004, Ms. Simon's determination is consistent with GMMPCPI's records. The records show that, after returning to Joplin, Ms. Acharon received her first allowance payment on May 4, 2004. GX 5-2; RX 403-2. At her deposition, Linda Castillo acknowledged that these records accurately list when the H-1B employees received their allowances. GX 2-10, 2-16; RX 426-7, 426-11. In addition, Kamendra Mishra testified that the employees typically began receiving the allowance when they first reported to Joplin. RX 425-18. Based on GMMPCPI's records, I find that Ms. Simon reasonably determined that Ms. Acharon returned to Joplin on May 4, 2004.

GMMPCPI has failed to offer any specific evidence to rebut Ms. Simon's determination that Ms. Acharon reported for work in Joplin on February 1, 2004, and May 4, 2004. Instead, GMMPCPI relies on several general arguments regarding Ms. Simon's findings as a whole. First, GMMPCPI alleges that the Administrator's use of allowance payment dates is "a new avenue not disclosed during discovery in this case." Respondent's Brief at 54. GMMPCPI contends that Ms. Simon provided "binding testimony" at her deposition that she primarily relied on the H-1B employees' arrival dates in the United States to determine their report for work dates. Respondent's Brief at 54. This argument, however, is immaterial to the adjudication of this case because I have independently reviewed the evidence in the record to determine the report for

work dates of each of the H-1B employees at issue.⁴⁵ As to Ms. Acharon, I note that Ms. Simon clearly testified at the hearing that Ms. Acharon's arrival dates were based on the dates she received allowance payments from GMMPCPI. Tr. 92. GMMPCPI also argues that "evidence regarding allowances paid to individuals does not suggest whether or not individuals were physically in Joplin, Missouri and available to work." Respondent's Brief at 57. As stated above, however, Mr. Mishra testified that the employees did not receive an allowance until they actually arrived in Joplin. RX 425-18. Thus, GMMPCPI's argument on this point must also fail.

For the above reasons, I conclude that Ms. Simon, acting on behalf of the Administrator, reasonably determined that Ms. Acharon reported for work in Joplin on February 1, 2004, and May 4, 2004. GMMPCPI has failed to provide any convincing arguments or evidence in rebuttal of these findings. Accordingly, I find that Ms. Acharon reported for work with GMMPCPI in Joplin on February 1, 2004, and May 4, 2004.

Back Wages Calculation

Ms. Simon next determined that GMMPCPI owes Ms. Acharon \$4,886.00 in back wages for seven weeks of nonproductive "benching" time. GX 15; GX 199. I initially find that Ms. Simon utilized a proper prevailing wage of \$36,296.00, which was the wage rate listed on Ms. Acharon's initial LCA for the period of October 15, 2003 to October 14, 2005. GX 16-19; *see also* JX 1. She also properly determined that this prevailing wage equals a semi-monthly wage rate of \$1,568.67. GX 32. While GMMPCPI has not disputed Ms. Simon's determination of back wages, I disagree with her method of calculating the length of Ms. Acharon's nonproductive "benching" period. Unlike the other 10 H-1B employees at issue, Ms. Acharon's benching period was not computed on a pay period basis, but was instead determined on a weekly basis. Tr. 96; GX 15. Ms. Simon determined that Ms. Acharon had been "benched" for one week in February 2004, and then for six weeks from May 4, 2004 to June 3, 2004. GX 15. I note that Ms. Simon's finding of one week in February 2004 is consistent with Ms. Acharon's interview statement, where she indicated that she had reported to Joplin for one week of training at the beginning of February 2004. GX 18-1, 18-3.

As to the remaining six weeks, Ms. Simon testified that she made this determination based on the number of allowance payments that Ms. Acharon received from May 4, 2004 to June 3, 2004. Tr. 96. However, there are only four calendar weeks during this period. For these reasons, I find that Ms. Acharon was only benched for four weeks from May 4, 2004 to June 3, 2004. Accordingly, I modify the Administrator's determination and find that Ms. Acharon was benched for a total of five weeks. Based on Ms. Acharon's average weekly wage rate of \$698.00, I conclude that GMMPCPI owes Ms. Acharon \$3,490.00 in back wages for uncompensated "benching" time.

⁴⁵ *See generally* 20 C.F.R. § 655.840(b) (stating that an Administrative Law Judge has broad discretion to "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator").

Euphill Juliette Aseniero

Arrival Date in Joplin

Ms. Simon determined that Euphill Juliette Aseniero first reported for work in Joplin on April 16, 2004. GX 32. She testified that she relied on Ms. Aseniero's interview statement, as well as GMMPCPI's records of when she first received an allowance payment. Tr. 97, 100. Ms. Simon's determination is consistent with the interview statement, where Ms. Aseniero stated that, after arriving in the United States on April 9, 2004, she visited family for five or six days before arriving in Joplin on "April 16th or 17th 2004." GX 36-1. While Ms. Aseniero did not sign the statement, Ms. Simon testified that the statement accurately reflects the information that she obtained during her interview with Ms. Aseniero. Tr. 97-98. I can find no other reason to doubt the credibility of Ms. Aseniero's statement. In addition, GMMPCPI's records indicate that Ms. Aseniero first received an allowance payment of \$100.00 on April 20, 2004. GX 5-1. As stated above, Mr. Mishra testified that an employee generally received an allowance payment when they first arrived in Joplin. RX 425-18. He acknowledged, however, that GMMPCPI was flexible and would at times give initial allowance payments "in close proximity" to when an employee arrived in Joplin. RX 425-19. Furthermore, Ms. Castillo testified that Ms. Aseniero may have initially received the \$100.00 as "back pay for a previous week" where she was in Joplin but had not been given an allowance. RX 426-10. In light of this testimony, as well as GMMPCPI's records and Ms. Aseniero's interview statement, I find that Ms. Simon reasonably determined that Ms. Aseniero first arrived in Joplin on April 16, 2004.

GMMPCPI has again failed to offer any specific evidence or argument in rebuttal of Ms. Simon's determination. Instead, GMMPCPI relies on the same general arguments discussed above. I have already found these arguments to be without merit. Accordingly, I find that Ms. Aseniero first reported for work with GMMPCPI in Joplin on April 16, 2004.

Back Wages Calculation

Ms. Simon next determined that GMMPCPI owes Ms. Aseniero \$6,959.50 in back wages for four full semi-monthly pay periods of nonproductive "benching" time. GX 32; GX 199. I initially find that Ms. Simon utilized a proper prevailing wage of \$37,648.00, which was the wage rate listed on Ms. Aseniero's initial LCA for the period of December 1, 2003 to November 30, 2005. GX 33-16; *see also* JX 1-8. She also properly determined that this prevailing wage equals a semi-monthly wage rate of \$1,568.67. GX 32. In light of Ms. Aseniero's report for work date, Ms. Simon determined that she had been "benched" from April 16, 2004 to June 15, 2004. I find that Ms. Simon's determination, however, is inconsistent with GMMPCPI's records. First, the records show that Ms. Aseniero did not receive her state occupational license until June 30, 2004. GX 4. Second, GMMPCPI's wage records show that Ms. Aseniero's "hire date" was also June 30, 2004, and that she only received a salary of \$152.00 for the pay period of June 16, 2004 to June 30, 2004. GX 34. Furthermore, Ms. Aseniero continued to receive allowance payments from GMMPCPI *after* June 15, 2004, including payments on June

24, 2005 and June 25, 2004. GX 5-1. I therefore find that Ms. Aseniero was actually “benched” for a total of five semi-monthly pay periods, where she was not paid the required wages by GMMPCPI.

For these reasons, I find that GMMPCPI “benched” Ms. Aseniero for a total of five semi-monthly pay periods, from April 16, 2004 to June 29, 2004. During this time, GMMPCPI failed to pay Ms. Aseniero the required semi-monthly prevailing wage rate of \$1,568.67. GMMPCPI’s wage records, however, show that Ms. Aseniero was paid \$152.00 for work performed on June 30, 2004. GX 34. The records also indicate that withholdings were made for taxes and other authorized deductions. I thus find that the \$152.00 constitutes “wages paid” to Ms. Aseniero under the regulations.⁴⁶ Accordingly, I find that GMMPCPI is entitled to a credit of \$152.00. I therefore modify the Administrator’s determination, and conclude that GMMPCPI owes Ms. Aseniero \$7,691.35 in back wages for uncompensated “benching” time.

Ellanie Berba

Arrival Date in Joplin

Ms. Simon determined that Ellanie Berba first arrived in Joplin on June 4, 2004. GX 41. She testified that she relied on Ms. Berba’s interview statement, her arrival date in the United States, and the date that she first received an allowance from GMMPCPI. Tr. 101. Ms. Simon’s findings are consistent with Ms. Berba’s interview statement, where she indicated that she “reported straight to the company” after arriving in the United States, with a report for work date of either June 3 or 4, 2004. GX 45-1. While the statement was not signed by Ms. Berba, Ms. Simon testified that the statement accurately reflects the information that she obtained during her interview with Ms. Berba. Tr. 102. I can find no other reason to doubt the credibility of Ms. Berba’s statement. In addition, GMMPCPI’s records show that Ms. Berba received her first allowance payment on June 3, 2004, GX 5-2, which was the same date that she arrived in the United States. GX 4, JX 1-8. I therefore find that Ms. Simon reasonably determined that Ms. Berba reported for work in Joplin on June 4, 2004.

GMMPCPI has again failed to offer any specific evidence or argument in rebuttal of Ms. Simon’s determination. Instead, GMMPCPI relies on the same general arguments discussed above. I have already found each of these arguments to be without merit. Accordingly, I find that GMMPCPI has failed to rebut Ms. Simon’s determination and I conclude that Ms. Berba first reported for work in Joplin on June 4, 2004.

Back Wages Calculation

Ms. Simon next determined that GMMPCPI owes Ms. Berba \$8,500.00 in back wages for six semi-monthly pay periods of nonproductive “benching” time. GX 41; GX 199. I initially find that Ms. Simon utilized a proper prevailing wage of \$37,648.00,

⁴⁶ See 20 C.F.R. § 655.731(c)(2) (outlining the requirements for payments made to an H-1B employee to be credited as “wages”); see also *Administrator v. Synergy Sys., Inc.*, ARB No. 04-076, slip op. at 10–11 (ARB June 30, 2006) (LCA).

which was the wage rate listed on Ms. Aseniero's initial LCA for the period of December 1, 2003 to November 30, 2005. GX 42-10; JX 1-8. She also properly determined that this prevailing wage equals a semi-monthly wage rate of \$1,568.67. GX 41. In light of Ms. Berba's report for work date, Ms. Simon determined that she had been "benched" from June 4, 2004 to August 31, 2004. GX 41. She therefore determined that GMMPCPI failed to pay Ms. Berba \$9,412.00 in required wages during her "benching" period. GX 41. Ms. Simon, however, gave GMMPCPI a \$912.00 credit for a subsequently-discovered partial payment made to Ms. Berba on September 10, 2004. GX 41. She therefore determined that Ms. Berba is owed \$8,500.00 in back wages. GX 41.

Under the regulations, however, amounts paid to H-1B employees do not constitute "wages paid" unless they meet several requirements. Included in these requirements are that amounts paid be:

- (i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for [authorized] deductions ...;
- (ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS ...; [and]
-
- (iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.⁴⁷

In this case, however, GMMPCPI's wage records do not document that \$912.00 was paid as "earnings for" Ms. Berba. Instead, the only documentation is a check statement dated September 10, 2004. GX 43. While a deduction of \$202.31 was made from the payment, there is no indication that it was a withholding for federal, state or local taxes, or was an otherwise authorized deduction. I therefore find that the \$912.00 does not constitute "wages paid" to Ms. Berba under the regulations. Accordingly, GMMPCPI is not entitled to the \$912.00 credit granted by the Administrator.

In addition, I find that Ms. Simon's determination of the "benching" period is inconsistent with GMMPCPI's records. While the wage records indicate that Ms. Berba first appeared on the payroll for the pay period of September 1, 2004 to September 15, 2004, the records list a hire date of August 23, 2004. GX 44. This is the same date that Ms. Berba received her state occupational license. GX 4. In addition, the wage records show that Ms. Berba earned a salary of \$2,343.34 for the pay period of September 1, 2004 to September 15, 2004, which is \$774.67 more than the prevailing monthly wage

⁴⁷ 20 C.F.R. § 731(c)(2)(i)-(ii), (iv). See also *Synergy Sys., Inc.*, ARB No. 04-076, slip op. at 10-11; *Administrator v. Pegasus Consulting Group, Inc.*, ARB Nos. 03-032, 03-033, slip op. at 10 (ARB June 30, 2005) (LCA).

rate of \$1,568.67. GX 44. I thus find that GMMPCPI's wage records establish a reasonable inference that Ms. Berba's "benching" period ended on August 22, 2004, and she earned \$774.67 from August 23, 2004 to August 31, 2004. I also find that the \$774.67 satisfies the above regulatory requirements, and therefore constitutes "wages paid" to Ms. Berba.

For the above reasons, I modify the Administrator's determination on several grounds. First, I find that Ms. Berba was "benched" from June 4, 2004 to August 22, 2004. This encompasses a total of six semi-monthly pay periods. Second, I find that GMMPCPI is entitled to a total credit of \$774.67 for "wages paid" to Ms. Berba from August 23, 2004 to August 31, 2004. Accordingly, I conclude that GMMPCPI owes Ms. Berba \$8,637.35 in back wages for uncompensated "benching" time.

