

**U.S. Department of Labor**

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**Issue Date: 27 January 2010**

CASE NO.: 2008-LCA-00036

In the Matter of

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

v.

**THE LAMBENTS GROUP,**

and

**VENKAT POTINI, President,**  
**LAMBENTS GROUP,**  
Respondents.

Appearances:

Stacy M. Goldberg, Esq.,  
For Prosecuting Party

Santosh K. Pawar, Esq.,  
For Respondents

Before: Janice K. Bullard  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the Immigration and Nationality Act H-1B visa program (“the Act” or “INA”), 8 U.S.C. § 1101 (a)(15)(H)(I)(b) and § 1182(n), and the implementing regulations found at 20 C.F.R. Part 655, Subparts H and I, 20 C.F.R. § 655.700 *et seq.*

## **I. INTRODUCTION**

### **A. Statutory and Regulatory Background**

The Immigration and Nationality Act's ("INA") H-1B visa program permits American employers to temporarily employ non-immigrant aliens to perform specialized<sup>1</sup> jobs in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). In order to protect U.S. workers and their wages from an influx of foreign workers, an employer must file a Labor Condition Application ("LCA") with the Department of Labor ("DOL") before an alien will be admitted to the United States as an H-1B non-immigrant worker. 8 U.S.C. § 1182(n)(1). As part of that LCA, the employer must attest that it:

- (i) Is offering and will offer during the period of authorized employment to [H-1B employees] wages that are at least –
  - (I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or
  - (II) the prevailing wage level for the occupational classification in the area of employment,whichever is greater, based on the best information available as of the time of filing the application...

Id. at §§ 1182(n)(1)(A)(i)(I)&(II).

Employers who seek to hire individuals under an H-1B visa must first file a LCA with DOL, and certification of the application is required before the Immigration & Naturalization Service ("INS") approves the visa petition. 8 U.S.C. § 1101(a)(15)(H)(i)(b); see also 20 C.F.R. Part 655, Subparts H and I. In the LCA, the employer must represent the number of employees to be hired, their occupational classification, the actual or required wage rate, the prevailing wage rate and the source of such wage data, the period of employment and the date of need. 20 C.F.R. §§ 655.730 -734; 8 U.S.C. § 1182(n).

### **B. Procedural History**

The Lambents Group, Inc., through its President Venkat Potini ("Respondents") filed numerous LCAs with the Department of Labor to secure H-1B visas for non-immigrant employees to work in the field of computer programming. The H-1B visas were approved and the employees came to the United States, where they received assignments to work for clients of the Respondents. Subsequently thereafter, the U.S. Department of Labor Wage and Hour Division ("the Administrator") conducted an investigation of Respondents' LCA practices, and concluded that ten H-1B non-immigrant employees were not paid the applicable prevailing wage for the metropolitan areas in which they worked. Respondents were notified by a determination letter dated July 1, 2008, that the Administrator had concluded that Respondents had willfully failed to pay wages as required; had willfully misrepresented material facts on the LCA; had substantially failed to provide notice of the filing of the LCA; had failed to make available for

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<sup>1</sup> "Specialized occupation" is defined within the Act as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher (or fashion model). 8 U.S.C. § 1184(i)(1).

public examination the LCA and other documents; and had failed to comply with provisions of the Act. The Administrator determined that a total of \$177,918.97 in back wages was due to ten non-immigrant employees, and assessed a civil money penalty in the total amount of \$95,400.00. On July 10, 2008, Respondents requested a hearing on the matter.

The case was assigned to me and I scheduled a hearing to commence on August 26, 2008. Thereafter, the Administrator requested a continuance of the matter to a date after November 17, 2008. I granted the continuance for good cause and rescheduled the hearing to commence on November 20, 2008 in Rochester, New York. I was informed on November 7, 2008 that Respondents had recently retained counsel, who requested a continuance. I granted the motion for continuance and rescheduled the hearing. A hearing was held before me in Rochester, New York on January 27, 2009, and February 5, 2009 by telephone. Time was extended to the Respondents to submit additional evidence, and the unavailability of counsel for the Administrator delayed the filing of briefs in this matter. The Administrator filed its closing written argument on August 31, 2009, and Respondents filed their post hearing brief on September 2, 2009.

The record in this matter is closed. This decision<sup>2</sup> is based upon a thorough review of the evidence, both documentary and testamentary, as well as the arguments and pleadings of the parties.

## **C. Contentions of the Parties**

### **1. The Administrator**

The Prosecuting Party in this matter contends that Respondents owe back wages to ten non-immigrant employees who were not paid the applicable prevailing wage rates for the geographic area where the employees worked. It is asserted that the LCAs submitted by Mr. Pontini did not reflect the actual geographic location where the non-immigrants were to work, and in addition identified lower wage rates for both the identified city and the actual geographic location of the employees. Also, the Administrator alleges that Respondents failed to keep proper records or make them available for inspection, and failed to file notice of intent to hire non-immigrant employees. Civil money penalties were assessed for violations of the Act. Further, the Administrator argues that Venkat Potini is individually liable for violations under the Act because he is no more than an “alter ego” for The Lambents Group.

### **2. Respondents**

Respondents admit that there was some non-compliance with H-1B rules, but contend that no willful non-compliance occurred. Respondents argue that the LCAs were made by Mr. Potini without benefit of legal advice and without his full understanding of how to properly identify a prevailing wage. Moreover, Respondents assert that all employees received payments that amounted to the proper wage rates. Respondents maintain that the wage rates used by the

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<sup>2</sup> In this Decision and Order, the evidence shall be designated as follows: Prosecuting Party’s (Administrator): “AX-#”; Employer’s (Respondents) “RX-#”. References to the transcript of the hearing shall be made to “Tr. at #”.

Administrator to determine prevailing wage rates were higher than required by the skill level necessary for the employees' work.

#### **D. Issues**

The issues presented in this case for resolution are:

1. Whether Respondents improperly determined applicable prevailing wages and whether back wages are due to ten non-immigrant employees;
2. Whether Respondents misrepresented material facts on Labor Condition Applications;
3. Whether Respondents willfully violated the Act by misrepresenting material facts and failing to pay prevailing wages;
4. Whether Respondents failed to provide notice of the filing of LCAs;
5. Whether Respondents failed to maintain records as required by the Act;
6. Whether Respondents failed to file LCAs for all work sites where non-immigrant employees were expected to perform work;
7. Whether civil monetary penalties should be assessed; and
8. Whether Venkat Potini should be held individually liable for any of The Lambents Group's violations of the Act.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. Factual Background**

#### **1. Testimony of Shilpa Komirishetty (Tr. at 265-335)**

Shilpa Komirishetty was employed by Respondents as a programmer/analyst from June 2006 through January 2007. Tr. 269-70, 281, 298; AX-8 'Lab 3, Tab A, Tab B, Tab G, and Tab I. Ms. Komirishetty received her bachelor's degree in Computer Science in India in 2004. Tr. 267. Before coming to the United States, she worked as a TIBCO Developer in India for RePro Technologies where she performed work that she described as "interface technology". Tr. 311-2, 332. Ms. Komirishetty testified that she had two and one half years of computer programming experience that she had discussed with Mr. Potini before coming to work for Respondents. Tr. 268-9. She believed that he hired her because of her prior work experience in India. Tr. 277. Ms. Komirishetty testified that Mr. Potini told her that she would be paid 80% of the amount billed for her services. Tr. 269, 330.

Ms. Komirishetty believed that her H1-B visa was approved on November 23, 2005, but she did not come to the United States before June, 2006. AX-8 Tab I; Tr. 270-2. She paid her own relocation expenses from India. Tr. 270. When Ms. Komirishetty arrived in the States, Respondents did not have a project for her to work on, but she was led to believe that Mr. Potini would find work for her. Tr. 317-8, 333-4. She did not go to Respondents' headquarters in Rochester, NY, and instead went to live with a friend in Memphis, Tennessee by agreement with Mr. Potini. Tr. 269-70; 297; 317-18; 323. Although Mr. Potini asked her to relocate to Rochester for a job, Ms. Komirishetty did not have the money to move there, and she never

worked in Rochester, NY. Tr. 270, 298.

From June 2006 through August 2006, Ms. Komirishetty had no contact with Mr. Potini. Tr. 317. Respondents did not find her any other project to work on, and instead she found her own projects. Tr. 272-3 277, 281, 313. Ms. Komirishetty found her first client project, a referral position with Symantec, through an online vacancy announcement. Tr. 272-3, 277, 313. After Symantec hired her, Ms. Komirishetty informed Respondents about the job and they paid her salary. Tr. 324 Symantec was not a client of the Lambents Group but rather, the job was subcontracted through Respondents. Tr. 274. She worked as a TIBCO Developer for Symantec in Sunnyvale, California, for about three months, beginning on August 21, 2006. Tr. 299, 313; 274-5; 299-300. Ms. Komirishetty described her job as a mid-level position that required a bachelor's degree and a minimum of two years of work experience. Tr. 275, 278-9, 314. She stated that someone with only entry level experience would not have been able to have performed the duties of the job at Symantec. Tr. 279. When the Symantec project ended, Ms. Komirishetty found new work at another California business, Infogain, where she worked for three months beginning in November, 2006. Tr. 281. That job was also a mid-level TIBCO Developer position that required experience. Tr. 282. Her job duties as TIBCO Developer included gathering data requirements, documenting the requirements, developing interface and testing the interface. Tr. 275, 281-82. Respondents paid Ms. Komirishetty's salary during the period she worked for Symantec and Infogain. Tr. 274. 280, 282.

Ms. Komirishetty testified that when she was hired, Mr. Potini told her that her annual salary would be a minimum of \$42,000 and if the project showed more hours she would receive 80% of Lambents billing rate. Tr. 290-2, 298, 301, 330-1. She believed that Respondents billed Symantec \$50.00 per hour for her work, and billed Infogain \$55.00 per hour. *Id.* She was paid monthly, based upon records of her hours that she documented and submitted to Respondents. Tr. 280, 283, 285. Ms. Komirishetty stated that she sent records to Respondents reflecting that she had worked 160 hours in December 2006 and 168 hours in January 2007, but was not paid for these months. Tr. 283-5, 287. Her numerous attempts to discuss this issue with Mr. Potini were not fruitful, and he did not respond to telephone calls or emails. Tr. 285-6. Ms. Komirishetty testified that she left Lambents because she was not getting paid, Respondents were not finding her new projects, and Mr. Potini did not respond to her telephone calls and email messages. Tr. 289, 334.

Ms. Komirishetty testified that she did not work in either Schaumburg or Chicago, Illinois, and she denied being told by Respondents to report to jobsites there. Tr. 288-9, 294. She also did not believe that she was a short term placement employee. Tr. 289. Respondents paid her \$700 in relocation expenses when she moved from Tennessee to California, but she received no other reimbursements or advances. Tr. 289, 303, 310, 325.

## **2. Testimony of Martin Murray (Tr. at 26-200)**

Mr. Murray has been employed as an investigator for the Administrator for more than thirty years. Tr. 33-34. His primary duties are to enforce statutes administered by the Wage and Hour Division, including laws and regulations pertaining to non-immigrant employees working in the United States under the H-1B program. Tr. 34. He described the process involved in

filing a petition for a non-immigrant visa for employees, and the requirements of filing a LCA. Tr. 35-37. Mr. Murray explained that the prevailing regulations at 20 C.F.R. Part 655 require employers to pay such employees the higher of the prevailing wage or the employer's actual wage rate for a particular occupation in a particular geographic location. Tr. 37-38. Mr. Murray testified that a prevailing wage is determined by the employer based upon a valid wage source. Tr. 37.

Mr. Murray first contacted Respondents in July, 2007, and visited the company business site on several occasions, beginning in September, 2007 until his last visit in June, 2008. Tr. 41. Mr. Murray described Respondents' business as a sponsor of H-1B visa workers who work as information technology consultants for client companies. Tr. 49. Early in his investigation, Mr. Murray met with Mr. Potini, who was unable to provide all LCAs or the source of the prevailing wage he used on the applications. Tr. 39; 47. Mr. Murray explained that Employers are required to keep documents pertaining to the process available for inspection. Tr. 38. Mr. Murray's investigation included interviews with employees, reviews of payroll and other records, review of LCAs and visa petition documents and discussions with Mr. Potini. Tr. 47. Mr. Potini advised Mr. Murray that he based the prevailing wages on OES data, which Murray explained is published by the Administrator, based upon information compiled by the United States Bureau of Labor Statistics. Tr. 39. Acceptable sources for Employers to use to determine prevailing wage can come from public or private sources, but must be listed on the LCA. Tr. 40.

Mr. Murray testified that Mr. Potini did not provide complete payroll records or copies of all LCAs that had been filed. Tr. 47. The company did not provide a physical copy of the source of the prevailing wages listed in LCAs or provide an accurate record of the geographic work sites of non-immigrant employees. Tr. 48. Eventually, Mr. Murray was provided payroll records and information about when and where the H 1B visa employees worked. *Id.* Mr. Murray deduced that Mr. Potini reconstructed documents from his records and his personal recollection, rather than from an archive of copies of originals. Tr. 49. The number of Respondents' employees varied, and no employees worked at the company's main office. Tr. 50. The duration of each employee's employment varied according to arrangements between Respondents and their clients. Tr. 50-51. Most of the employees moved around geographically to the sites of Respondents' clients. *Id.*

Mr. Murray testified that Mr. Potini provided varying explanations of how employees were paid. Tr. 54. Payroll records reflected that employees were paid salaries, but Mr. Potini told Mr. Murray that they were paid hourly and also were paid per diem. Tr. 54; 55. Potini explained that there were no LCAs for some locations where employees worked because employees were on "short-term placement", which Mr. Murray described as a regulatory provision that allows employers to place H-1B workers in another city for a limited time under circumstances that excuse the employer from filing another LCA. Tr. 54-55.

It took Mr. Murray a long time to discern how employees were paid, and he finally reached this understanding:

[Mr. Potini] explained that the workers were paid on an hourly rate of pay that was determined as a percentage of the final billing rate to the client. It was called an 80/20 system, that the final billing rate to the client, 80 percent of that was the wage rate that the employee received for the hours worked, and that, during the period that the wages were calculated, which wasn't always a month -- it could be for a week or two weeks or three weeks -- he would multiply the number of hours worked times the wage rate, based on 80 percent of the client billing rate, to determine the gross amount of earnings, wages paid to be paid to that employee. And, once that figure was established, from that he would subtract the money that had been paid on the payroll records as wages, and the balance would be paid to the employee in a separate check -- off-the-record or off-the-books is the term we used, which initially had been told to me was a per diem check for expenses. But, upon realizing that this was the pay system, I realized that it was actually part of an hourly rate of pay that was paid in a separate check off-the-books. Clear?

Tr. 55-56. Respondents did not keep all records of hours worked by employees, although some were kept because Potini used them to bill clients. Mr. Murray explained that employees' wages consisted of both payroll wages and separate checks from which no withholding tax was taken. Tr. 57. These amounts were not shown as wages on payroll records, but were reported in the form of a separate payment made to employees. Tr. 58. Employees were issued Form 1099s that reflected these payments. Id.