Zadel Cabrera

Arrival Date in Joplin

Ms. Simon determined that Zadel Cabrera first arrived in Joplin on December 1, 2003. GX 52. She testified that she relied on Ms. Cabrera's interview statement, as well as the allowance information provided by GMMPCPI. Tr. 107-108, 137-138. GMMPCPI's records indicate that Ms. Cabrera arrived in the United States on November 28, 2003. GX 4; GX 5-1; JX 1-8. In addition, Ms. Simon's findings are consistent with Ms. Cabrera's interview statement, where she stated that, before reporting to Joplin, she had stayed with family in New York for approximately two days because of a blizzard. GX 55-1. While the statement is unsigned, Ms. Simon testified that the statement accurately reflects the information that she obtained during her interview with Ms. Cabrera. Tr. 106-107. I can find no other reason to question Ms. Cabrera's credibility or the accuracy of the interview statement. In addition, GMMPCPI's records indicate that Ms. Cabrera received an initial allowance payment of \$138.60 on December 16, 2003. GX 5-1. At her deposition, Linda Castillo testified that some H-1B employees may have been in Joplin "for a couple of weeks before" GMMPCPI gave them their first allowance payment. RX 426-7. As a result, their initial payment would be greater than \$50.00. RX 426-7. She also acknowledged that some of GMMPCPI's H-1B employees may have received initial allowance payments that exceeded \$50.00 to make up for previous weeks in which GMMPCPI did not give an allowance. RX 426-10. Based on GMMPCPI's records, as well as Ms. Cabrera's interview statement, I find that Ms. Simon reasonably determined that Ms. Cabrera arrived in Joplin on December 1, 2003.

GMMPCPI has again failed to offer any specific evidence or argument in rebuttal of Ms. Simon's determination. Instead, GMMPCPI relies on the same general arguments discussed above. I have already found these arguments to be without merit. Accordingly, I find that GMMPCPI has failed to rebut Ms. Simon's determination and I conclude that Ms. Cabrera reported for work in Joplin on December 1, 2003.

Back Wages Calculation

Ms. Simon next determined that GMMPCPI owes Ms. Cabrera \$7,561.67 in back wages for five semi-monthly pay periods of nonproductive “benching” time. GX 52; GX 199. I initially find that Ms. Simon utilized a proper prevailing wage of \$36,296.00, which was the wage rate listed on Ms. Cabrera’s initial LCA for the period of October 15, 2003 to October 14, 2005. GX 53-10; JX 1-8. She also properly determined that this prevailing wage equals a semi-monthly wage rate of \$1,512.33. GX 52. In light of Ms. Cabrera’s report for work date, Ms. Simon determined that she had been “benched” from December 1, 2003 to February 15, 2004. GX 52. While Ms. Simon did not explain how she determined that Ms. Cabrera was “benched” until February 15, 2004, I find that her determination is consistent with GMMPCPI’s wage records. The records show that Ms. Cabrera first appeared on GMMPCPI’s payroll for the pay period of February 16, 2004 to February 28, 2004, with a hire date of February 17, 2004. GX 54. This is the same date on which she received her Missouri therapist license. GX 4. I therefore find that Ms. Simon reasonably determined that Ms. Cabrera was “benched” for a total of five semi-monthly pay periods. Accordingly, I find that GMMPCPI owes Ms. Cabrera \$7,561.67 in back wages for uncompensated “benching” time.

Celeste Cabugason

Arrival Date in Joplin

Ms. Simon determined that Celeste Cabugason first arrived in Joplin on July 1, 2003. GX 56; JX 1-8. She testified that she relied on a comparison of Ms. Cabugason’s arrival date in the United States, which was also July 1, 2003, and the date she obtained her Missouri therapist license, which was September 1, 2003. Tr. 109; *see also* GX 4. She relied on this comparison “[b]ecause the information for the other employees through statements and the records that I had indicated that they spent approximately a couple of months in the process of studying and obtaining their license.” Tr. 110. Ms. Simon thus inferred that, because other H-1B employees had obtained their licenses after spending a few months in Joplin, this must necessarily be the case with Ms. Cabugason. Under *Mt. Clemens*, however, the prosecuting party only satisfies its initial burden if it presents “sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.”⁴⁸ While there are no specific requirements for the type of evidence to be produced, the cases applying *Mt. Clemens* to claims under the Act demonstrate that a prosecuting party must *at least* present evidence *specific to* the employee at issue.⁴⁹ In this case, however, that is no evidence that Ms. Simon interviewed Ms. Cabugason as a part of her investigation. Nor is there any evidence that Ms. Cabugason was ever paid an allowance by GMMPCPI. Furthermore, Ms. Simon

⁴⁸ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946), *superseded on other grounds by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, *as recognized in IBP, Inc. v. Alvarez*, 546 U.S. 21, 41 (2005).

⁴⁹ *See, e.g., Pegasus*, ARB Nos. 03-032, 03-033, slip op. at 8-9 (holding that employee testimony is sufficient evidence to satisfy the *Mt. Clemens* burden); *Administrator v. Law Offices of Sergio Villaverde, PLLC*, 2009-LCA-00019, slip op. at 12 (ALJ Nov. 4, 2010) (finding that an employee’s testimony regarding hours worked satisfied the Administrator’s burden).

admitted at the hearing that there was a “fair amount of variance” in the time periods between when an individual H-1B employee arrived in the United States and when they obtained their license. Tr. 148-149. For these reasons, I find that Ms. Simon’s determination that Ms. Cabugason arrived in Joplin on July 1, 2003, is unreasonable and cannot be affirmed.

Even if I were to find that Ms. Simon acted reasonably in setting the date of Ms. Cabugason’s arrival in Joplin, GMMPCPI has presented sufficient evidence in rebuttal. GMMPCPI submitted a letter, dated December 4, 2009, to Ms. Cabugason from counsel for the Administrator, which indicates that the Administrator did “not know the date [she] arrived in Joplin, Missouri.” RX 423-1. Thus, the Administrator has expressly acknowledged that it does not know when Ms. Cabugason reported for work in Joplin. I therefore deny the Administrator’s determination that Ms. Cabugason first arrived in Joplin on July 1, 2003.

The Administrator has not presented any additional evidence that will establish Ms. Cabugason’s report for work date. Absent such evidence, I am necessarily unable to make a determination as to whether the Administrator correctly determined the amount of back wages due to Ms. Cabugason. For this reason, I must reverse and deny the Administrator’s determination that GMMPCPI owes Ms. Cabugason \$6,274.67 in back wages for uncompensated “benching” time. Instead, I conclude that GMMPCPI is not liable for any back wages to Ms. Cabugason.

Rinna Daymiel

Arrival Date in Joplin

Ms. Simon determined that Rinna Daymiel first arrived in Joplin on July 12, 2004. GX 77. She testified that she primarily relied on the date when Ms. Daymiel “began receiving allowance payments” from GMMPCPI. Tr. 112. She further noted that Ms. Daymiel first arrived in the United States on July 12, 2004. Tr. 113. GMMPCPI’s records, however, indicate that Ms. Daymiel received her first allowance payment on July 15, 2004. GX 5-2. As stated above, Kamendra Mishra testified that GMMPCPI began paying allowances to an H-1B employee on either the day that they arrived in Joplin, or on a date “in close proximity” to when they reported for work. RX 425-19. In light of the close proximity between Ms. Daymiel’s arrival date in the United States and the date that she received her first allowance payment, I find that Ms. Simon reasonably inferred from GMMPCPI’s records that Ms. Daymiel arrived in Joplin on July 12, 2004.

GMMPCPI has again failed to offer any specific evidence or argument in rebuttal of Ms. Simon’s determination. Instead, GMMPCPI relies on the same general arguments discussed above. I have already found each of these arguments to be without merit. GMMPCPI has thus failed to rebut the Administrator’s determination, and I find that Ms. Daymiel first reported for work in Joplin on July 12, 2004.

Back Wages Calculation

Ms. Simon next determined that GMMPCPI owes Ms. Daymiel \$6,351.67 in back wages for four semi-monthly periods of nonproductive “benching” time. GX 77; GX 199. I initially find that Ms. Simon utilized a proper prevailing wage of \$37,648.00, which was the wage rate listed on Ms. Daymiel’s initial LCA for the period of December 1, 2003 to November 30, 2005. GX 78-8; JX 1-8. She also properly determined that this prevailing wage equals a semi-monthly wage rate of \$1,568.67. GX 77. I disagree, however, with Ms. Simon’s determination that Ms. Daymiel was only “benched” for four semi-monthly pay periods. She found that Ms. Daymiel was “benched” from July 12, 2004 to September 30, 2004. GMMPCPI’s records, however, indicate that Ms. Daymiel was hired on September 27, 2004. GX 81-2. In addition, the period of July 12, 2004 to September 27, 2004 encompasses five pay periods: (1) July 16, 2004 to July 31, 2004; (2) August 1, 2004 to August 15, 2004; (3) August 16, 2004 to August 31, 2004; (4) September 1, 2004 to September 15, 2004; and (5) September 16, 2004 to September 30, 2004. Furthermore, GMMPCPI’s records show that Ms. Daymiel continued receiving allowance payments, and did not appear on GMMPCPI’s payroll, until the end of the pay period for September 16, 2004 to September 30, 2004. GX 5-2; GX 81-2. For these reasons, I modify the Administrator’s determination and find that Ms. Daymiel was “benched” for a total of five pay periods.

Ms. Simon, however, gave GMMPCPI credit for a payment of \$608.00 made to Ms. Daymiel on September 30, 2004. GX 77. This credit reflects “at least a partial payment” made to Ms. Daymiel for wages earned from September 27, 2004 to September 30, 2004. Tr. 113; *see also* GX 81-2. GMMPCPI’s wage records confirm that Ms. Daymiel earned the \$608.00 for work performed between September 27, 2004 and September 30, 2004. GX 81-2. The records also indicate that withholdings were made for taxes and other authorized deductions, as required by the regulations.⁵⁰ I thus find that the \$608.00 constitutes “wages paid” to Ms. Daymiel. Accordingly, I find that the Administrator correctly granted a credit of \$608.00 to GMMPCPI.

For the above reasons, I modify the Administrator’s determination on several grounds. I initially find that Ms. Daymiel was “benched” from July 12, 2004 to September 27, 2004. I also find, however, that this constitutes a “benching” period of five semi-monthly pay periods. Furthermore, I find that GMMPCPI is entitled to a credit of \$608.00. Accordingly, I concluded that GMMPCPI owes Ms. Daymiel a total of \$7,235.35 in back wages for uncompensated “benching” time.

Iris de la Calzada

Arrival Date in Joplin

Ms. Simon determined that Iris de la Calzada first arrived in Joplin on June 2, 2004. GX 82. She testified that she relied on her interview with Ms. de la Calzada. Tr. 114. At the hearing, however, Ms. Simon acknowledged that a sworn affidavit from Ms.

⁵⁰ *See* 20 C.F.R. § 655.731(c)(2).

de la Calzada reflected a Joplin arrival date of June 3, 2004. Tr. 114; *see also* GX 85. Ms. Simon's testimony at the hearing is consistent with the affidavit, which declares that Ms. de la Calzada arrived in the United States on June 2, 2004, but "flew to Missouri the following day and reported to [GMMPCPI] for orientation and training ... on June 3, 2004." GX 85. The affidavit is signed and notarized, so I find Ms. de la Calzada's statements to be credible. In addition, her statements are consistent with GMMPCPI's records of allowance payments, which show that she first arrived in Joplin on June 3, 2004. GX 5-2. Based on the sworn affidavit, I find that Ms. Simon reasonably concluded at the hearing that Ms. de la Calzada arrived in Joplin on June 3, 2004.

Once again, GMMPCPI has not provided any specific evidence or argument in rebuttal of Ms. Simon's determination. Instead, GMMPCPI relies on the same general arguments discussed above, which I have already found to be without merit. I therefore find that GMMPCPI has failed to rebut Ms. Simon's determination on behalf of the Administrator. Accordingly, I find that Ms. de la Calzada first reported for work in Joplin on June 3, 2004.

Back Wages Calculation

Ms. Simon next determined that GMMPCPI owes Ms. de la Calzada \$6,122.67 in back wages for four semi-monthly pay periods of nonproductive "benching" time. GX 82; GX 199. I initially find that Ms. Simon utilized a proper prevailing wage of \$37,648.00, which is the wage rate listed on Ms. de la Calzada's initial LCA for the period of December 15, 2003 to December 14, 2005. GX 83-10; *see also* JX 1-8. She also properly determined that this prevailing wage equals a semi-monthly wage rate of \$1,568.67. Ms. Simon initially found that Ms. de la Calzada had been "benched" for three (3) full pay periods from June 2, 2004 to July 15, 2004, but also found that she had only been paid \$152.00 for a fourth pay period of July 16, 2004 to July 31, 2004. GX 82. Thus, Ms. de la Calzada was "benched" during a total of four pay periods. I find this determination to be consistent with GMMPCPI's records and Ms. de la Calzada's sworn affidavit. In her affidavit, she stated that she was not paid a salary "until after [she] received [her] state occupational therapist license." GX 85. She obtained her license on July 30, 2004. In addition, GMMPCPI's wage records reveal that Ms. de la Calzada was hired, and first appeared on the payroll, on July 30, 2004. GX 84. Furthermore, the records show that she continued to receive the \$50.00 weekly allowance through July 30, 2004. GX 5-2. For these reasons, I find that Ms. de la Calzada was "benched" from June 3, 2004 to July 29, 2004. I also agree with Ms. Simon's determination and find that Ms. de la Calzada was "benched" for four pay periods.

Ms. Simon, however, also gave GMMPCPI credit for a payment of \$152.00 made to Ms. de la Calzada on July 31, 2004. Tr. 116; GX 82. GMMPCPI's wage records confirm that Ms. de la Calzada earned the \$152.00 for work performed from July 30-31, 2004. GX 84. The records also indicate that withholdings were made for taxes and other authorized deductions, as required by the regulations.⁵¹ I thus find that the \$152.00

⁵¹ *See id.*

constitutes “wages paid” to Ms. de la Calzada. Accordingly, I find that the Administrator correctly granted a credit of \$152.00 to GMMPCPI.

For the reasons stated above, I affirm the Administrator’s determination that GMMPCPI owes Ms. de la Calzada a total of \$6,122.67 in back wages for uncompensated “benching” time.

Mary Carmel Elizon

Arrival Date in Joplin

Ms. Simon determined that Mary Carmel Elizon first arrived in Joplin on March 31, 2004. GX 94. She testified that she utilized GMMPCPI’s records to make a comparison of Ms. Elizon’s arrival date in the United States and the date she began receiving allowance payments. Tr. 117. Ms. Simon’s findings are consistent with GMMPCPI’s records, which indicate that Ms. Elizon not only arrived in the United States on March 31, 2004, but also received her first allowance payment on that date. GX 4; GX 5-1. As stated above, Mr. Mishra testified that H-1B employees generally received their first allowance payment when they arrived in Joplin. RX 425-18. Based on GMMPCPI’s records, I find that Ms. Simon reasonably determined that Ms. Elizon first reported for work in Joplin on March 31, 2004.