Mr. Murray explained that the records did not establish that Respondents met the requirements of short-term placement. The exemption from filing a new LCA requires a limit on short term work of generally 30 days, and also requires that employees be paid travel and subsistence expenses. Tr. 58-60. There were no receipts to show hotel bills, airfare, or other costs of daily subsistence. Tr. 59; 62. In addition, employees told Mr. Murray that they were paid on an hourly basis and received extra checks as part of their wages, and records showed that employees generally worked at a location for months or even an entire year. Tr. 60. Prevailing regulations require that in order for payments to be credited as wages, they would have to be shown in payroll records and treated like wages, subject to normal payroll deductions and withholdings. Tr. 62. Mr. Murray's investigation revealed that most employees were initially paid a salary, but after six months or so were also paid on the per diem method. Tr. 63.

Murray testified that employees were paid on what was described as an 80/20 pay scale, which was calculated by Potini on the basis of "...the hourly rate times the number of hours worked to determine the earnings or wages payable for a period and subtracted from that the gross wages shown on payroll records. The result was the remaining amount, which was paid in a separate check, which he called a per diem check. [T]he hourly rate that was used to calculate the total amount of wages was 80 percent of the billing rate to the client. So, if someone worked a number of hours, they would multiply [the hours] times the 80 percent of the billing rate to determine the total wages. And then from that the salary was subtracted." Tr. 89. Using a hypothetical sample, Mr. Murray explained how Respondents paid employees 80% of the reported hourly rate:

If an employee -- if the billing rate to the client was \$50.00, 80 percent of that would have been the rate paid to the employee, which would have been \$40.00... If in a month an employee worked 160 hours, Mr. Potini would have calculated the earnings owed to the employee was 160 hours times \$40.00 per hour, which would be \$6,400.00... If that employee was on a \$4,000.00-per-month salary, the \$4,000.00 would have already been paid in the paycheck. He would have subtracted that from the \$6,400.00, and the resulting amount, the \$2,400.00, would be the amount that he would calculate to be paid in separate checks as a per diem amount recorded on a 1099.

Tr. 98-99. Relying upon an example from the Administrator's documentary evidence, Mr. Murray engaged in the following dialogue with me to explain how the employees' pay was calculated:

THE WITNESS: Oh, okay. On here, he -- and this particular one, he doesn't identify as the 80/20 arrangement. He identifies \$38.00 per hour as the rate.

JUDGE BULLARD: So would, then, the 504 hours be based on 20 percent of \$38.00 per hour?

THE WITNESS: The total amount that he would have calculated owed to these employees, looking at this, would have been 504 hours times 38.

JUDGE BULLARD: So that's what he paid the employees?

THE WITNESS: That's what he would have calculated as what he should have given to them, from which he would subtract -- or, he has already paid on the payroll records if the paid wages that month, \$3,500.00. And then the remaining amount, as he explained it to me, would be paid in a separate check.

JUDGE BULLARD: And I already have proven my inadequacies with arithmetic, but we have 504 hours times \$38.00 per hour? I have only a calculator on my cell phone, but I think I need it, if you'll just indulge me. It's my one and only opportunity to understand this.

THE WITNESS: I had a little trouble myself.

JUDGE BULLARD: Okay. So, if we have 504 hours -- see, I'm not going to be able to use this, and now my technological inadequacies will show themselves. That's not helpful, okay. So it looks as though, just based on simple arithmetic, the total of hours of 504 times \$38.00 per hour yields nineteen one fifty-two, and the employee earned, out of that, \$3,500.00? Is that --

THE WITNESS: I'd have to look at the employee's earnings, but he's describing the entire period of employment here.

JUDGE BULLARD: Oh, okay.

THE WITNESS: It's not by month. It's for the entire period in Birmingham, Alabama.

JUDGE BULLARD: Oh, I see.

THE WITNESS: Yes.

JUDGE BULLARD: Okay.

THE WITNESS: So the wage record I looked at showed only two payments of \$3,500.00, a total of \$7,000.00.

JUDGE BULLARD: For the entire -- and that is listed in exhibit AX-15, 124.

THE WITNESS: AX-15.

JUDGE BULLARD: Page 124?

THE WITNESS: Yes.

JUDGE BULLARD: Yeah, okay. So this individual, for the entire time they worked, only made \$7,000.00?

THE WITNESS: On the payroll records, yes.

JUDGE BULLARD: So is it really significant how it was explained to you that their salary was derived? I mean, do you really -- does it matter?

THE WITNESS: It matters in that it shows that the company was essentially falsifying its pay records. It adds to support that it was done willfully, that they are providing records to me showing what employees were paid that were not accurate. And one of their items they must maintain besides a accurate pay record is something that's called a description of the actual wage system, how they calculated earnings. That has to be maintained in paper form for me to look at and read so I'll have a fair understanding of it. They maintained nothing like that and didn't even disclose this information to me until after many months of questioning about it.

JUDGE BULLARD: Okay. And these advance per diem checks, as I understand from earlier testimony, you did not consider -- let's just take these two payments made to this individual, Dheeravath.

THE WITNESS: Right.

JUDGE BULLARD: You did not consider these two payments, one for \$2,000.00, one for \$5,275.66, to be wages?

THE WITNESS: No.

JUDGE BULLARD: And you did not credit respondent with those amounts as part of the gross wages?

THE WITNESS: No, I did not, because they were not properly shown on the pay records with proper withholdings and taxes taken out of them. I did have a discussion with Mr. Potini -- I think it was at my last meeting that we talked about it the most, that we could give no credit towards the required wages for these amounts that were not shown on the pay records. But I also informed him that, if he were to retroactively file amended tax returns or filings with the taxing authorities and remit the full amount of the withholdings, that our agency could provide credit, and gave him an opportunity to do so.

JUDGE BULLARD: All right. And these were the amounts that would have been reflected on the 1099's that were issued to the employees?

THE WITNESS: Yeah, these -- generally, it almost adds up perfectly, but not quite. There is some factor that I can't make an example, but they pretty much add up to the 1099 amounts.

JUDGE BULLARD: And did you look at W-2's?

THE WITNESS: Yes, I did.

JUDGE BULLARD: And did the W-2's square up with the gross wage reports that you have seen?

THE WITNESS: Yes. Yes, they did.

Tr. 88-92; Tab F of AX-1.

Mr. Murray acknowledged that there would have been no violation of H-1B pay rules if the entire payments had been shown in payroll records, presuming the total wage was the accurate prevailing wage. Tr. 99. Mr. Murray rejected Respondents' assertion that the separate payments made to employees constituted "per diem" payments, and instead he considered them payments for work. Tr. 102.

In addition to the irregularities in reporting wages, Mr. Murray concluded that Respondents did not pay proper prevailing wage rates. As far as Mr. Murray knew, the LCA did not require an employer to identify its source of a wage rate, but the regulations require employers to retain the documentation used as sources of the wage rates used in the LCA. Tr. at 68-69. When asked by Mr. Murray for records of Respondents' source of prevailing wage rate, Mr. Potini responded that he used "OES" wage levels, which Murray acknowledged to be a valid source. Tr. at 64-65. Mr. Potini believed that he used level III OES wages, which would reflect a significantly higher level of wages than Respondents had paid. Tr. 65. Mr. Murray was aware of four OES levels for computer programmers, and he explained that the educational requirements, expertise and experience required of each level increased from the lowest at level I to the highest at level IV. Tr. at 66-67. Mr. Murray testified that the wage determinations reported on the LCAs provided by Respondents did not correspond to Level III wages reported in OES. Tr. 67. Mr. Murray stated that Mr. Potini eventually divulged his method of determining a wage rate, as follows:

He explained that, in filing his labor condition applications, which is done online, that he would enter a number into the application system, a low number, and if it was rejected by the system as being too low, that it couldn't possibly be a prevailing wage, then he would try a higher number and enter that. And if that might be rejected, then he would try a higher number, and he would continue this process until finally it took one.