Once again, GMMPCPI has not provided any specific evidence or argument in rebuttal of Ms. Simon’s determination. Instead, GMMPCPI relies on the same general arguments discussed above, which I have already found to be without merit. I therefore find that GMMPCPI has failed to rebut Ms. Simon’s determination on behalf of the Administrator. Accordingly, I find that Ms. Elizon first reported for work in Joplin on March 31, 2004.

Back Wages Calculation

Ms. Simon next determined that GMMPCPI owes Ms. Elizon \$6,274.67 in back wages for four semi-monthly pay periods of nonproductive “benching” time. GX 94; GX 199. I initially find that Ms. Simon utilized a proper prevailing wage of \$37,648.00, which was the wage rate listed on Ms. Elizon’s initial LCA for the period of December 1, 2003 to November 30, 2005. GX 95-9; *see also* JX 1-8. She also properly determined that this prevailing wage equals a semi-monthly wage rate of \$1,568.67. GX 94. Based on Ms. Elizon’s report for work date, Ms. Simon determined that she had been “benched” from March 31, 2004 to May 31, 2004. GX 94. This encompasses four pay periods: (1) April 1, 2004 to April 15, 2004; (2) April 16, 2004 to April 30, 2004; (3) May 1, 2004 to May 15, 2004; and (6) May 16, 2004 to May 31, 2004. While the parties stipulated that Ms. Elizon first appeared on GMMPCPI’s payroll on June 15, 2004, JX 1-9, GMMPCPI’s wage records show that she was actually hired, and appeared on the payroll, on June 4, 2004. GX 96. Thus, I find that Ms. Simon’s determination is largely consistent with GMMPCPI’s wage records. In addition, Ms. Elizon received her state occupational license on June 4, 2004. GX 4. GMMPCPI’s records, however, also show that she continued to receive weekly allowance payments through June 3, 2004. GX -1.

Accordingly, I modify the Administrator's determination and find that Ms. Elizon was "benched" from March 31, 2004 to June 3, 2004. I therefore find that while Ms. Elizon was "benched" for four full pay periods from March 31, 2004 to May 31, 2004, her "benching" period continued into a fifth pay period.

GMMPCPI's wage records, however, indicate that Ms. Elizon earned \$1,127.34 for work performed from June 4, 2004 to June 15, 2004. GX 96. The records also show that withholdings were made for taxes and other authorized deductions, as required by the regulations.⁵² I thus find that the \$1,127.34 constitutes "wages paid" to Ms. Elizon. I therefore find that GMMPCPI is entitled to a credit of \$1,127.34 for amounts paid to Ms. Elizon during the pay period of June 1, 2004 to June 15, 2004. For these reasons, I modify the Administrator's determination and conclude that GMMPCPI owes Ms. Elizon a total of \$6,716.01 in back wages for uncompensated "benching" time.

Marjorie Ham

Arrival Date in Joplin

Ms. Simon determined that Marjorie Ham first arrived in Joplin on August 6, 2005. GX 109. She testified that she relied on both Ms. Ham's arrival date in the United States and the date she began receiving allowance payments from GMMPCPI. Tr. 118. While GMMPCPI's records show that Ms. Ham arrived in the United States on August 6, 2005, they also indicate that she did not receive her first \$50.00 allowance payment until August 12, 2005. GX 4; GX 5-14. While GMMPCPI generally began making allowance payments within "close proximity" of an employee's arrival date in Joplin, RX 425-18 to 425-19, I find that GMMPCPI's records are more consistent with a Joplin arrival date of August 12, 2005.

GMMPCPI, however, has not provided any specific evidence or argument to rebut a finding that Ms. Ham arrived in Joplin on *either* August 6, 2005 or August 12, 2005. Instead, GMMPCPI relies upon the same general arguments that I have already found to be without merit. Under the regulations, an Administrative Law Judge has the authority and discretion to "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator."⁵³ I therefore modify the Administrator's determination and find that Ms. Ham reported for work with GMMPCPI in Joplin on August 12, 2005.

Back Wages Calculation

Ms. Simon next determined that GMMPCPI owes Ms. Ham \$9,422.50 in back wages for six semi-monthly pay periods of nonproductive "benching" time. GX 109; GX 199. I initially find that Ms. Simon utilized a proper prevailing wage of \$37,690.00, which was the wage rate listed on Ms. Ham's initial LCA for the period of December 1, 2004 to November 30, 2006. GX 110-3; *see also* JX 1-8. She also properly determined

⁵² *See id.*

⁵³ 20 C.F.R. § 655.840(b). *See also Administrator v. Itek Consulting, Inc.*, 2008-LCA-00046, slip op. at 18 (ALJ May 6, 2009).

that this prevailing wage equals a semi-monthly wage rate of \$1,570.42. GX 109. Ms. Simon determined that Ms. Ham was “benched” from August 6, 2005 to October 31, 2005, which encompassed six [6] pay periods. GX 109. As discussed above, however, I find that Ms. Ham did not report for work, and thus did not become “benched,” until August 12, 2005. In addition, GMMPCPI’s records indicate that Ms. Ham did not receive her state occupational license until November 3, 2005. GX 4. Mr. Mishra testified that GMMPCPI’s employment agreements “clearly [state] that the employment starts from the day [the therapists] will have [passed] the NVCOT or NPT exam and have obtained the license.” RX 425-14. GMMPCPI’s records also show that Ms. Ham first appeared on the payroll for the period of November 1, 2005 to November 15, 2005. GX 111. This is consistent with the parties’ stipulation that Ms. Ham first appeared on the payroll on November 15, 2005. JX 1-9. I thus find that Ms. Ham’s hire date was November 3, 2005. Accordingly, I find that Ms. Ham was “benched” from August 12, 2005 to November 3, 2005.

As a result, I cannot accurately determine the amount of back wages due to Ms. Ham based on the number of pay periods in which she was “benched.” As discussed above, Ms. Simon determined the back wages due to Marissa Acharon on a weekly basis. See Tr. 96; GX 15. I have therefore utilized this method of calculation for Ms. Ham. I first find that Ms. Ham’s prevailing wage of \$37,690.00 equals an average weekly wage rate of \$724.81 (\$37,690.00 divided by 52 weeks). I also find that Ms. Ham’s “benching” period from August 12, 2005 to November 3, 2005, equals a period of 12 calendar weeks. I have therefore multiplied the weekly wage rate of \$724.81 by 12 weeks, and I find that Ms. Ham is owed \$8,697.72 in back wages.

For the reasons discussed above, I have modified the Administrator’s determination on several grounds. First, I find that Ms. Ham was “benched” from August 12, 2005 to November 3, 2005. Second, in order to obtain a more accurate determination of back wages, I have used a calculation that computes wages due on a weekly basis. As a result, I conclude that GMMPCPI owes Ms. Ham \$8,697.72 for uncompensated “benching” time.

Angeles Mojica

Arrival Date in Joplin

Ms. Simon determined that Angeles Mojica first arrived in Joplin on July 6, 2005. GX 136. She testified that she relied upon Ms. Mojica’s arrival date in the United States and the date that she received her first allowance payment from GMMPCPI. Tr. 101. Ms. Simon’s findings are consistent with GMMPCPI’s records, which state that Ms. Mojica arrived in the United States on July 6, 2005, and received her first allowance payment on July 8, 2005. GX 4; GX 12-15. As stated above, Mr. Mishra testified that GMMPCPI began paying allowances to H-1B employees on either the day that they arrived in Joplin, or on a date “in close proximity” to when they arrived in Joplin. RX 425-18 to 425-19. I therefore find that Ms. Simon reasonably determined that Ms. Mojica reported for work in Joplin on July 6, 2005.

GMMPCPI has not offered any specific evidence or argument in rebuttal of Ms. Simon's determination. Instead, GMMPCPI relies on the same general arguments that I have already found to be without merit. I therefore find that GMMPCPI has failed to rebut Ms. Simon's determination on behalf of the Administrator. Accordingly, I find that Ms. Mojica first reported for work in Joplin on July 6, 2005.

Back Wages Calculation

Ms. Simon next determined that GMMPCPI owes Ms. Mojica \$12,632.67 in back wages for eight semi-monthly pay periods of nonproductive "benching" time. GX 136; GX 199. I initially find that Ms. Simon utilized a proper prevailing wage of \$37,898.00, which was the wage rate listed on Ms. Mojica's initial LCA for the period of January 15, 2005 to January 14, 2007. GX 137-3; *see also* JX 1-8. She also properly determined that this prevailing wage equals a semi-monthly wage rate of \$1,579.08. GX 136. In light of Ms. Mojica's report for work date, Ms. Simon determined that she had been "benched" from July 6, 2005 to October 31, 2005. GX 136. This period encompasses eight of GMMPCPI's pay periods: (1) July 1, 2005 to July 15, 2005; (2) July 16, 2005 to July 31, 2005; (3) August 1, 2005 to August 15, 2005; (4) August 16, 2005 to August 31, 2005; (5) September 1, 2005 to September 15, 2005; (6) September 16, 2005 to September 30, 2005; (7) October 1, 2005 to October 15, 2005; and (8) October 16, 2005 to October 31, 2005. GMMPCPI's records, however, show that Ms. Mojica received her state occupational license on November 4, 2005. GX 4. As stated above, Mr. Mishra testified that an H-1B employee was considered to have been "hired" by GMMPCPI on the date that employee received his or her state license. RX 425-14. GMMPCPI's records also show that Ms. Mojica continued to receive allowance payments until November 4, 2005. GX 5-12. For these reasons, I find that Ms. Mojica was "benched" from July 6, 2005 to November 3, 2005.

As a result, Ms. Mojica remained "benched" for a portion of a ninth semi-monthly pay period, from November 1, 2005 to November 15, 2005. This is consistent with the parties' stipulation that Ms. Mojica first appeared on GMMPCPI's payroll on November 15, 2005. JX 1-9. Applying the semi-monthly wage rate determined by Ms. Simon, I find that nine pay periods of benching equals \$14,211.72 in back wages. GMMPCPI's wage records, however, indicate that Ms. Mojica earned \$1,151.52 for work performed from November 4, 2005 to November 15, 2005. The records also show that withholdings were made for taxes and other authorized deductions, as required by the regulations.⁵⁴ I thus find that the \$1,151.52.00 constitutes "wages paid" to Ms. Mojica. Accordingly, I find that GMMPCPI is entitled to a credit of \$1,151.52 for amounts actually paid to Ms. Mojica.

For the reasons discussed above, I modify the Administrator's determination on several grounds. First, I find that Ms. Mojica was "benched" from July 6, 2005 to November 3, 2005. Second, I find that GMMPCPI is entitled to a credit of \$1,151.52 for "wages paid" to Ms. Mojica from November 4, 2005 to November 15, 2005. Accordingly,

⁵⁴ *See* 20 C.F.R. § 655.731(c)(2).

I conclude that GMMPCPI owes Ms. Mojica \$13,060.30 in total back wages for uncompensated “benching” time.

Grethel Ocampo-Dakay

Arrival Date in Joplin

Ms. Simon determined that Grethel Ocampo-Dakay first arrived in Joplin on July 15, 2003. GX 139. She testified that she relied on Ms. Ocampo-Dakay’s interview statement, her arrival date in the United States, and the date that she received her first allowance payment. Tr. 125. GMMPCPI’s records indicate that Ms. Ocampo-Dakay arrived in the United States on July 1, 2003. GX 4; *see also* JX 1-8. In addition, I find that Ms. Simon’s determination is consistent with Ms. Ocampo-Dakay’s interview statement, where she indicated that she had “stayed 2 weeks in San Francisco before [she] went to Missouri.” GX 141-1. Furthermore, GMMPCPI’s records state that Ms. Ocampo-Dakay received an initial allowance payment of \$135.00 on August 2, 2003. GX 5-1. As discussed above, Linda Castillo testified at her deposition that some H-1B employees may have been in Joplin “for a couple of weeks before” GMMPCPI gave them their first allowance payment. RX 426-7. As a result, their initial payment would be greater than \$50.00. RX 426-7. She also acknowledged that some of GMMPCPI’s H-1B employees may have received initial allowance payments that exceeded \$50.00 to make up for previous weeks in which GMMPCPI did not give an allowance. RX 426-10. Based on GMMPCPI’s records, as well as Ms. Ocampo-Dakay’s interview statement, I find that Ms. Simon reasonably determined that Ms. Ocampo-Dakay reported for work in Joplin on July 15, 2003.

GMMPCPI has again failed to offer any specific evidence or argument in rebuttal of Ms. Simon’s determination. Instead, GMMPCPI presents the same general arguments discussed above. I have already found these arguments, however, to be without merit. I therefore find that GMMPCPI has failed to rebut Ms. Simon’s determination on behalf of the Administrator. Accordingly, I find that Ms. Ocampo-Dakay first reported for work in Joplin on July 15, 2003.

Back Wages Calculation

Ms. Simon next determined that GMMPCPI owes Ms. Ocampo-Dakay \$4,536.99 in back wages for three (3) semi-monthly pay periods of nonproductive “benching” time. GX 139; GX 199. I initially find that Ms. Simon utilized a proper prevailing wage of \$36,296.00, which was the wage rate listed on Ms. Ocampo-Dakay’s initial LCA for the period of April 15, 2003 to April 14, 2005. GX 140-10; *see also* JX 1-8. She also properly determined that this prevailing wage equals a semi-monthly wage rate of \$1,512.33. GX 139. In light of Ms. Ocampo-Dakay’s report for work date, Ms. Simon determined that she had been “benched” from July 15, 2003, to the end of August 2003. GX 139. She testified that she relied solely on Ms. Ocampo-Dakay’s interview statement because GMMPCPI “did not have or maintain the required payroll records during that time frame.” Tr. 126. Ms. Ocampo-Dakay stated that she began receiving her salary in September 2003. GX 141-1. Ms. Simon thus testified that she “credited for all of

September of '03 that she would have been paid, even though I didn't have a payroll record." Tr. 127.

I find Ms. Simon's determination, however, to be inconsistent with GMMPCPI's records. First, the records show that Ms. Ocampo-Dakay did not receive her state occupational license until September 17, 2003. GX 4. As stated above, Mr. Mishra testified that license dates determined when an employee was deemed "hired" under GMMPCPI's employment agreements. RX 425-14. In addition, GMMPCPI's records show that Ms. Ocampo-Dakay continued to receive a weekly allowance through September 15, 2003. GX 5-1. For these reasons, I find that Ms. Ocampo-Dakay was "benched" from July 15, 2003 to September 17, 2003, which constitutes a total of four semi-monthly pay periods. I therefore modify the Administrator's determination, and conclude that GMMPCPI owes Ms. Ocampo-Dakay \$6,049.32 in back wages for uncompensated "benching" time.

2. Summary of Back Wages Due for "Benching" Violations

For the reasons discussed above, I **MODIFY** the Administrator's findings regarding the back wages owed by GMMPCPI to Marissa Acharon, Euphill Juliette Aseniero, Ellanie Berba, Rinna Daymiel, Mary Carmel Elizon, Marjorie Ham, Angeles Mojica, and Grethel Ocampo-Dakay. I **AFFIRM** the Administrator's findings pertaining to Zadel Cabrera and Iris de la Calzada. I **REVERSE AND DENY** the Administrator's findings regarding Celeste Cabugason.

Accordingly, I make the following findings regarding GMMPCPI's "benching" violations for the 11 H-1B employees whose back wages were not stipulated in this case:

1. Marissa Acharon reported for work in Joplin on both February 1, 2004, and May 4, 2004. She was "benched" by GMMPCPI for a total of six weeks and was not paid the prevailing wage specified in her LCA. GMMPCPI therefore owes Ms. Acharon \$3,490.00 in back wages.
2. Euphill Juliette Aseniero reported for work in Joplin on April 16, 2004. She was "benched" by GMMPCPI during five semi-monthly pay periods from April 16, 2004 to June 29, 2004, and was not paid the prevailing wage specified in her LCA. GMMPCPI, however, is entitled to a credit of \$152.00 for "wages paid" to Ms. Aseniero. GMMPCPI therefore owes Ms. Aseniero \$7,691.35 in back wages.
3. Ellanie Berba reported for work in Joplin on June 4, 2004. She was "benched" by GMMPCPI during six semi-monthly pay periods from June 4, 2004 to August 22, 2004, and was not paid the prevailing wage specified in her LCA. GMMPCPI, however, is entitled to a credit of \$774.67 for "wages paid" to Ms. Berba. GMMPCPI therefore owes Ms. Berba \$8,637.35 in back wages.

4. Zadel Cabrera reported for work in Joplin on December 1, 2003. She was “benched” by GMMPCPI for a total of five semi-monthly pay periods from December 1, 2003 to February 15, 2004, and was not paid the prevailing wage specified in her LCA. GMMPCPI therefore owes Ms. Cabrera \$7,561.67 in back wages.
5. The Administrator failed to satisfy her burden of establishing the date on which Celeste Cabugason reported for work in Joplin. Absent a report for work date, Ms. Cabugason’s “benching” period cannot be determined and an accurate calculation of back wages cannot be made. Therefore, GMMPCPI is not required to pay any back wages to Celeste Cabugason.
6. Rinna Daymiel reported for work in Joplin on July 12, 2004. She was “benched” by GMMPCPI during five semi-monthly pay periods from July 12, 2004 to September 27, 2004, and was not paid the prevailing wage specified in her LCA. GMMPCPI, however, is entitled to a credit of \$608.00 for “wages paid” to Ms. Daymiel. GMMPCPI therefore owes Ms. Daymiel \$7,235.35 in back wages.
7. Iris de la Calzada reported for work in Joplin on June 3, 2004. She was “benched” by GMMPCPI during four semi-monthly pay periods from June 3, 2004 to July 29, 2004, and was not paid the prevailing wage specified in her LCA. GMMPCPI, however, is entitled to a credit of \$152.00 for “wages paid” to Ms. de la Calzada. GMMPCPI therefore owes Ms. de la Calzada \$6,122.67 in back wages.
8. Mary Carmel Elizon reported for work in Joplin on March 31, 2004. She was “benched” by GMMPCPI during five semi-monthly pay periods from March 31, 2004 to June 3, 2004, and was not paid the prevailing wage specified in her LCA. GMMPCPI, however, is entitled to a credit of \$1,127.34 for “wages paid” to Ms. Elizon during the fifth pay period. GMMPCPI therefore owes Ms. Elizon \$6,716.01 in back wages.
9. Marjorie Ham reported for work in Joplin on August 12, 2005. She was “benched” by GMMPCPI for a total of 12 weeks from August 12, 2005 to November 3, 2005, and was not paid the prevailing wage specified in her LCA. GMMPCPI therefore owes Ms. Ham \$8,697.72 in back wages.
10. Angeles Mojica reported for work in Joplin on July 6, 2005. She was “benched” by GMMPCPI during nine semi-monthly pay periods from July 6, 2005 to November 3, 2005, and was not paid the prevailing wage specified in her LCA. GMMPCPI, however, is entitled to a credit of \$1,151.52 for “wages paid” to Ms. Mojica during the ninth pay period. GMMPCPI therefore owes Ms. Mojica \$13,060.30 in back wages.
11. Grethel Ocampo-Dakay reported for work in Joplin on July 15, 2003. She was “benched” by GMMPCPI during four semi-monthly pay periods from

July 15, 2003 to September 17, 2003, and was not paid the prevailing wage specified in her LCA. GMMPCPI therefore owes Ms. Ocampo-Dakay \$6,049.32 in back wages.

Furthermore, the parties have stipulated to the amount of back wages that GMMPCPI owes for “benching” violations to the remaining 30 H-1B employees at issue in this case. *See* JX 1, stipulation number 4, pp. 4–6. I have adopted the stipulations as my findings of fact. Accordingly, I find that GMMPCPI owes 40 H-1B employees a total of \$338,042.69 in back wages for uncompensated “benching” time, pursuant to 20 C.F.R. §§ 655.731(c)(7)(i) and 655.810(a).

B. Damages for Early Termination of Employment: Liquidated Damages or Illegal Penalty?

Under the Act and regulations, an employer commits a violation if it requires an H-1B employee “to pay a penalty for ceasing employment with the employer prior to a date agreed to by the [H-1B employee] and the employer.”⁵⁵ The regulations provide that an employer “is not permitted to require (directly or indirectly) that the [H-1B employee] pay a penalty for ceasing employment with the employer prior to an agreed date.”⁵⁶ This includes making a “deduction from or reduction in the payment of the required wage to collect such a penalty.”⁵⁷ An employer, however, is permitted to recover “*bona fide* liquidated damages from the H-1B [employee] who ceases employment with the employer prior to an agreed date.”⁵⁸ Under the regulations, the distinction “between liquidated damages (which are permissible) and a penalty (which is prohibited) is to be made on the basis of the applicable *State law*.”⁵⁹ The Administrator is granted authority to determine “whether the payment in question constitutes liquidated damages or a penalty” under state law.⁶⁰ If the employer is found to have imposed an early termination penalty in violation of the Act and regulations, the Administrator “may impose a civil monetary penalty of \$1,000 for each such violation and issue an administrative order requiring the return to the [H-1B employee] of any amount paid in violation.”⁶¹

In the present case, GMMPCPI’s employment agreements from 2004, 2005 and 2006 all contain provisions that require an H-1B employee to pay damages for voluntary early termination of employment. The 2004 and 2005 Agreements each provide for payment of damages ranging from \$3,000.00 to \$10,000.00, depending on when an H-1B employee terminated his or her employment. *See* RX 415-6; RX 416-6. The 2006 Agreement provides for payment of damages ranging from \$10,000.00 to \$25,000.00, depending on when an H-1B employee terminated his or her employment. *See* RX 417-6

⁵⁵ 8 U.S.C. § 1182(n)(2)(C)(I); *see also* 20 C.F.R. § 655.731(c)(10)(i) (finding that an unauthorized deduction or reduction of wages includes a “penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer”).

⁵⁶ 20 C.F.R. § 655.731(c)(10)(i)(A).

⁵⁷ *Id.*

⁵⁸ 20 C.F.R. § 655.731(c)(10)(i)(B).

⁵⁹ 20 C.F.R. § 655.731(c)(10)(i)(C) (emphasis added).

⁶⁰ *Id.*

⁶¹ 8 U.S.C. § 1182(n)(2)(C)(III).

to 417-7. As stated above, the parties have stipulated that GMMPCPI collected early termination damages from Alena Gay Arat, Maricon Barba, Darlene Claud, Estella Daraway, Michael Gonzales, Lordele Pato, Kahlila Quidlat-Fowler, and Jaycin Yee. JX 1-3 to 1-4, 1-6. Each of GMMPCPI's employment agreements also generally provides for repayment of 100% of all expenses incurred on behalf of the H-1B employee. *See* GX 12-3; GX 13-3; GX 14-3; RX 415-3; RX 416-3; RX 417-3. Furthermore, the agreements state that the provisions are governed "by the pertinent laws of the State of Missouri." GX 12-7; GX 13-7; GX 14-7; RX 415-7; RX 416-7; RX 417-7. Accordingly, I find that the validity of GMMPCPI's damages provision must be determined under Missouri law.

1. Unconscionability under Missouri Law

The Administrator initially argues in her brief that GMMPCPI's provisions for early termination damages are "unconscionable and, therefore, unenforceable." Administrator's Brief at 28. The Administrator contends that the contract provisions are both procedurally and substantively unconscionable, and are thus void under Missouri law. Administrator's Brief at 31. In response, GMMPCPI contends that "[a]ny issues about whether the employment agreement is unconscionable are not properly before this Court." Respondent's Brief at 51. More specifically, GMMPCPI contends that the Administrator never mentioned the issue of unconscionability in her determination letters or dispositive motions, at the hearing, or during the deposition of Erica Simon. Respondent's Brief at 52. In the alternative, GMMPCPI argues that the Administrator has failed to meet her burden of proof that the provisions for early termination damages are both procedurally and substantively unconscionable. For the reasons discussed below, I find that the evidence does not establish that GMMPCPI's contract provisions are unenforceable as unconscionable under Missouri law. Accordingly, I decline to address GMMPCPI's argument that the unconscionability issue has not been properly raised.

Under Missouri law, an unconscionable agreement is one in which there is "an inequality so strong, gross, and manifest that it must be impossible to state it to one with common senses without producing an exclamation at the inequality of it."⁶² Missouri law recognizes two aspects of unconscionability: procedural unconscionability and substantive unconscionability.⁶³ "Procedural" unconscionability addresses "the formalities of making the contract," and focuses on such things as "high pressure sales tactics, unreadable fine print, or misrepresentation among other unfair issues in the contract formation process."⁶⁴ "Substantive" unconscionability deals with "the terms of the contract itself" and refers to "an undue harshness in the contract terms."⁶⁵ Before a contract provision can be voided, there must be both procedural and substantive

⁶² *Pleasants v. Am. Express Co.*, 541 F.3d 853, 857 (8th Cir. 2008) (quoting *Smith v. Kriska*, 113 S.W.3d 293, 298 (Mo. Ct. App. 2003)) (internal quotation marks omitted); *see also Cicle v. Chase Bank USA*, 583 F.3d 549, 554 (8th Cir. 2009).

⁶³ *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. 2006) (en banc); *Repair Masters Constr. Co., Inc. v. Gary*, 277 S.W.3d 854, 857 (Mo. Ct. App. 2009).

⁶⁴ *Repair Masters*, 277 S.W.3d at 857 (quoting *Schneider*, 194 S.W.3d at 858)) (internal quotation marks omitted).

⁶⁵ *Id.* at 857-58 (quoting *Schneider*, 194 S.W.3d at 858)) (internal quotation marks omitted).

unconscionability, although “it need not be in equal amounts.”⁶⁶ The burden of proving that a contractual provision is unconscionable rests with the party challenging the provision.⁶⁷

a. Procedural Unconscionability

As to procedural unconscionability, the Administrator argues that the terms of the damages provision “were determined and written entirely” by GMMPCPI and there was “no discussion or negotiation” between GMMPCPI and its H-1B employees. Administrator’s Brief at 29-30. In addition, the Administrator alleges that if the employees did not accept the contract, GMMPCPI “would not assist them in obtaining their visas.” Administrator’s Brief at 29-30. The Administrator also contends that, while GMMPCPI “informed the workers of all the benefits [GMMPCPI] had to offer,” no mention was made “of ‘liquidated damages,’ a second contract, or the need to repay 100% of [GMMPCPI’s] claimed expenses” if an employee terminated his or her employment early. Administrator’s Brief at 28-29. The Administrator further notes that the H-1B employees “were required to sign a second contract, which was presented to them only after they had spent thousands of dollars to get to the United States.” Administrator’s Brief at 30. Furthermore, the Administrator contends that English was a second language for many of the employees and GMMPCPI “did not explain the contracts in detail to the employees and it is doubtful the term ‘liquidated damages’ was one with which the workers were familiar.” Administrator’s Brief at 29. For all of these reasons, the Administrator argues that the provisions for early termination damages in GMMPCPI’s contracts are procedurally unconscionable.

GMMPCPI replies with the argument that there is “no proof that the contract formation process was so unfair as to rise to the level of unconscionable.” Respondent’s Brief at 52. In particular, GMMPCPI alleges that the Administrator has provided no evidence of “high pressure techniques, misrepresentation, or unequal bargaining positions.” Respondent’s Brief at 52.

In general, the fact that an employment contract is a prerequisite to employment does *not* render it procedurally unconscionable.⁶⁸ Simply because the agreement is a condition to obtaining employment “does not force the employee to accept and execute it.”⁶⁹ Instead, the employee “has the option of foregoing the employment if the terms of the agreement are not satisfactory.”⁷⁰ The Missouri courts, however, have recognized that this type of “take-it-or-leave-it” contract becomes procedurally unconscionable if the circumstances show that the employee “had no negotiating leverage or *other*

⁶⁶ *Id.* at 858 (citing *Whitney v. Alltel Commc’ns, Inc.*, 173 S.W.3d 300, 308 (Mo. Ct. App. 2005)).