Tr. at 68.

In explaining how he determined that wage rates were wrong, Mr. Murray referred to documents relating to the ten employees that the Administrator identified as being underpaid. One LCA for programmer/analyst for the period from 2005 to 2008 listed a wage rate of \$38,015.00. Tr. 70-71. Mr. Murray testified that Mr. Potini agreed with him that the rate for Level II programmers should have been the wage rate. Tr. 71. A comparison between the OES rates demonstrated that the listed rate was deficient. *Id.* Mr. Murray further noted that the wage source noted on the LCA was not OES, but was "SESA", which represents "State Employment Service Agency". *Id.* Murray testified that SESA uses OES rates. Tr. 72. Prevailing wages differ according to geographic location, and Mr. Murray used information provided by Mr. Potini to determine where employees worked. Tr. 79-81; 89. Although the information was not kept in payroll records, Mr. Murray believed that the information provided by Potini was reliable. Tr. 84.

Mr. Murray described the specific violations related to inaccurate wage determinations. Respondents' LCA in 2005 listed Schaumburg and Chicago Illinois as the work locations. Tr. 104; AX-1B, E. This LCA was associated with Swarna Dheeravath, who did not work at those locations, as demonstrated by Respondents' documents reflecting that she worked in Birmingham, Alabama, and her statement to Murray confirming that she worked only in Birmingham. Tr. 105; AX-1F. Moreover, the wage rates listed in Respondent's LCA for Schaumburg (\$38,015.00) and for Chicago (\$36,691.00) were not the OES wage rate for those cities. OES level 1 listed a rate of \$42,390.00 and OES level II listed \$53,498.00 for the geographic location that pertains to both Schaumburg and Chicago. Tr. 107-108; AX-22.

Similarly, an LCA supporting the petition for Venkatas Inturi identified Reno and Carson City, Nevada as work locations, but Mr. Inturi worked in Burlingame California. Tr. 109; AX-4. The prevailing wage for Reno and Carson City, Nevada was not correct for those locations, and in addition was less than the rate for Burlingame, California. Tr. 111. In each of the ten cases where Mr. Murray concluded wage violations occurred, the wage rates identified by Respondents did not accurately reflect the OES/SESA prevailing wage for the locations identified in Respondents' LCAS. Tr. 111-113. However, there were instances where employees worked in the place identified on the LCA (e.g., Manoj Koduri, AX-7; Tr. 187-188).

Mr. Murray calculated back wages based upon his conclusion that OES level II programmer/analyst wage rates applied. Tr. 113 He relied in part upon DOL guidelines (AX-21) and documentation supporting the H-1B visa petitions that described the work (Tr. 113-114). The petitions of all employees included a supporting letter with the same position description. Tr. 115; AX-1 through AX-10. Mr. Murray concluded from the description that the position did not represent an entry level I job, but required some experience. Tr. 117. Mr. Murray confirmed his belief through telephone conversations with employees who worked for Respondents. Tr. 118. Mr. Murray believed level II was a conservative estimate of the job requirements for the employees, particularly where Mr. Potini had originally advised that Respondents had used OES level III wage rates. Tr. 119. Murray did not ask DOL's Employment and Training Administration (ETA) to establish a prevailing wage because he was not required to; Mr. Murray believed that he and Mr. Potini had agreed that OES level II wage rates applied. Tr. 120.

Mr. Murray's calculations of back wages are summarized at AX-14 and AX-15. He determined the actual work sites and periods of employment for each employee and identified the amount of wages that they earned in a month, compared with the prevailing wage, converted to a monthly amount. Tr. 79. Mr. Murray calculated wages for employees for periods when they were employed by Respondents but not paid, because he found no evidence that employees did not work due to their own fault. According to H-1B rules, employees must be paid even for non-productive time. Tr. 84. Mr. Murray did not specifically ascertain why certain employees did not receive any wages for certain periods of time. Tr. 83. Mr. Murray subtracted the amount paid on payroll records from the prevailing wage that should have been paid in each month, and pro-rated some months by the number of days employees worked at a site. Tr. 82. In calculating back wages, Mr. Murray did not consider the payments made to employees under a 1099 to be wages, and he did not credit Respondents with those payments. Tr. 84-86. A total of \$170,541.71<sup>3</sup> in back wages was calculated due to ten employees. (Tr. 76).

Mr. Murray believed that the violations that his investigation uncovered were willful because Respondents did not maintain wage source material; randomly selected wage rates without regard to the actual geographic location of work; made payments off the books; misclassified wages as reimbursements; and did not keep proper payroll records. Tr. 103-104. He believed that Respondents willfully misrepresented material facts by not using actual OES wage determinations. Id. Mr. Murray calculated civil money penalties because of what he

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<sup>3</sup> The original determination letter advised that Respondents owed almost \$178,000.00 in back wages, but that amount was later corrected to the lower figure due to "arithmetic errors". Tr. at 43. Respondents were not provided a revised determination or otherwise informed of the correction except as noted in Administrator's exhibits. Tr. at 44.

considered to be willful failure to pay required wages. Tr. 121. The penalty was based on the number of employees not paid times \$2,500.00 per employee, reduced by 10% because of the small size of The Lambents Group, for a total of \$22,500.00. Tr. 121-122; 123; AX-19. Mr. Murray also assessed a civil money penalty against Respondents for a willful misrepresentation of material fact on LCAs, based upon the number of LCAs involved. Tr. 122. The investigation disclosed 27 LCAs, each representing a penalty of \$2,500.00 reduced by 10% for a total penalty of \$60,750.00. Tr. 122-123. Civil money penalties were also assessed against Respondents for failure to provide notice of the filing of LCAs at the rate of \$500.00 per 27 LCAs, reduced by 10% for a total of \$12,150.00. Tr. 123. This violation occurred because Respondents failed to post a notice of the filing of an LCA at the locations where employees were expected to work. Tr. at 123-124. Mr. Murray testified that Respondents did not attempt to post notice at work sites until sometime after December 31, 2007. Tr. 124. No penalty was assessed for Respondents' failure to maintain records of all documents relating to the filing of LCAs and work performed thereunder, or for the improper classification of short-term placement provisions of the Act. Tr. 124-126.

Mr. Murray acknowledged that the LCAs filed by Respondents cited to SESA wage determinations as their source. Tr. 129. Although he believed that states relied upon OES wage determinations for their own conclusions, he admitted that he was not really aware of what other information a state might use in calculating a wage determination. Tr. 129-132. Mr. Murray did not contact SESA to confirm that the wage rates were the same as those published by OES in the on-line library, based upon internal policy guidance. Tr. 132. Although Respondents could not provide source material for the wage determinations they cited on the LCAs they filed, Mr. Murray believed that he and Mr. Potini agreed to use OSE Level II wage rates, thereby obviating the need to request a prevailing wage from ETA. Tr. 135-137. He relied upon internal policy in reaching this conclusion. *Id.* Mr. Murray testified that wage determinations can be based upon a union contract, a valid labor market survey, or by specific request for a state workforce assessment. Tr. 197. In the absence of those sources, employers are permitted to use a valid government source such as the OES wage data. *Id.* Mr. Murray asked Respondents whether they had requested a state workforce assessment, which is equivalent to the SESA noted on Respondents' LCAs, but was told by Mr. Potini that OES data was used. Tr. 198. Mr. Murray testified that if requested, a state would have to make a wage determination using the formula indicated in the state forms. Tr. 198.