⁶⁷ *See In re Estate of Looney*, 975 S.W.2d 508, 520 (Mo. Ct. App. 1998) (citing *Mochar Sales Co. v. Meyer*, 373 S.W.2d 911, 914 (Mo. 1964)).

⁶⁸ *Smith v. Kriska*, 113 S.W.3d 293, 298 (Mo. Ct. App. 2003); *Whelan Sec. Co., Inc. v. Allen*, 26 S.W.3d 592, 596 (Mo. Ct. App. 2000) (citing, inter alia, *Adrian N. Baker & Co. v. DeMartino*, 733 S.W.2d 14, 19 (Mo. Ct. App. 1987)).

⁶⁹ *Whelan*, 26 S.W.3d at 596.

⁷⁰ *Id.*; *see also Kriska*, 113 S.W.3d at 298 (“Because [the employee] had the option of seeking employment elsewhere, the relative bargaining power of the [employer] does not make the Agreement ... unconscionable.”).

reasonable option aside from accepting the contract.”⁷¹ In *Manfredi v. Blue Cross & Blue Shield of Kansas City*, the Missouri Court of Appeals recently found a health insurance contract to be procedurally unconscionable where it was offered on a “take-it-or-leave-it” basis, there was no room to negotiate its terms, and the plaintiff stated that “he could not afford not to sign the Agreement.”⁷² The court also found it significant that the defendant was the “largest health insurer in the Kansas City area,” while the plaintiff was an individual healthcare provider.⁷³ Accordingly, the court held that the totality of the circumstances rendered the contract procedurally unconscionable.⁷⁴

In the present case, I have focused on GMMPCPI’s second employment agreements in my analysis of procedural unconscionability. As stated above, each H-1B employee was required to sign a second agreement after obtaining their Missouri occupational license. Tr. 270; RX 425-23. I find that the Administrator has presented sufficient evidence that the damages provisions in the second employment agreements are procedurally unconscionable. As argued by the Administrator, GMMPCPI’s employees “were required to sign a second contract, which was presented to them only after they had spent thousands of dollars to get to the United States.” Administrator’s Brief at 30. The second agreement was required in order for an employee to remain in the United States. Administrator’s Brief at 30. This is consistent with Kamendra Mishra’s testimony at the hearing, where he stated that the new contract was required because the employees’ H-1B visas only allowed them to work for GMMPCPI. Tr. 229, 270. In addition, the evidence in the record clearly establishes that the H-1B employees invested significant amounts of money, amounting to thousands of dollars for each employee, in order to obtain their H-1B visas and gain entry to the United States. See GX 29-2; GX 36-1 to 36-2; GX 55-1; GX 76-2; GX 107-1; GX 141-1; GX 155-1; RX 431-3.

While the present case involves employment contracts, I find that it is similar to the situation addressed in *Manfredi*. The contracts signed by each H-1B employee expressly required that they “accept[] employment ... on the terms of this Agreement.” RX 415-2; RX 416-2; RX 417-2. Thus, GMMPCPI’s contracts were presented on a “take-it-or-leave-it” basis. It is undisputed that the H-1B employees *technically* had the ability to forego employment if they deemed GMMPCPI’s contract terms to be unsatisfactory. As stated above, however, the employees’ LCA’s and H-1B visas only authorized them to work for GMMPCPI.⁷⁵ Thus, I find that the H-1B employees were *effectively* required to accept employment with GMMPCPI if they wished to remain in the United States. Accordingly, the H-1B employees lacked the realistic option of “foregoing the employment if the terms of the agreement [were] not satisfactory.”⁷⁶ In addition, the H-1B employees had already invested thousands of dollars prior to their arrival in the United States. I therefore find that the H-1B employees had “no negotiating leverage or

⁷¹ *Manfredi v. Blue Cross & Blue Shield of Kansas City*, 340 S.W.3d 126, 133 (Mo. Ct. App. 2011) (en banc) (emphasis added).

⁷² *Id.* at 133.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See 20 C.F.R. § 655.730(d)(1) (stating that an employer submitting an LCA must attest that it will be the entity that employs an H-1B worker).

⁷⁶ *Whelan Sec. Co., Inc. v. Allen*, 26 S.W.3d 592, 596 (Mo. Ct. App. 2000); see also *Smith v. Kriska*, 113 S.W.3d 293, 298 (Mo. Ct. App. 2003).

other reasonable option aside from accepting” GMMPCPI’s employment agreement, complete with the provisions for early termination damages.⁷⁷ For these reasons, I conclude that the damages provisions in GMMPCPI’s second employment agreements with its H-1B employees are procedurally unconscionable under Missouri law.

b. Substantive Unconscionability

In order to render the employment agreements unenforceable, however, the Administrator must also show that the contracts are substantively unconscionable. In her brief, the Administrator argues that GMMPCPI’s early termination damages provisions are substantively unconscionable because they “required the employees to pay starting ‘liquidated damages’ of \$10,000.00 to \$25,000.00 plus whatever amounts [GMMPCPI] determined it wished to recoup under other provisions of the contracts.” Administrator’s Brief at 30. The Administrator further notes that these payments “were scheduled to begin after the H-1B employees had spent thousands of dollars to come to the United States and months of living ... without being paid a salary.” Administrator’s Brief at 30. In response, GMMPCPI contends that the Administrator has failed to prove that the early termination damages are substantively unconscionable. More specifically, GMMPCPI argues that the damages provisions “balance the reimbursement to [GMMPCPI] with the amount of time the employee honored his or her side of the bargain.” Respondent’s Brief at 53.

As stated above, substantive unconscionability refers to “an undue harshness in the contract terms.”⁷⁸ The analysis focuses on the actual terms of the contract and “examines the relative fairness of the obligations assumed at the time the contract was made.”⁷⁹ Substantive unconscionability is generally found “where the contract terms are so one-sided as to be oppressive or there is an overall imbalance in the rights and obligations imposed.”⁸⁰ Where “form contracts” are at issue, courts consider “the reasonable expectation of the average person.”⁸¹ In a recent case involving a liquidated damages provision in a home repair contract, the Missouri Court of Appeals found that the provision contributed to the substantive unconscionability of the overall contract.⁸² The Missouri court, in *Repair Masters Construction Co., Inc. v. Gary*, found it significant that there was “no set amount of liquidated damages set forth in the documents; rather it [was] set forth as fifteen percent of an unknown contract price.”⁸³ The contract only contained price estimates ranging from \$40,000.00 to over \$90,000.⁸⁴ While invalidating the provision, the court noted that the situation would have been different if the contract had been contingent upon the homeowner’s approval

⁷⁷ *Manfredi*, 340 S.W.3d at 133 (emphasis added).

⁷⁸ *Repair Masters Constr. Co., Inc. v. Gary*, 277 S.W.3d 854, 857–58 (Mo. Ct. App. 2009) (quoting *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858) (Mo. 2006) (en banc) (internal quotation marks omitted).

⁷⁹ *Manfredi*, 340 S.W.3d at 133–34 (quoting *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 96 (Mo. Ct. App. 2008)).

⁸⁰ *Id.* at 134 (citing *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 22 (Mo. 2010) (en banc)).

⁸¹ *Id.* (citing *Brewer*, 323 S.W.3d at 23).

⁸² See *Repair Masters*, 277 S.W.3d at 859.

⁸³ *Id.*

⁸⁴ *Id.*

of a price estimate. The court reasoned that “if [the homeowner] chose not to use [the contractor’s] services after an estimate had been approved ... she would have done so *knowing how much that she would have to pay* for the termination under the liquidated damages clause.”⁸⁵

In light of this legal authority and the arguments of the parties, I find that the Administrator has failed to meet her burden of showing that GMMPCPI’s early termination damages are substantively unconscionable. While the damages provisions require an H-1B employee to pay between \$3,000.00 and \$25,000.00 for early termination of employment, the Administrator does not present any evidence or legal authority that such damages are *per se* substantively unconscionable. Nor has the Administrator presented sufficient evidence to show that the damages “are so one-sided as to be oppressive or there is an overall imbalance in the rights and obligations imposed.”⁸⁶ Instead, I find that the present case is analogous to the situation addressed in *Repair Masters*. Unlike the liquidated damages considered by the Missouri court, GMMPCPI’s contracts contain *set amounts* of damages that an H-1B employee must pay upon early termination of employment. *See* RX 415-6; RX 416-6; RX 417-6 to 417-7. In addition, the provisions clearly identify how much an individual H-1B employee would be required to pay, depending on when that employee terminated his or her employment. Thus, an H-1B employee who terminated his or her employment did so “knowing how much that [he or she] would have to pay for the termination.”⁸⁷ For these reasons, I find that GMMPCPI’s early termination damages provisions are not substantively unconscionable under Missouri law.

c. Overall Unconscionability

For the reasons discussed above, I find that the provisions for early termination damages in GMMPCPI’s second set of employment agreements, which were signed by the H-1B employees after they had passed their state occupational examinations, are procedurally unconscionable under Missouri law. I also find, however, that the damages provisions are not substantively unconscionable. Accordingly, I conclude that GMMPCPI’s contract provisions for early termination damages are not unenforceable as unconscionable under Missouri law.

2. Liquidated Damages or Illegal Penalty under Missouri Law

The Administrator’s next argument is that GMMPCPI’s contract provisions for early termination damages are illegal penalties under Missouri law. Missouri courts adopt the general rule that liquidated damages are valid and enforceable, while penalty clauses are invalid.⁸⁸ “Liquidated damages” are defined as a “measure of compensation which, at the time of contracting, the parties agree shall represent damages in case of

⁸⁵ *Id.* (emphasis added).

⁸⁶ *Manfredi*, 340 S.W.3d at 134 (citing *Brewer*, 323 S.W.3d at 22).

⁸⁷ *Repair Masters*, 277 S.W.3d at 859.

⁸⁸ *Valentine’s, Inc. v. Ngo*, 251 S.W.3d 352, 354 (Mo. Ct. App. 2008); *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878, 880 (Mo. Ct. App. 1994) (citing *Taos Constr. Co. v. Penzel Constr. Co.*, 750 S.W.2d 522, 525 (Mo. Ct. App. 1988)).

breach.”⁸⁹ Penalty clauses, however, are damages imposed as a punishment for breach of contract.⁹⁰ In distinguishing between liquidated damages and illegal penalties, Missouri courts have adopted the rules contained in the Restatement of Contracts.⁹¹ The Restatement of Contracts provides that, in order for a damages clause to be considered a valid liquidated damages provision: (1) “the amount fixed as damages must be a reasonable forecast for the harm caused by the breach;” and (2) “the harm must be of a kind difficult to accurately estimate.”⁹² The two prongs of this test are interrelated, where “[i]f the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm.”⁹³ The mere fact that the parties refer to a damages provision as “liquidated damages” is not conclusive evidence that the damages constitute valid liquidated damages versus an invalid penalty.⁹⁴

In this case, the Administrator first contends that the early termination damages in GMMPCPI’s contracts are not “fixed on the basis of compensation,” as required for a finding of *bona fide* liquidated damages. Administrator’s Brief at 31. More specifically, the Administrator argues that it was GMMPCPI “who determined what items it would seek to recover in the event a breach of contract occurred.” Administrator’s Brief at 32. While acknowledging that GMMPCPI did not have records of all of the expenses incurred on behalf of employees, the Administrator contends that a lack of records “does not make those damages indefinite or unascertainable.” Administrator’s Brief at 33. The Administrator next argues that GMMPCPI admitted that its damages were “not tied solely to compensating the company for any damages it might have incurred.” Administrator’s Brief at 33. Instead, GMMPCPI considered the “market value” of its H-1B employees and the amounts needed to make its employees stay, both of which are factors that the Administrator deems improper. Administrator’s Brief at 33. The Administrator’s third argument is that GMMPCPI failed to provide any documentation that its provisions for early termination damages are “anything but a penalty for early cessation of employment.” Administrator’s Brief at 36. In particular, the Administrator alleges that GMMPCPI has failed to provide any evidence of actual damages. Administrator’s Brief at 35. Finally, the Administrator argues that the language of the employment contracts, which also provide for recovery of actual expenses, establishes that the early termination damages are illegal penalties. Administrator’s Brief at 36-37.

GMMPCPI makes several arguments in response. First, GMMPCPI contends that the Administrator has failed to meet her burden of proving that the early termination damages are a penalty. GMMPCPI alleges that the Administrator has presented no legal authority for the propositions that it must calculate actual damages before recovering liquidated damages, or that recovery of specific, calculable damages precludes

⁸⁹ *Valentine’s*, 251 S.W.3d at 354 (quoting *Paragon*, 878 S.W.2d at 880).

⁹⁰ *Id.* (quoting *Paragon*, 878 S.W.2d at 880–81).

⁹¹ *Paragon*, 878 S.W.2d at 881 (citing *Grand Bissell Towers v. Joan Gagnon Enter.*, 657 S.W.2d 378, 379 (Mo. Ct. App. 1983)).

⁹² *Id.* at 881 (citing RESTATEMENT (SECOND) OF CONTRACTS § 356 (1979)).

⁹³ *Luna v. Smith*, 861 S.W.2d 775, 779 (Mo. Ct. App. 1993) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b); *see also Paragon*, 878 S.W.2d at 881 (“Where the difficulty of [measuring] loss is great, significant latitude is allowed in setting the amount of anticipated damages.”).

⁹⁴ *See Robert Blond Meat Co. v. Eisenberg*, 273 S.W.2d 297, 299 (Mo. 1954); *Muhlhauser v. Muhlhauser*, 754 S.W.2d 2, 5 (Mo. Ct. App. 1988).

liquidated damages. Respondent's Brief at 32-33. GMMPCPI also argues that the Administrator has not presented any evidence "to suggest that the liquidated damages clause is not a reasonable approximation of [GMMPCPI's] losses." Respondent's Brief at 33-34. In the alternative, GMMPCPI argues that its provisions for early termination damages do not constitute penalty provisions under Missouri law. Respondent's Brief at 36. First, GMMPCPI points to the fact that the parties agreed to amounts that were fixed and stipulated at the creation of the contracts. Respondent's Brief at 37-38. Second, GMMPCPI emphasizes that the damages are a reasonable approximation of the anticipated damage caused by an H-1B employee's early termination of employment. Respondent's Brief at 39. In particular, GMMPCPI alleges that it "considered its lost investment (especially its extensive training, benefits, and orientation that other companies do not provide) and its lost profits," as well as the market value of its employees. Respondent's Brief at 40-41. GMMPCPI also points to the fact that it prorated the damages according to when an H-1B employee terminated his or her employment. Respondent's Brief at 42. Furthermore, GMMPCPI alleges that the damages were not designed to prevent employees from leaving, or to punish them for doing so. Respondent's Brief at 45.

In light of these arguments, as well as the applicable law and the evidence in the record, I find that GMMPCPI's contract provisions for early termination damages constitute valid liquidated damages under Missouri law.

a. Difficult to Accurately Estimate the Harm

As stated above, one of the requirements for a valid liquidated damages provision is that the harm caused by a breach of contract "must be of a kind difficult to accurately estimate."⁹⁵ This generally requires that the parties anticipate "that the loss will be difficult to measure at the time breach is discovered."⁹⁶ In the present case, the Administrator emphasizes the fact that GMMPCPI "wrote the contract terms and it was [GMMPCPI] who determined what items it would seek to recover in the event a breach of contract occurred." Administrator's Brief at 32. While noting that GMMPCPI did not document "the work of its employees, its payroll costs, its expenses and costs, its contracts and its profits and losses," the Administrator asserts that this lack of documentation "does not make those damages indefinite or unascertainable." Administrator's Brief at 32-33.

Under Missouri law, however, certain types of harm caused by a breach of contract are deemed "difficult to accurately estimate." In *Dynasteel Corp. v. Black & Veatch Corp.*, the United States District Court for the Western District of Missouri recognized that damages may be difficult to estimate where "there are some overhead, supervision, and administrative costs."⁹⁷ The court specifically recognized that "overhead, supervision, and administrative expenses are types of costs that can be particularly difficult to estimate."⁹⁸ I find that *Dynasteel* is applicable to the present

⁹⁵ *Paragon*, 878 S.W.2d at 881 (citing RESTATEMENT (SECOND) OF CONTRACTS § 356 (1979)).

⁹⁶ *Monsanto Co. v. McFarling*, 363 F.3d 1336, 1345 (Fed. Cir. 2004) (interpreting Missouri law).

⁹⁷ *Dynasteel Corp. v. Black & Veatch Corp.*, 698 F. Supp. 2d 1170, 1179 (W.D. Mo. 2010).

⁹⁸ *Id.*

case. At both the hearing and his deposition, Kamendra Mishra testified extensively regarding the factors considered in setting the early termination damages. In relevant part, Mr. Mishra testified that the early termination damages reflected both the “direct and indirect” costs associated with each H-1B employee. Tr. 239. He acknowledged that GMMPCPI was aware of certain “defined” expenses associated with employees who terminated their employment early, including salaries paid and the costs of contracts with facilities. Tr. 273-274. He testified, however, that the early termination damages were based in large part on the “costs involved and the expected profit, and that would be the cost, time, whatever we have involved with bringing [the H-1B employees] to business perspective.” RX 425-28. These costs involved the development and implementation of a “detailed plan for training [the] therapist[s],” where each employee was provided instruction and guidance related to driving, the English language, social customs in the workplace, managing and protecting money, and the technical aspects of their jobs. Tr. 246-250.

The Administrator has not presented any evidence to refute Mr. Mishra’s testimony. I therefore find that the costs incurred by GMMPCPI included “overhead, supervision, and administrative expenses” related to the training and development of its H-1B employees.⁹⁹ As stated above, these “are types of costs that can be particularly difficult to estimate” under Missouri law.¹⁰⁰ In addition, while these costs were roughly equal to the salaries of GMMPCPI’s staff who spent time training and “hand-holding” the new H-1B employees, Mr. Mishra testified there was no way of tracking the exact time spent on each H-1B employee. Tr. 241; RX 425-29. Instead, he was only able to provide a rough estimate of \$5,000.00 to \$7,000.00 in costs per employee from 2004 to 2005, and \$12,000.00 to \$13,000.00 in costs for 2006. Tr. 204; RX 425-34. For these reasons, I conclude that the harm caused to GMMPCPI by an H-1B employee’s early termination of employment was difficult to accurately estimate.

b. Reasonable Forecast of the Harm Caused by a Breach

Under Missouri law, the next requirement for a valid liquidated damages provision is that the amounts “be a reasonable forecast for the harm caused by the breach” of contract.¹⁰¹ To satisfy this requirement, a damages provision “must be fixed on the basis of compensation.”¹⁰² This generally requires that the damages “must not be unreasonably disproportionate to the amount of harm anticipated when the contract was made.”¹⁰³ In other words, the amount set as damages must approximate “the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss.”¹⁰⁴ As stated above, however, “significant latitude” is granted in setting the amount of anticipated damages where the difficulty of measuring

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Paragon*, 878 S.W.2d at 881 (citing RESTATEMENT (SECOND) OF CONTRACTS § 356 (1979)).

¹⁰² *Monsanto Co. v. McFarling*, 363 F.3d 1336, 1345 (Fed. Cir. 2004) (applying Missouri law); *Robert Blond Meat Co. v. Eisenberg*, 273 S.W.2d 297, 299 (Mo. 1954); *Diffley v. Royal Papers, Inc.*, 948 S.W.2d 244, 247 (Mo. Ct. App. 1997).

¹⁰³ *Paragon*, 878 S.W.2d at 881 (quoting *Burst v. R.W. Beal & Co., Inc.*, 771 S.W.2d 87, 90 (Mo. Ct. App. 1989)).

¹⁰⁴ *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b).

loss is great.¹⁰⁵ The reasoning is that “[t]he greater the difficulty either of proving that loss has occurred or of establishing its amount with requisite certainty ..., the easier it is to show that the amount fixed is reasonable.”¹⁰⁶

In the present case, the Administrator argues that the early termination damages in the 2004, 2005 and 2006 Agreements are unreasonable because they are not “fixed on the basis of compensation.” In particular, the Administrator contends that GMMPCPI “admitted that the amount set forth in its ‘liquidated damages’ provision was not tied solely to compensating the company for any damages it might have incurred.” Administrator’s Brief at 33. Instead, GMMPCPI also considered the “market value” of its employees and “what amount was needed to make its employees stay.” Administrator’s Brief at 33.

I find the Administrator’s argument to be without merit. The Administrator challenges the factors relied upon by GMMPCPI in setting its early termination damages, but does not present any evidence or authority to suggest that these factors are impermissible. Nor has the Administrator presented any proof of what is specifically required for damages to be considered as “fixed on the basis of compensation.” Missouri law, however, does not require damages to be fixed on any specific form of “compensation.” Instead, the courts have recently upheld liquidated damages that were designed to compensate a party for loss of profits, clients and goodwill, damage to reputation, and overhead, supervision and administrative costs.¹⁰⁷ Pursuant to Mr. Mishra’s testimony, it is undisputed that GMMPCPI considered multiple factors in setting the levels of early termination damages: (1) the amount required to persuade employees to “think about” their decision to leave; (2) the costs incurred by GMMPCPI in bringing H-1B employees “to business perspective” and the expected profits; and (3) the “market perspective” for each employee. Tr. 203; RX 425-28. Mr. Mishra testified, however, that the main purpose of the damages was “to protect the investment, protect the interest and investment of the company.” Tr. 234.

Under Missouri law, a damages provision that is designed solely to provide a punishment for breach of contract is an unenforceable penalty clause.¹⁰⁸ In this case, while one of GMMPCPI’s goals was to cause the H-1B employees to “think about” their decision to breach the employment agreement, this was not the only consideration. Instead, GMMPCPI also considered the two other factors identified above. As to “market perspective,” Mr. Mishra explained that “it has become more and more difficult to bring therapists from overseas,” and therefore the “demand is increasing for the therapists.”

¹⁰⁵ *Valentine’s, Inc. v. Ngo*, 251 S.W.3d 352, 355 (Mo. Ct. App. 2008); *Paragon*, 878 S.W.2d at 881; *Luna v. Smith*, 861 S.W.2d 775, 779 (Mo. Ct. App. 1993).

¹⁰⁶ *Grand Bissell Towers, Inc. v. Joan Gagnon Enters., Inc.*, 657 S.W.2d 378, 379 n.3 (Mo. Ct. App. 1983) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (1979)).

¹⁰⁷ *See, e.g., McCann v. Barton*, 614 F.3d 893, 911 (8th Cir. 2010) (upholding liquidated damages that compensated for loss of profits and goodwill resulting from former employees’ breach of restrictive agreements); *Dynasteel Corp. v. Black & Veatch Corp.*, 698 F. Supp. 2d 1170, 1179 (W.D. Mo. 2010) (holding that liquidated damages were a reasonable forecast of overhead, supervision and administrative costs incurred from a breach of a purchase agreement).

¹⁰⁸ *Paragon*, 878 S.W.2d at 880–81 (citing *Goldberg v. Charlie’s Chevrolet, Inc.*, 672 S.W.2d 177, 179 (Mo. Ct. App. 1984)).

Tr. 257. This increased demand has made competitors “willing to pay for the profit [of the H-1B employees]” without going through the steps of bringing the employees to the United States, or performing the training and orientation provided by GMMPCPI. GX 1-25; RX 425-30. In other words, GMMPCPI considered the “market perspective” in order to protect its “interest and investment” should another company choose to hire away the H-1B employees. The Administrator has not presented any evidence to refute Mr. Mishra’s testimony. As discussed above, GMMPCPI also considered the costs it incurred, and the expected profits, for each H-1B employee. RX 425-28 to 425-29. The Missouri case law suggests that these are all proper factors to consider when setting liquidated damages.¹⁰⁹ I therefore find that GMMPCPI’s early termination damages are “fixed on the basis of compensation” under Missouri law.

The Administrator does not make any other arguments that are relevant to the issue of whether GMMPCPI’s early termination damages are a “reasonable forecast for the harm.” I must still make a determination, however, as to the reasonableness of the damages at issue. The Missouri courts have generally upheld liquidated damages clauses amounting to 16%, 30%, and even 66% of the total value of the contract.¹¹⁰ In a recent decision, the Missouri Court of Appeals also found that liquidated damages of \$100,000.00 were a “reasonable estimate” of the damage caused by a breach of a commercial lease agreement.¹¹¹ The court noted that the plaintiff would have paid \$890,000.00 in rent during the course of the 15-year lease, and found that damages of \$100,000.00 constituted “only 11.2% of the total value of the contract” and were therefore reasonable.¹¹² Furthermore, the United States Court of Appeals for the Eighth Circuit recently held that liquidated damages of over \$1.35 million were a “reasonable forecast” of the harm caused by four former employees’ violation of a company’s non-solicitation agreement.¹¹³ The court explained the amount equaled “the fees [the company] received from the solicited client in the two years preceding the solicitation.”¹¹⁴

In the present case, GMMPCPI’s employment agreements required a former employee to pay damages that were pro-rated to *when* that employee terminates his or her employment. The 2004 and 2005 Agreements each required an H-1B employee to pay between \$3,000.00 and \$10,000.00, depending on when the employee ended his or her employment. GX 12-6; GX 13-6; RX 415-6; RX 416-6. The 2006 Agreement required payments between \$10,000.00 and \$25,000.00 for early termination. GX 14-6 to 14-7;

¹⁰⁹ See *McCann*, 614 F.3d at 911 (permitting damages to “compensate” for lost profits); *Dynasteel*, 698 F. Supp. 2d at 1179 (allowing liquidated damages to “compensate” for overhead, supervision and administrative costs).

¹¹⁰ See *Paragon*, 878 S.W.2d at 881 (liquidated damages provision that was 16.7% of the value of a lease agreement deemed reasonable); *Standard Imp. Co. v. DiGiovanni*, 768 S.W.2d 190, 192–92 (Mo. Ct. App. 1989) (upholding a liquidated damages provision that was 30% of the total price in a home improvement contract); *Taos Constr. Co., Inc. v. Penzel Constr. Co., Inc.*, 750 S.W.2d 522, 525–27 (Mo. Ct. App. 1988) (finding that liquidated damages totaling 66% of the actual harm caused by a subcontractor were reasonable).

¹¹¹ See *Valentine’s, Inc. v. Ngo*, 251 S.W.3d 352, 355 (Mo. Ct. App. 2008).

¹¹² *Id.*

¹¹³ See *McCann*, 614 F.3d at 911.

¹¹⁴ *Id.*

RX 417-6 to 417-7. At the hearing, Mr. Mishra testified that the “gradual nature” of the damages reflects the fact that GMMPCPI experienced decreasing levels of harm from early termination of employment where an H-1B employee worked for longer periods of time under the agreement. Tr. 243. In addition, he stated that the levels of damages reflect the expected profit per employee, which he estimated to be \$1,000.00 per month beginning in 2004. Tr. 241. Mr. Mishra testified that there was no way to accurately determine the costs incurred for each H-1B employee. Tr. 241; RX 425-29. He provided a rough estimate, however, of \$5,000.00 to \$7,000.00 in costs for each employee from 2004 to 2005, and \$12,000.00 to \$13,000.00 in 2006. Tr. 204; RX 425-34. Furthermore, Mr. Mishra repeatedly testified that the damages also reflect the “market perspective” of each employee. Tr. 257; GX 1-25; RX 425-30.

In light of Mr. Mishra’s testimony, I find that GMMPCPI’s early termination damages are not “unreasonably disproportionate to the amount of harm anticipated when the contract was made.”¹¹⁵ In addition, where the difficulty in estimating the amount of loss is great, “significant latitude” is given in setting the amount of anticipated damages.¹¹⁶ I have already found that the harm caused to GMMPCPI by an H-1B employee’s early termination of employment is the type that is difficult to estimate. I therefore conclude that GMMPCPI’s damages are a “reasonable forecast for the harm” caused by the early termination of employment of its H-1B employees.