Mr. Murray testified that he reviewed the job descriptions included in the petition for H-1B visas and concluded that more than entry level work was involved. Tr. 159. He believed that the work involved knowledge and expertise in different aspects of computer programming, and would require individuals to have education and job experience in designing and implementing systems. Tr. 159-160. He compared the requirements of the described jobs to the skill levels described in the OES wage determination. Tr. 165. Mr. Murray's experience with investigating cases involving computer programmers has caused him to question classifications of programmers at level 1. Tr. 161-167. He did not believe that Respondents' jobs were basic entry level positions as described in the guidance published by ETA, which is responsible for setting wage determinations. Tr. 166. Mr. Murray did not go through a multi-step calculation assigning values to the characteristics described in the job description to conclude that the jobs required more than a level 1 wage determination. Tr. 170. He relied upon Respondents'

supporting letters, internal guidelines, ETA guidance regarding wage levels and his experience that few employees are properly classified level 1 jobs in the H-1B visa process. Murray admitted that the job description did not identify a requirement for any length of experience and acknowledged that the job description asked for bachelor's degree or equivalent experience and did not ask for bachelor's degree and experience. Tr. 181; 185-186.

Mr. Murray acknowledged that there is often a period of time between when a LCA is filed and when an employee begins to work, and that there were long gaps between Respondents' LCAs and when some employees began work. Tr. 173-174. He did not look into that issue as a potential violation for non-productive time, as his investigation focused on wage issues. Tr. 186-187. He focused his investigation on the areas where he had reasonable cause to investigate due to a complaint, although he did not ignore obvious instances of non-productive time that he observed during his investigation. Tr. 197. Mr. Murray acknowledged that he did not ascertain whether Respondents had anticipated having work at the locations cited on LCAs that was no longer available when employees finally joined the company. Tr. at 192. He explained that employers are required to file a new LCA if an employee works at a different location than named in the LCA unless they are considered short-term placement, and that Respondents failed to do so. Tr. 194-195. Mr. Murray testified that short-term placement rules did not apply in cases where the work location changed between the filing of the LCA and the commencement of the employee's employment. Tr. 196. In those instances, Respondents would have been required to file new LCAs. Id.

Mr. Murray reiterated that Mr. Potini originally described the 1099 payments made to employees as reimbursements for expenses, but admitted his method of payment when pressed by Murray. Tr. 176. Murray did not see the actual 1099 forms, but did see copies of checks that were issued to employees separate from payroll checks. Tr. 176-177. Although Mr. Murray did not make specific inquiries into why individuals did not work at places identified on LCAs, he did ask Respondents where individuals worked, and was told they were short-term placements. Tr. 179. Mr. Potini was not able initially to tell Mr. Murray where individuals worked, but had to conduct research to provide that information. Id. Mr. Murray acknowledged that his investigation was the first conducted by the Administrator into Respondents LCA process, but he did not agree that Mr. Potini "provided his utmost cooperation". Tr. 189. Mr. Murray testified that "it was a painstaking and slow process to obtain the information. When I asked him for something, it was here's a little bit of information, here you can have that and only that and nothing more. And it was often incomplete and inexact..." Tr. 189-190.

Mr. Murray also believed that Mr. Potini should be held personally liable for back wages and penalties, as he personally prepared all LCAs at issue, and is the principal owner of The Lambents Group. Tr. 121.

### **3. Testimony of Venkat Potini**

Mr. Potini testified that he is the president of The Lambents Group. Tr. 202. He prepared the paperwork to hire H-1B employees for his company by himself, with no help from an attorney. Id. He recalled that he prepared a LCA and H-1B petition for Swarna Dheeravath, who was in the United States at the time, and said that he expected her to work on a contract with

a company in Schaumburg, Illinois. Tr. 203-205. He did not apply to SESA to get a wage determination for the LCA, but relied upon a wage level that he had used in a LCA for another employee that had been approved previously. Tr. 205; 206. Mr. Potini was aware that the online application system would accept a SESA wage source, which he thought was the online wage survey established by the ETA. Id. Mr. Potini testified that he was not aware that he had to get his own SESA determination for a wage source, and he did not consult an attorney regarding the application. Tr. 207.

The LCA for Ms. Dheeravath was approved on June 8, 2005, and she was supposed to begin employment with the company by October 1, 2005. Id. He recalled being told by Ms. Dheeravath's husband that she could not work immediately because she had recently given birth. She contacted Mr. Potini in September, 2006 to advise him of her availability to work. Tr. 208. By then, he no longer had work available in Schaumburg, Illinois. Id. Ms. Dheeravath found her own employment in Birmingham, Alabama, where she worked for a few months. Tr. 209. Mr. Potini did not file an amended LCA because he believed that the assignment was short-term. Id. Ms. Dheeravath did not inform Respondents when her employment ended on December 22, 2006. Tr. 209.

Mr. Potini testified that he wrote a check for \$2,000.00 to Ms. Dheeravath as an advance to move from the Midwest to Birmingham. Tr. 210. In January, 2007, Respondents paid Ms. Dheeravath \$5,275.00 for salary, because she was not included in the company's payroll that month. Id. At Ms. Dheeravath's request, Respondents made the check out to her husband, Osho Girawat. Tr. 211. Mr. Potini testified that Ms. Dheeravath's base salary was \$2,500.00 per month, and he did not make per diem payments to her. Tr. 211. He asserted that he paid her salary in the form of a 1099 at her request, and he was not aware that H-1B rules prohibited paying employees in that fashion. Id. Mr. Potini never consulted an attorney about non-immigrant pay rules, but verified with his accountant that he could make payments like this to people as subcontractors. Tr. 212. All payments were accounted for and reported on corporate tax returns. Id.

Mr. Potini filed a LCA and visa petition for Harshal Doshi in June, 2005, and he came on board with Respondents on May 8, 2006. Tr. 213. Mr. Doshi was in Houston, Texas at the time, and the LCA cited that city, which is where Mr. Doshi trained. Id. Mr. Potini stated that Mr. Doshi's position required him to have a bachelor's degree or equivalent experience, but no additional experience was required. Tr. 214. Mr. Potini testified that Mr. Doshi worked in Los Angeles, not Houston, and he stated that he did not get a LCA for Los Angeles because Mr. Doshi only worked for a month and a half there. Tr. 217. After that, Mr. Doshi worked in Charlotte, North Carolina from August 21 to December 31, and Mr. Potini did not file an amended LCA for that employee. Tr. 217. Mr. Doshi then worked in Boston, Massachusetts for two and one half months, but there was no LCA for that location either. Tr. 218. Mr. Potini did not file new LCAs for the various locations because the projects were short term. Id. He believed that Mr. Doshi was paid on a "salary basis plus two deposits". Tr. 218.

Mr. Potini testified that there were times when Respondents did not have a project for Mr. Doshi, and they paid him for those periods. Tr. 219. He recalled one period between June 30, 2006 and August 21, 2006, when Mr. Doshi asked for a leave of absence due to family

obligation which required his absence from the United States. Tr. 219-220. Mr. Potini did not keep any written record of the leave of absence. Tr. 220.

Mr. Potini testified that Respondents pay employees on a salary basis according to the prevailing wage for the initial six months of employment, and then pay them on “80/20 basis”. Tr. 218. He paid the prevailing wage set forth on LCAs. Id. Respondents had only one person at each location at a time. Tr. 219. He testified that all of the programmers, or developers, were expected to follow other people’s guidelines, and work under supervision. Tr. 214. He explained that analysts would work at a higher level, and that based on the job duties and the job requirements, the programmers would be placed in the lowest skill level. Tr. 214-215. Potini was confused about how the levels worked, believing that Level 1 was highest, and Level IV lowest, but he now understood how the levels apply to skills. Id. He declined to categorize the job by OES level, demurring that he was “not a legal expert”, but Mr. Potini reiterated that the jobs he filled did not require work experience. Tr. 216.

Mr. Potini denied telling Mr. Murray that he had initially believed level III to be the proper wage determination for the jobs for which he filed LCAs. Tr. 216. He denied that he consented to use Level II as the proper wage determination, and said that he told Mr. Murray that he did not have the legal expertise to classify the jobs. Id. He was not aware that the computer programmer jobs could be set at any of four OES levels when he filed LCAs. Tr. 216. Mr. Potini testified that he considers all the programmers he uses to be entry-level programmers, and he said that he treats them all the same. Tr. 217.

When Mr. Potini prepared the LCA for Ven Bruna in 2004, he had a contract with a vendor in Frankfort, Kentucky. Tr. 221. Mr. Bruna did not take that job because he was not qualified, but he worked at another location, and Mr. Potini did not prepare a new LCA for that location. Tr. 221-222. In 2005, Respondents had work in Reno, Nevada, that was no longer available when the employee came to the United States in the fall of 2006. Tr. 222. Mr. Potini used the wage determination for Reno, Nevada that had been approved in association with a previously filed LCA. Tr. 223. Mr. Potini cited SESA as the wage determination source because he understood it to be the online wage survey, but he acknowledged that he did not get the wage figure from a current online wage survey. Tr. 223.

Mr. Potini testified that employee Venkateswara Kakula joined the company more than a year after his H-1B visa was approved, and work was no longer available at the location named on the LCA. Tr. 224. Employee Susan Koturi joined Respondents’ firm on April 10, 2006 and worked in Des Moines, Iowa for only one and one half months, going to work in California in August, 2006, until she left the company. Tr. 225. Another LCA was prepared for Schaumburg, Illinois in 2005, but the employee did not join the company because she was pregnant. Tr. at 226-227. Mr. Potini testified that his contract jobs generally are no longer available after four months. Tr. 227. When that employee joined the company in April, 2006, she worked in Des Moines, Iowa, and no new LCA was filed because the assignment was only for one and one half months. Tr. 227. Respondents did not have an LCA for San Diego, California, where that employee next went to work. Tr. 227-228. She was paid the wage of \$4,000.00 a month and also paid her 1099 payments. Tr. 228. Potini recalled receiving an email advising that she left her employment to return to India. Id.

Employee Manj Koduri was employed in Houston, Texas, where Respondents had an approved LCA. Tr. 228-229. The prevailing wage was \$42,000.00, which Mr. Potini determined from a previously approved LCA for Houston. Tr. 229.

The LCA filed for Shilpa Komirishetty in June, 2005 was for Schaumburg Illinois, where Respondents had a contract with Cook Systems. Tr. 229-230. Ms. Komirishetty was outside the United States when the LCA and visa petition were filed, and Potini did not know when she first arrived in the United States. Tr. 231. Ms. Komirishetty's brother contacted him to tell him that she was in the country, and Mr. Potini contacted her by email on June 1, 2006 to tell her to report to Rochester, New York where he had a job. Tr. 232. She responded by email and rejected the offer, advising that she would look for other opportunities. Tr. 232-233. Mr. Potini testified that Ms. Komirishetty got her first job in August in California, where she worked until October 31. Tr. 233. He believed the contract lasted until December, but Ms. Komirishetty voluntarily left the job and joined his company from August 22 through January 31, 2007. Tr. 234. Ms. Komirishetty was paid through W-2 wages and 1099 that represented an advance to help her relocate from Tennessee to California. Tr. 234.

Respondents filed a LCA for Jamish Kondru for Little Rock, Arkansas, but the employee refused the assignment to that location. Tr. 235-236. He worked in California, beginning in January, 2005, and Potini did not file an amendment to reflect the change in location. Tr. 236. He believed that Kondru was paid prevailing wages for California, and also was paid 1099 payments.

A LCA was filed for Lavanya Selvaraj for Maryland Heights, Missouri. Tr. 236. At the time the application was filed, Respondents had a contract with Stratus Technologies in that location, but she did not join the company as expected in October 2006, but came onboard in January 2007, after the contract had expired. Tr. 237. Ms. Selvaraj was unwilling to relocate from Massachusetts, and she worked there from January 15, 2007 until March 31, 2007. Tr. 238. She was paid wages and was issued a W-2. Id.

Mr. Potini denied making misrepresentations in LCA filings because he had contracts for work at the locations cited in the applications he prepared. Tr. 238-239. He could not be responsible for the availability of the employees or the work, as he relies on third parties. Tr. 239. He testified that all of the programmer jobs were entry level. Id. Potini testified that he posts LCAs at his office, and advises his clients to post at the job sites, but he believed that his consultants did not take that seriously. Tr. 239. He does not personally post LCAs at client locations. Tr. 240. Mr. Potini issued 1099s rather than paying employees a wage at their request. He explained, "[t]he employees says they are all in very complicated field. Some people, when they transfer their H-1B's to my company, they said a lot of companies are issuing 1099's, so if you work on that I will transfer my H-1 and I work through your company, so whatever prevailing wage is you can put in the payroll, the rest we can file in our taxes." Tr. 241. He was not aware that such payments were prohibited for H-1B visa employees. Mr. Potini reiterated that his company reported all 1099 payments on corporate tax returns. Tr. 241-242.

Respondents fully cooperated with the investigator, and provided all bank statements and documents that were requested. Tr. 242. Mr. Potini was not aware that he was not following LCA rules, and he believed that he was doing the online paperwork properly, noting that it was an easy system. Id. Mr. Potini averred that he had a better understanding of the rules and will be able to maintain documents, use the proper wage determination and post LCAs at work locations. Tr. 243.

Mr. Potini admitted that he prepared and signed all of the LCAs submitted for his employees. Tr. 245. He admitted that employees did not always work at the location named on the LCAs used to sponsor their visa petitions. Tr. 246-247. He was not aware at the time that he had to file amended LCAs if the work location changed. Tr. 247. He presumed that the prevailing wages that he cited were correct. Tr. 248. Mr. Potini wrote the supporting documents and letters that described the work for the programmers. Tr. 248-249. He could not definitively say whether the duties required were entry level, and stated that it depended upon the consultant and where he worked. Tr. 250. Mr. Potini expected his consultants to earn more than the prevailing wage set forth in the LCAs he had prepared because the field is competitive. Tr. 250. He testified that he has been hiring people under the H-1 B program since 2002, and he used approved LCA wage rates from earlier approved LCAs when he prepared the applications at issue herein. Tr. 251-252. He used wage determinations from DOL's online wage site when preparing the first LCAs. Tr. 252.

Respondent denied telling Mr. Murray that he did not file amended LCAs because he believed the employees were short term and amended applications were not necessary. Tr. 253. Potini admitted that paying employees through a 1099 saves the company money. Id. He had no receipts for expenses that employees incurred and he did not pay taxes on the per diem payments. Tr. 254.

#### **4. Documentary Evidence**

##### **Respondents' Evidence<sup>4</sup>**

- RX-1. Job Description for Ms. Shilpa Komirishetty
- RX-2. 2006 W-2 & 2006 1099 for Shilpa Komirishetty
- RX-3. 2007 W-2 for Shilpa Komirishetty
- RX-4. Copies of checks and bank statement showing payments made to Shilpa Komirishetty
- RX-5. 2006 W-2 & 2006 1099 for Swarna L. Dheeravath
- RX-6. 2006 W-2, 2006 1099, & 2007 W-2 for Harshal R. Doshi
- RX-7. 2005 W-2, 2005 1099, 2006 W-2, 2006 1099, 2007 W-2, & 2007 1099 for Venkata Gunna
- RX-8. 2006 W-2, 2006 1099, 2007 W-2, & 2007 1099 for Venkatesh Inturi
- RX-9. 2005 W-2, 2005 1099, 2006 W-2, 2006 1099 for Venkateswara Kakula
- RX-10. 2006 W-2, 2007 W-2, & 2007 1099 for Susan Katuri
- RX-11. 2005, 2006 & 2007 W-2 for Manoj K. Koduri
- RX-12. 2005 W-2, 2005 1099, 2006 W-2, 2006 1099, 2007 W-2, & 2007 1099 for Ramesh Kondru

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<sup>4</sup> I have renumbered the documentary evidence to conform with my pre-hearing Order.