For the reasons discussed above, I find that GMMPCPI’s early termination damages are a “reasonable forecast” of the harm caused by an H-1B employee’s early termination of employment. In addition, I find that the harm caused to GMMPCPI is a type that is difficult to ascertain. Accordingly, I conclude that GMMPCPI’s early termination damages satisfy the two requirements to be “liquidated damages” under Missouri law.

3. The Parties’ Additional Arguments

The parties make several additional arguments on the issue of whether GMMPCPI’s early termination damages are valid liquidated damages or an illegal penalty under Missouri law. I will address each of these arguments individually.

a. GMMPCPI’s Evidentiary Argument

In its brief, GMMPCPI makes an extensive argument regarding the insufficiency of the Administrator’s evidence pertaining to the early termination damages. In particular, GMMPCPI takes issue with the deposition and hearing testimony of Erica Simon, who was the DOL investigator and the Administrator’s representative in this case. At her deposition in December 2008, Ms. Simon was unable to provide “the specifics” regarding her determination that GMMPCPI’s early termination damages were an illegal penalty. Respondent’s Brief at 34. Yet, she was able to provide the

¹¹⁵ *Paragon*, 878 S.W.2d at 881 (quoting *Burst v. R.W. Beal & Co., Inc.*, 771 S.W.2d 87, 90 (Mo. Ct. App. 1989)).

¹¹⁶ *Valentine’s*, 251 S.W.3d at 355; *Paragon*, 878 S.W.2d at 881; *Luna v. Smith*, 861 S.W.2d 775, 779 (Mo. Ct. App. 1993).

information at the formal hearing in July 2010. As a result, GMMPCPI argues that the Administrator failed to “present a witness or witnesses to testify fully as to the Administrator’s contentions.” Respondent’s Brief at 35. GMMPCPI thus contends that Ms. Simon’s testimony, as well as the Administrator’s other evidence regarding the early termination damages, should be excluded. Respondent’s Brief at 35.

As discussed above, however, I find that GMMPCPI’s early termination damages constitute valid liquidated damages under Missouri law. I have made this determination after considering *all* of the evidence in the record, including Ms. Simon’s testimony and the evidence presented by the Administrator. Accordingly, I find GMMPCPI’s evidentiary argument to be moot.

b. Lack of Documentary Evidence of Actual Harm

The Administrator’s first argument is that GMMPCPI has failed to provide documentary evidence of “actual harm” resulting from the H-1B employees’ early termination of employment, and this failure compels a finding that the damages are illegal penalties. More specifically, the Administrator contends that GMMPCPI must provide evidence of actual harm for the early termination damages to be valid. Administrator’s Brief at 35. As noted by the Administrator, Missouri law generally requires a plaintiff to show “at least some actual harm or damage caused by a breach [of contract] ... before a liquidated damages clause can be triggered.”¹¹⁷ If the party seeking enforcement of the damages provision fails to submit evidence of damages, the clause “actually becomes a penalty and is unenforceable.”¹¹⁸

A showing of actual harm, however, is only required in an action “to recover liquidated damages.”¹¹⁹ The present case is not an action to “trigger” or “enforce” GMMPCPI’s early termination damages provisions, or to “recover liquidated damages.” Instead, the only issue is whether the early termination damages are *valid* under Missouri law.¹²⁰ In addition, each of the Missouri cases which required a showing of “actual harm” involved a party’s action to *enforce* and *obtain* liquidated damages.¹²¹ Accordingly, I find that GMMPCPI was not required to produce evidence of “actual harm” in this case to show that the early termination damages are valid liquidated damages.

¹¹⁷ *Mihlfeld & Assocs., Inc. v. Bishop & Bishop, L.L.C.*, 295 S.W.3d 163, 172 (Mo. Ct. App. 2009) (citing *Grand Bissell Towers, Inc. v. Joan Gagnon Enters., Inc.*, 657 S.W.2d 378, 379 (Mo. Ct. App. 1983)). See also *Strouse v. Starbuck*, 987 S.W.2d 827, 829 (Mo. Ct. App. 1999); *Goldberg v. Charlie’s Chevrolet, Inc.*, 672 S.W.2d 177, 179 (Mo. Ct. App. 1984).

¹¹⁸ *Strouse*, 987 S.W.2d at 829 (citing *Grand Bissell*, 657 S.W.2d at 379 n.4).

¹¹⁹ *Valentine’s*, 251 S.W.3d at 355.

¹²⁰ See generally 20 C.F.R. § 655.731(c)(10)(i)(C) (stating that the Administrator shall determine under state law “whether the payment in question *constitutes* liquidated damages or a penalty” (emphasis added)).

¹²¹ See, e.g., *Mihlfeld*, 295 S.W.3d at 172 (breach of contract action against a former employee seeking to enforce a liquidated damages provision); *Valentine’s*, 251 S.W.3d at 353 (breach of lease action seeking to enforce a liquidated damages clause).

c. Lack of Documentary Evidence of “Liquidated Damages”

In a similar argument, the Administrator contends that the early termination damages are an illegal penalty because GMMPCPI has failed to provide documentary evidence that the damages are actually “liquidated damages.” In other words, the Administrator argues that GMMPCPI has failed to provide documentation “of any kind to support its claim that its ‘liquidated damages’ provision was anything but a penalty for early cessation of employment.” Administrator’s Brief at 36.

This argument seems to suggest that GMMPCPI bears the burden of proving that its early termination damages do *not* constitute illegal penalties. Under Missouri law, however, it is well-established that “[c]ourts look with candor on provisions deliberately entered into between parties, and do not look with disfavor upon liquidated damage stipulations.”¹²² In addition, I can find no legal authority for the proposition that GMMPCPI bears the burden of providing evidence to show its damages provisions are “anything but a penalty.” Accordingly, I reject the Administrator’s argument on this point.

d. Terms of the Employment Agreements

The Administrator’s final argument is that the terms of GMMPCPI’s employment agreements themselves establish that the provisions for early termination damages are illegal penalties under Missouri law. In particular, the Administrator argues that the agreements contain “two provisions in which [GMMPCPI] seeks monetary damages as a result of the same occurrence, early cessation of employment.” Administrator’s Brief at 37. These clauses include the provisions for early termination damages, which are section 9 of the 2004 Agreement and section 10 of the 2005 and 2006 Agreements. *See* GX 12-6; GX 13-6; GX 14-6 to 14-7; RX 415-6; RX 416-6; RX 417-6 to 417-7. Section 5(c) of the 2004, 2005 and 2006 Agreements also provide for repayment of specific expenses in the event of early termination. *See* GX 12-3; GX 13-3; GX 14-3; RX 415-3; RX 416-3; RX 417-3. The Administrator thus argues that “in the event an employee ceases employment before an agreed upon date, [GMMPCPI] seeks to recover both actual damages and a penalty for the same “injury,” the employee’s early cessation of employment.” Administrator’s Brief at 37.

As the Administrator correctly states, Missouri courts generally consider liquidated damages to be a replacement for actual damages.¹²³ The reasoning is that “the vice to be guarded against is a duplication of damages.”¹²⁴ The Missouri courts, however, have limited this general rule to situations where a contract only provides for liquidated damages.¹²⁵ Where a contract provides for actual damages *and* liquidated damages, the

¹²² *Dynasteel Corp. v. Black & Veatch Corp.*, 698 F. Supp. 2d 1170, 1178–79 (W.D. Mo. 2010) (citing *Germany v. Nelson*, 677 S.W.2d 386, 388 (Mo. Ct. App. 1984)).

¹²³ *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878, 882 (Mo. Ct. App. 1994); *Germany*, 677 S.W.2d at 388.

¹²⁴ *Twin River Constr. Co., Inc. v. Pub. Water Dist. No. 6*, 653 S.W.2d 682, 694 (Mo. Ct. App. 1983) (quoting *Louis Lyster Gen. Contractor v. City of Las Vegas*, 489 P.2d 646, 654 (N.M. 1971)).

¹²⁵ *See Warstler v. Cibrian*, 859 S.W.2d 162, 165–66 (Mo. Ct. App. 1993); *Twin River*, 653 S.W.2d at 694.

party enforcing the agreement may seek to recover both.¹²⁶ For example, in *Twin River Construction Co. v. Public Water District No. 6*, the Missouri Court of Appeals made the following observations regarding the damages provisions in a construction contract:

It is true that liquidated and actual damages may not be awarded as compensation for the same injury. But “the vice to be guarded against is a duplication of damages.” The contract before us can be fairly read to authorize *both types of damages*; actual damages related to the cost of completion, and liquidated damages to compensate for losses resulting from the delay (for instance, revenue lost because service was not available to customers as scheduled). Damages of the latter type could not easily be calculated and are a proper subject for a liquidated damages clause.¹²⁷

The opposite situation was addressed in *Warstler v. Cibrian*, where the court found that the plaintiff could only recover liquidated damages under a real estate contract.¹²⁸ The court reasoned that “the contract [did] not contain any language providing for alternative remedies such as specific performance or actual damages in case of breach,” but instead “only provide[d] for liquidated damages.”¹²⁹

As an initial matter, I note that the Administrator has not presented any specific evidence to show that GMMPCPI seeks to recover actual and liquidated damages for the same injury. At the hearing, Erica Simon testified to her belief that GMMPCPI’s early termination damages constituted “double dipping” for expenses already accounted for in section 5(c). Tr. 159-160. She admitted, however, that *no investigation* was performed on this issue and she had *no evidence* that the early termination damages actually overlapped with the expenses covered in section 5(c). Tr. 160, 162. Thus, the Administrator’s argument on this point is essentially refuted by the testimony of her own witness.

Even without Ms. Simon’s testimony, however, I find that the present case is similar to the situation addressed in *Twin River*. The 2004, 2005 and 2006 Agreements can all “be fairly read to authorize” both actual damages and liquidated damages. First, section 9 of the 2004 Agreement, as well as section 10 of the 2005 and 2006 Agreements, expressly states that an H-1B employee “agrees to pay liquidated damages to the [Respondent] in the event of early termination of this Agreement.” GX 12-6; GX 13-6; GX 14-6; RX 415-6; RX 416-6; RX 417-6. Section 5(c) of the 2004 Agreement, however, states that an H-1B employee “shall reimburse [GMMPCPI] 100% of *all relocation expenses*” in the event of early termination. GX 12-3; RX 415-3 (emphasis added). Similarly, section 5(c) of the 2005 Agreement provides that an H-1B employee “shall reimburse [GMMPCPI] 100% of *all relocation and other expenses such as down payment for [a] car etc.*” GX 13-3; RX 416-3 (emphasis added). Furthermore, section 5(c) of the 2006 Agreement requires an H-1B employee to reimburse GMMPCPI for 100% “of all relocation and any other expenses” incurred on behalf of the employee. GX

¹²⁶ *See id.*

¹²⁷ *Twin River*, 653 S.W.2d at 694 (citations omitted) (emphasis added).

¹²⁸ *Warstler*, 859 S.W.2d at 166.

¹²⁹ *Id.*

14-3; RX 417-3. These expenses include down payments for vehicles, travel expenses related to the state occupational examination, and costs of preparing for the examination. GX 14-3; RX 417-3.

Based on the language of these contractual provisions, I find that the 2004, 2005 and 2006 Agreements can all “be fairly read” to authorize GMMPCPI to recover *both* actual damages and liquidated damages when an H-1B employee left his or her employment early. Accordingly, I find that Missouri law permits recovery of both types of damages, and does not convert the early termination damages into an illegal penalty. In addition, I note that the expenses stated in section 5(c), including relocation costs, travel expenses and car payments, are all costs incurred by GMMPCPI *prior to* an H-1B employee’s departure. Thus, they are readily ascertainable as actual damages. As GMMPCPI argues, however, the early termination damages can be fairly interpreted “to compensate for losses” resulting from an H-1B employee’s early termination, including lost profits and lost investments. *See* Respondent’s Brief at 40-41. In fact, GMMPCPI considered these types of losses when it set the different levels of early termination damages. *See* Tr. 203, 241, 246-250; RX 425-28 to 425-30. These types of damages are not easily calculated, and are therefore the proper subject of liquidated damages.¹³⁰ Accordingly, I find that the terms of GMMPCPI’s employment agreements authorize the recovery of *both* actual damages and liquidated damages. I therefore conclude that the damages provided for in section 5(c) do not establish that the early termination damages are illegal penalties under Missouri law.

e. Summary of Findings and Conclusions: Damages for Early Termination of Employment Were *Bona Fide* Liquidated Damages Under Missouri Law

As discussed above, I find that GMMPCPI’s contract provisions for early termination damages satisfy the two requirements for “liquidated damages” under Missouri law. More specifically, I find that the damages are a “reasonable forecast” of the harm caused by an employee’s early termination of employment, and this harm is “of a kind difficult to accurately estimate.”¹³¹ In addition, I reject the Administrator’s arguments that GMMPCPI’s failure to provide documentary evidence of “actual harm,” or that the damages are “anything but a penalty,” compel a finding that the early termination damages are an illegal penalty. Furthermore, I find that the presence of additional damages provisions in GMMPCPI’s employment agreements do not establish that the early termination damages are illegal penalties. For all of these reasons, I conclude that GMMPCPI’s early termination damages constitute valid “liquidated damages” under Missouri law.

For the reasons discussed above, I find that GMMPCPI’s contract provisions for early termination damages, contained in section 9 of the 2004 Agreement and section 10 of the 2005 2006 Agreements, constitute valid “liquidated damages” under Missouri law. In addition, I find that the contracts are not unenforceable as unconscionable.

¹³⁰ *See Dynasteel Corp. v. Black & Veatch Corp.*, 698 F. Supp. 2d 1170, 1179 (W.D. Mo. 2010); *Twin River*, 653 S.W.2d at 694.

¹³¹ *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878, 881 (Mo. Ct. App. 1994) (citing RESTATEMENT (SECOND) OF CONTRACTS § 356 (1979)).

Accordingly, I conclude that GMMPCPI was permitted to collect the early termination damages from its H-1B employees.¹³² For these reasons, I **REVERSE** and **DENY** the Administrator’s finding that GMMPCPI violated the Act and regulations by collecting, or attempting to collect, an illegal penalty from eight of its H-1B employees.