RX-13.2007 W-2 for Lavanya

### **Administrator's Evidence**

AX-1 through AX-10 are documents relating to the employment by Lambents of the ten employees for whom back wages were computed include the following:

- Labor Condition Application
- INS Approval Notice
- H-1 B Petition Package
- Letter of Confirmation of Employment to Consulate
- Lambents Company Letter includes the identical position description and qualification requirements for each of the ten employees. The letters vary only by date issued, and the specific qualifications of the individual employees.
- Letter of Confirmation of Employment re: H-1B Visa Application for each employee
- Resignation notice from certain employees
- Letter from Respondent to USCIS cancelling H-1B visa where appropriate
- Lambents' Records of Employee Work History and Pay rate showing each employee's monthly salary, total hours worked on projects, and check number for "per diem" payments.
- Copies of checks from the Lambents Group to employees made in addition to payroll
- Foreign Labor Certification (FLC) Data Center Online Wage Library - OES Wage Rates for the locations where the employees worked

In addition, notes of Investigator Murray's interviews and email exchange with some of the employees were included, and are summarized as follows:

#### AX-1 Tab A

An email between Investigator Martin Murray and Swarna Dheeravath dated Feb. 4, 2008 consists of Swarna Dheeravath's answers to questions posed by the investigator. Ms. Dheeravath advised that she worked for Lambents Group's client AT&T in Birmingham, AL and was paid \$3500.00 per month. No per diem was paid, and no payments were made for September, 2006 and October, 2006.

#### AX-2 Tab A

Telephone interviews with Harshal Doshi dated Jan. 16, 2008 and Feb. 14, 2008 taken by Investigator Martin Murray note that Mr. Doshi began working for Lambents in March 2006, and worked for one to one and one half months in Texas. He then went to Santa Anna, California where he worked for Corinthian College for four to five months. He then went to the University of Massachusetts for several months. He was not paid for one or two months in 2006 because he did not have a project. In 2007, the employee spent several months working for Conde Naste Publications in New York City. As of the interview in January, 2008, he had been working at North Carolina State University in Raleigh, NC since September of 2007. He has always been paid a salary of \$4,000.00 per month regardless of the location of his assignments. He also

earned some per diem expenses paid directly from vendors, and not from Lambents. He recalled getting some expenses paid by Lambents. In addition to the \$4,000.00 monthly salary, the employee received a percentage of his billing rate for working extra hours. The rate for extra hours was 80%, but it might have been 75% at one time.

In his interview on February 14, 2008, Mr. Doshi stated that he lived in Philadelphia, PA and had lived in Houston, Texas in 2006 while he took a software training course. When he first worked for Lambents in May, 2006, he was in Los Angeles, CA. When that project ended he returned to Philadelphia, where he did not work for one to perhaps two months until August, 2006 when he was assigned to Charlotte, NC. That project ended in January 2007, and he returned to Philadelphia where he had no work again for a short time. He was assigned work in Amherst Massachusetts in January, 2007. He was not reimbursed for travel or expenses incurred by living in a hotel at his temporary assignment sites. He shared hotel rooms and expenses with a friend, and estimates that he spent an average of \$30.00 to \$40.00 per day.

In an email between Investigator Martin Murray and Mr. Doshi dated March 3, 2008, Mr. Doshi stated that he continued to work for Lambents in Raleigh, NC. He wrote that on his first project, travel and lodging expenses were paid. He stopped working only because projects ended, and he was available during down times for assignments.

#### AX-3 Tab A

In an email between Investigator Martin Murray and Venkata Gunna dated Feb.7, 2008, Mr. Gunna stated that he started working for Lambents in 2003 and remained employed by Lambents Group. He worked in Rochester, NY in 2004, and worked in Phoenix, AZ from December, 2004 to August, 2005. He worked in Los Angeles, CA from September 2005 and presumably still worked in that area. Mr. Gunna wrote that his annual salary was \$55,000.00 "Balance per diem" and described the basis of his pay as "80-20%".

#### AX-6 Tab A

Mr. Murray summarized his telephone interviews with Susan Katuri dated Jan. 3, 2007 and Jan. 28, 2008. He wrote that Ms. Katuri began working for Lambents in Des Moines, IA in April 2006, when she was paid an annual salary of \$48,000.00. In August, 2006, she went to San Diego, CA where she also earned \$48,000.00. She returned to India for vacation in August, 2007 and returned to the United States in late December, 2007, and did not anticipate returning to work because she was expecting a baby. Ms. Katuri recalled that when she lived in Iowa, she returned to San Diego a few times and was paid expenses of \$1,000.00. She was never paid by the hour. When she worked in Iowa, Lambents paid her per diem based on the hours she worked, calculated at a percentage of the rate that Lambents billed the client. In August, 2006, Ms. Katuri began working in San Diego, and in addition to her salary, she was paid a per diem based on 80% of the billing rate to the client.

AX-7 Tab A

Mr. Murray interviewed Manoj Koduri by telephone on January 28, 2008 and noted that at the time of the interview, Mr. Koduri had worked for Lambents for approximately six years. He worked in Minneapolis, MN in 2003, but for the past four years had worked in Houston, TX. He is a senior programmer and his salary is \$60,000.00. He was also paid monthly checks for per diem, but the amount was based on an arrangement between Lambents and the clients.

AX-8 Tab A

In an Affirmation dated January 19, 2009, Shilpa Komirishetty stated that she had been employed by Respondents from June 2006 to January 2007. When she first came to the United States she lived with a friend in Memphis, TN. In June, Mr. Potini told her to go to Rochester, NY for a work assignment, but she refused the job because she did not have money to travel, and her request to Respondent to pay expenses was denied. She found her own project in mid-August, 2006 as a Programmer Analyst for Symantec in Sunnyvale, California, and she worked there until October 31, 2006. Lambents billed the client \$50.00 per hour for her services, and she was paid 80% of the billing rate, or \$40.00 per hour. From November, 2006 to January, 2007, she worked for Lambents in Losgastos, CA and was paid \$44.00 per hour, or 80% of the billing rate of \$55.00. Ms. Komirishetty described both jobs as mid-level, and she said she had three years of computer programming experience.

While at Lambents, Ms. Komirishetty was paid a regular monthly salary, plus payments that were called per diem, but she never submitted expenses or receipts to Respondent. The two payments together constituted 80% of her billing rate. She was not paid for December, 2006 or January 2007, though she received a check for \$3,066.10 for January that was later voided. (AX-8, Tab A (1)). She kept records of the hours she worked, and she was not paid for 160 hours. She never lived or worked in Rochester, NY or in Illinois, and she was not directed by Respondent to report to work in Illinois. She left Lambents to work for another company, and her H-1B visa was terminated by Lambents on February 1, 2007.

Emails between Shilpa Komirishetty and The Lambents Group dated January 5, 2007, January 6, 2007; April 26, 2007; May 3, 2007 reflect that she inquired about payments due to her, and was told that she would be paid. Later emails from Respondent maintain that she was not owed any money.