C. Unauthorized Deductions from H-1B Employees’ Wages

Under the regulations governing the H-1B program, an employer is permitted to make “authorized deductions” from the required wages of its employees.¹³³ In relevant part, a wage deduction must satisfy one of three requirements. It must be a:

- (i) Deduction which is required by law (e.g., income tax or FICA); or
- (ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (e.g., union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution ...) ...; or
- (iii) Deduction which meets the following requirements:
 - (A) Is made in accordance with a voluntary, written authorization by the employee ...;
 - (B) Is for a matter principally for the benefit of the employee ...;
 - (C) Is not a recoupment of the employer’s business expenses ...;
 - (D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered ...; and
 - (E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25 percent of an employee’s disposable earnings for a workweek.¹³⁴

Under subsection A, a “voluntary, written authorization” does not include an employee’s “mere acceptance of a job which carries a deduction as a condition of employment.”¹³⁵ Housing and food allowances are considered to be expenses that are “principally for the benefit of the employee” under subsection B.¹³⁶ Subsection C defines “business expenses” to include the costs of tools and equipment, transportation for employees,

¹³² See 20 C.F.R. § 655.731(c)(10)(i)(B) (stating that an employer may recover “*bona fide* liquidated damages from the H-1B [employee] who ceases employment with the employer prior to an agreed date”).

¹³³ 20 C.F.R. § 655.731(c)(9).

¹³⁴ 20 C.F.R. § 655.731(c)(9).

¹³⁵ 20 C.F.R. § 655.731(c)(9)(iii)(A).

¹³⁶ 20 C.F.R. § 655.731(c)(9)(iii)(B).

and “attorney fees and other costs connected to the performance of H-1B program functions.”¹³⁷ An employer is required under subsection D to “document the cost and value” of the matters covered by the deduction.¹³⁸

In the present case, GMMPCPI utilized two different avenues in its efforts to recover the early termination damages. First, GMMPCPI withheld the final paychecks of four H-1B employees. The employees and amounts withheld are as follows:

1.	Alena Gay Arat	\$1,964.59
2.	Estella Daraway	\$4,166.68
3.	Michael Gonzales	\$575.01
4.	Kahlila Quidlat Fowler	\$1,577.95

JX 1-3 to 1-4; Administrator’s Brief at 44. Second, GMMPCPI also received payments of early termination damages from five H-1B employees. The employees and amounts paid are as follows:

1.	Darlene Claud	\$1,900.00
2.	Estella Daraway	\$268.18
3.	Lordele Pato	\$4,000.00
4.	Maricon Barba	\$7,000.00
5.	Jaycin Yee	\$500.00

JX 1-6; Administrator’s Brief at 46.

In my Order on October 23, 2009, I found that GMMPCPI failed to satisfy the requirements for authorized deductions contained in 20 C.F.R. § 655.731(c)(9) before withholding the final paychecks of three of the four H-1B employees. *See* Order Granting Partial Summary Decision at 6-8. In her brief, however, the Administrator appears to argue that GMMPCPI was required to satisfy these conditions before collecting *any liquidated damages* from its H-1B employees. *See* Administrator’s Brief at 38. I find that this argument is contrary to the express language of the regulations. I have found that GMMPCPI’s early termination damages are valid liquidated damages under Missouri law. Sub-section (c)(10) specifically prohibits penalties for early termination of employment, but allows liquidated damages, and addresses an employer’s receipt of liquidated damages as follows:

(B) The employer is permitted to receive *bona fide* liquidated damages from the H-1B nonimmigrant who ceases employment with the employer prior to an agreed date. However, the requirements of paragraph (c)(9)(iii) of this section must be fully satisfied, if such damages are to be received by the employer via deduction from or reduction in the payment of the required wage.¹³⁹

¹³⁷ 20 C.F.R. § 655.731(c)(9)(iii)(C).

¹³⁸ 20 C.F.R. § 655.731(c)(9)(iii)(D).

¹³⁹ 20 C.F.R. § 655.731(c)(10)(B).

In other words, GMMPCPI must only satisfy the five regulatory requirements in (c)(9)(iii) before making deductions from an employee's paycheck, or withholding the paycheck, as payment for liquidated damages. Accordingly, I find that GMMPCPI was *not* required to meet the requirements of 20 C.F.R. § 655.731(c)(9)(iii) before collecting payments from Darlene Claud, Estella Daraway, Lordele Pato, Maricon Barba, or Jaycin Yee.

Although I find that GMMPCPI was not required to satisfy the elements of (c)(9)(iii) prior to receiving payments of liquidated damages from its H-1B employees, I find that under (c)(10)(i)(B), it was required to satisfy those requirements in order to deduct from or withhold their paychecks. GMMPCPI has failed to show, or even argue, that its deductions were in compliance with (c)(9)(iii). On the contrary, the undisputed evidence supports the Administrator's contention that withholding the final paychecks did not comply with the requirements of the regulation. Withholding was not made in accordance with voluntary, written authorization; was not for the benefit of the employee; was for recoupment of the employer's business expenses; cost and value of the matter covered were not documented; and the amount exceeded the limits for garnishment of wages. Accordingly, I **REVERSE** and **DENY** the Administrator's determination that GMMPCPI illegally obtained payments from Darlene Claud, Estella Daraway, Lordele Pato, Maricon Barba, and Jaycin Yee. But I **AFFIRM** the Administrator's determination that GMMPCPI illegally withheld the final paychecks of Alena Gay Arat, Estella Daraway, Michael Gonzales, and Kahlila Quidlat-Fowler.

D. Pre- and Post-Judgment Interest on Back Wages

The final issue contested by the parties is whether GMMPCPI must pay pre- and post-judgment interest on the back wages owed to each of the H-1B employees at issue. GMMPCPI provides a number of arguments regarding the scope of the Administrator's complaint, the various delays in the proceedings, and the length of time that this case has been pending. *See* Respondent's Brief at 58-59. As a result, GMMPCPI contends that it "should not singularly bear the brunt of the lengthy nature of these proceedings in the form of pre- or post-judgment interest." Respondent's Brief at 59.

I find GMMPCPI's arguments to be unpersuasive and contrary to the law governing this case. While the Act does not specifically authorize an award of interest on back wages, the Administrative Review Board has repeatedly held that both pre- and post-judgment interest may be granted on back pay awards in LCA cases.¹⁴⁰ The Board reasoned that the remedial nature and "make whole" goal of back pay awards warrants both pre- and post-judgment interest.¹⁴¹ Accordingly, the Board held that H-1B employees who are awarded back wages under the Act are "also entitled to prejudgment compound interest on the back pay award and post judgment interest until [the employer] satisfies the debt."¹⁴² The post-judgment interest accrues on the date of an

¹⁴⁰ *See Mao v. Nasser*, ARB No. 06-121, slip op. at 11-12 (ARB Nov. 26, 2008) (LCA); *Innawalli v. Am. Info. Tech. Corp.*, ARB No. 04-165, slip op. at 8-9 (ARB Sept. 29, 2006) (LCA); *Amtel Group of Fl., Inc. v. Yongmahapakorn*, ARB No. 04-087, slip op. at 12-13 (ARB Sep. 29, 2006) (LCA).

¹⁴¹ *See Innawalli*, ARB No. 04-165, slip op. at 9 (citing *Amtel*, ARB No. 04-087, slip op. at 12).

¹⁴² *Innawalli*, ARB No. 04-165, slip op. at 8.

Administrative Law Judge’s Decision and Order, and continues until the liable employer satisfies the debt.¹⁴³

In light of this Board precedent, I find that each of the H-1B employees in this case is entitled to pre-judgment compound interest on their individual back wage awards. In addition, I find that each employee is entitled to post-judgment interest on his or her back wage award, from the date of this Decision and Order until GMMPCPI satisfies its back wage liability to each individual employee. Furthermore, I find that the interest rate for both the pre- and post-judgment interest shall be the interest rate charged “on the underpayment of federal income taxes prescribed under 26 U.S.C. § 6621(a)(2) (Federal short-term rate plus three percentage points).”¹⁴⁴

ORDER

For the reasons discussed above, I find that GMMPCPI violated the Act and regulations by failing to pay the required prevailing wages to 41 H-1B employees during nonproductive “benching” periods of employment. I find, however, that GMMPCPI is only liable to pay back wages to 40 of these employees. I also find that GMMPCPI did not violate the Act and regulations by collecting, or attempting to collect, damages from its employees for early termination of employment. But I find that GMMPCPI violated the regulations by withholding the final paychecks of four of its H-1B employees without first satisfying the regulatory requirements of 20 C.F.R. § 655.731(c)(9). Furthermore, pursuant to my Order dated October 23, 2009, I find that GMMPCPI violated the Act and regulations by deducting expenses from the wages of its H-1B employees for H-1B extension fees and related attorney fees.

IT IS THEREFORE ORDERED that:

1. Pursuant to 20 C.F.R. §§ 655.731(c)(7)(i) and 655.810(a), GMMPCPI shall pay back wages for “benching” violations to the following individuals in the specified amounts:

a.	Marissa Acharon	\$3,490.00
b.	Rhandie Aloya	\$9,474.00
c.	Alena Gay Arat	\$6,316.33
d.	Euphill Juliette Aseniero	\$7,691.35
e.	Aileen Bausa	\$7,852.08
f.	Ellanie Berba	\$8,637.35
g.	Frances Bertulfo	\$6,188.00
h.	Karen Gay Bunanig	\$7,895.42
i.	Zadel Cabrera	\$7,561.67
j.	Darlene Claud	\$6,281.67
k.	Perlas Dang-awan	\$17,369.92
l.	Estella Daraway	\$9,765.50

¹⁴³ *Mao*, ARB No. 06-121, slip op. at 12.

¹⁴⁴ *Id.* (citing *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012 (ARB May 17, 2000) (ERA)).

m.	Rinna Daymiel	\$7,235.35
n.	Iris de la Calzada	\$6,122.67
o.	Ryan de los Reyes	\$9,474.50
p.	Naomie del Mar	\$6,281.67
q.	Mary Carmel Elizon	\$6,716.01
r.	Emmanuel A. Fernandez	\$8,564.50
s.	Allan Roque H. Fruelda	\$4,882.75
t.	Michael M. Gonzales	\$8,564.50
u.	Marjorie Ham	\$8,697.72
v.	Franklin Herrera	\$7,735.00
w.	Darlene Himbing	\$5,999.65
x.	Hazel Mae H. Hofilena	\$15,790.83
y.	Joshua E. Inventor	\$18,845.00
z.	Michelle Lumapas	\$7,101.64
aa.	Charmaine T. Manuel-Isip	\$6,281.67
bb.	Angeles Mojica	\$13,060.30
cc.	Grethel Ocampo-Dakay	\$6,049.32
dd.	Lordele Pato	\$6,281.67
ee.	Kahlila Quidlat-Fowler	\$9,327.50
ff.	Ian T. Regis	\$17,274.58
gg.	Jason Sablan	\$5,392.99
hh.	Jerome Satorre	\$6,281.67
ii.	Roselle Y. Solijon	\$7,852.08
jj.	Maria Elena Soriano	\$7,821.23
kk.	Eva L. Tarce	\$7,852.08
ll.	Caren Grace O. Uy	\$7,852.08
mm.	Helenber Villaster	\$9,991.94
nn.	Trixy L. Ypil	\$6,188.00

2. Pursuant to 20 C.F.R. §§ 655.731(c)(9) and 655.810(a), GMMPCPI shall pay back wages, for illegally deducting USCIS fees and attorney fees for H-1B extensions, to the following individuals in the specified amounts:

a.	Rhandie Aloya	\$185.00
b.	Alena Gay Arat	\$690.00
c.	Euphill Juliette Aseniero	\$685.00
d.	Aileen Bausa	\$685.00
e.	Perlas Dang-awan	\$690.00
f.	Estella Daraway	\$685.00
g.	Rinna Daymiel	\$685.00
h.	Ryan de los Reyes	\$685.00
i.	Naomie del Mar	\$685.00
j.	Michael Gonzales	\$185.00
k.	Franklin Herrera	\$685.00
l.	Joshua E. Inventor	\$185.00
m.	Yvette L. Jakosalem	\$190.00
n.	Michelle Lumapas	\$185.00

o.	Kahlila Quidlat-Fowler	\$685.00
p.	Jerome Satorre	\$185.00
q.	Roselle Y. Solijon	\$185.00

3. Pursuant to 20 C.F.R. §§ 655.731(c)(9), 655.731(c)(10)(i)(B) and 655.810(a), GMMPCPI shall pay back wages for illegally withholding final paychecks to the following individuals in the specified amounts:

a.	Alena Gay Arat	\$1,964.59
b.	Estella Daraway	\$4,166.68
c.	Michael Gonzales	\$575.01
d.	Kahlila Quidlat Fowler	\$1,577.95

4. The individuals receiving the above back wage awards are entitled to pre-judgment compound interest on the accrued back wages at the applicable rate of interest, which shall be calculated in accordance with 26 U.S.C. § 6621 and this Decision and Order.
5. GMMPCPI shall be assessed post-judgment interest on each back wage award under 26 U.S.C. § 6621 until satisfaction of the award.
6. The Administrator’s claim that GMMPCPI collected illegal penalties for early termination of employment is **DENIED**.
7. The Administrator’s claim that GMMPCPI owes back wages to Celeste Cabugason for “benching” violations is **DENIED**.
8. The Administrator of the Wage and Hour Division, Employment Standards Division, Department of Labor, shall make such calculations as may be necessary and appropriate with respect to back pay, and all calculations of interest necessary to carry out this Decision and Order. These calculations, however, shall not delay GMMPCPI’s obligation to make immediate payment to the individuals receiving the above back wage awards.
9. This Decision and Order shall supersede the Administrator’s Determination and Amended Determination, which shall be deemed void and without further effect.

A

Alice M. Craft
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within 30

calendar days of the date of issuance of the administrative law judge's decision.¹⁴⁵ 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.¹⁴⁶

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 30 days of the date the Petition is filed notifying the parties that it has accepted the case for review.¹⁴⁷

¹⁴⁵ See 20 C.F.R. § 655.845(a).

¹⁴⁶ See 20 C.F.R. § 655.845(a).

¹⁴⁷ See 29 C.F.R. § 655.840(a).