A signed statement of Shilpa Komirishetty dated October 3, 2007 reflects that she was paid once a month by electronic deposit to her account.

Telephone Interviews of Shilpa Komirishetty dated September 5, 2007, September 26, 2007, October 16, 2007, November 16, 2007 taken by Investigator Martin Murray reiterate her testimony and affidavit.

Emails between Shilpa Komirishetty and Lambents Group dated September 20, 2006 and October 13, 2006 record her flight information from Memphis to California.

AX-9 Tab A

In an email between Ramesh Kondru and Investigator Martin Murray dated Jan. 29, 2008, Mr. Kondru responded to questions posed by the Investigator, and wrote that he worked for Respondents and earned 80% of his billing rate, based upon a salary of \$60,000.00 per year, supplemented by “per diem” checks. He worked in Santa Anna, Lake Forest, San Diego, CA and Tempe, AZ. He believed he was paid all that he was owed.

AX-10 Tab A

In his summary of his telephone interview of Lavanya Selvaraj dated Jan. 3, 2008, Mr. Murray noted that Ms. Selvaraj stated that she worked for Respondents from December, 2006 to the end of March, 2007 as a programmer analyst in Cambridge, MA. She was paid a monthly salary based on annual salary of \$45,000.00 per year. She believed she was paid all of her salary for all of the time she worked for Lambents’ Group.

There is no documentation of an interview or correspondence between Investigator Murray and Venkatesh Inturi (AX-4) or Venkateswara Kakula (AX-5).

Exhibit AX-11- Additional LCAs Provided By Lambents at Initial Visit

Exhibit AX-12 Supplemental LCA’s Filed by Lambents (printed off Website)

Exhibit AX-13 Lambents Payroll Register July 2005 - December 2007

Exhibit AX-14 Summary of Unpaid Wages (Form *WH-56*)<sup>5</sup>

Exhibit AX-15 Back wage Computations

Back wages were calculated due to ten employees. The method of calculation varied according to the violation alleged, but generally, back wages were calculated based upon the prevailing wage that the Administrator considered, minus the total earnings paid to the employees. In some circumstances, the total earnings were calculated by a determination of the wage determination by month, pro-rated by the number of days the employee actually worked in a month. In addition, the Administrator calculated back wages for some periods where it appeared the employees were paid non-productive time.

Exhibit AX-16 Copies of Lambents Group paychecks from November 22, 2006- June 21, 2007

Exhibit AX-17 Lambents Summaries of Invoices Billed Per Worker

Exhibit AX-18 Sub-Contractor Payments (Form 1099) 2005-2007

Exhibit AX-19 Determination Letter dated July 1, 2008

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<sup>5</sup> Amounts reflect corrected amounts, as per back wage computation at AX-15

Exhibit AX-20 NYS Department of State Entity Status

Exhibit AX-21 Foreign Labor Certification (FLC) Data Center Online Wage Library

Employment and Training Administration, *Prevailing Wage Determination Policy Guidance*, Revised May 9, 2005: n.b. pages 6-7

Exhibit AX-22 Foreign Labor Certification (FLC) Data Center Online Wage Library-OES Wage Rates Chicago IL (2005) and Reno NV (2005)

## **B. Analysis**

### **1. Respondents failed to pay the proper prevailing wages**

An employer seeking to employ H-1B non-immigrants in a specialty occupation must attest in a labor condition application (“LCA”) that they will pay the H-1B non-immigrants a required wage rate, which is the greater of the “actual wage” or the “prevailing wage”. 8 U.S.C. §1182(n)(1)(A)(I) and (II). The prevailing wage is determined for the occupational classification in the area of intended employment and must be determined as of the time of the filing of the LCA. 20 C.F.R. § 655.731(a)(2). The regulations require that the prevailing wage be based on the best information available. *Id.*

DOL considers a determination from the relevant State Workforce Agency (SWA) to be the most accurate and reliable source for determining the prevailing wage. *Id.* Prior to 2006, State Workforce Agencies (SWA) were called “State Employment Security Agencies” (SESA). 71 Fed Reg. 35521. Employers may request a prevailing wage from SWA, or may use an independent authoritative source or other legitimate source of wage data to determine the prevailing wage. 20 C.F.R. §655.731(a)(2). The term, “independent authoritative source” means a professional, business, trade, educational or governmental association, organization, or other similar entity, not owned or controlled by the employer, which has a recognized expertise in the occupational field. 20 CFR § 655.655.920. Employers may use the job classifications recorded in the DOL Online Wage Library (“OWL”) as an “independent authoritative source” for the prevailing wage it enters on the LCA. In addition, DOL’s Bureau of Labor Statistics (BLS) collects wage data for its Occupational Employment Statistics (OES) program, which it compiles in the Occupational Information Network (O\*NET) database that is made available to the public at <http://online.onetcenter.org>. SWAs have access to the data, which they can use to determine prevailing wage rates for each state. *See also*, [http://www.bls.gov/oes/oes\\_ques.htm](http://www.bls.gov/oes/oes_ques.htm).

On the LCAs filed by Lambents, SESA is identified as the source of prevailing wages. During the DOL investigation, Mr. Potini advised Mr. Murray that he used the OES wage determinations posted on OWL and O\*NET. I accord weight to Mr. Murray’s explanation that the SESA reported prevailing wages rely upon the OES information reported at OWL or O\*NET. However, I find that Respondent did not actually rely upon OWL, OES or SESA wage determinations. Mr. Potini testified that when he prepared the LCAs at issue, he used the prevailing wages that were reported on earlier approved LCAs. I also note Mr. Murray’s recollection that Potini input random numbers in his application. The evidence demonstrates that

Potini actually put little thought into the relationship between the requirements of the job and the qualifications of the employee candidates. Every letter from Lambents that accompanied an H-1B visa petition in evidence included a job description and position qualifications that were identical in every respect. The evidence shows no relationship between the actual job and the requisite qualifications of the employees. For the most part, the employees worked for brief periods on a number of different assignments for different clients. Information about what the employees actually did on each assignment is not in evidence.

The regulations require the Administrator to determine whether an employer has the proper documentation to support its wage attestation. 20 C.F.R. § 655.731(d)(1). Where the documentation is nonexistent or insufficient to determine the prevailing wage, or where the employer has been unable to demonstrate that the prevailing wage determined by an alternate source is in accordance with the regulatory criteria, the Administrator may contact the Department of Labor's Employment and Training Administration (ETA), which shall provide the Administrator with a prevailing wage determination. *Id.* The Administrator shall use this determination as the basis for determining violations and for computing back wages, if such wages are found to be owed. *Id.* If the employer objects to the prevailing wage determination, it must file a request for review with the agency that made the determination. 20 C.F.R. § 655.731(d)(2). If the employer fails to do so, the prevailing wage determination shall be deemed to have been accepted by the employer as accurate and appropriate (as to the amount of the wage) and thereafter shall not be subject to challenge in a hearing before the Office of Administrative Law Judges. 20 C.F.R. §655.731(d)(2)(ii).

It is clear that Respondents did not keep adequate documentation to support the prevailing wages attested on the LCAs it prepared. Respondents were unable to completely explain the source of the prevailing wages reported on LCAs, and in some instances relied upon a previously approved LCA. No documentation from DOL's internet sources, or SESA or SWA documentation was available at Respondents' place of business, and I credit Mr. Murray's testimony that Potini told him he thought the LCA itself was sufficient documentation. Accordingly, I find that it would have been appropriate for the Administrator to request a prevailing wage determination. However, I accord substantial weight to Mr. Murray's testimony in which he explained that he did not exercise that option because his conversations with Mr. Potini led him to believe that Respondents agreed that the non-immigrant employees should have been paid at OES level II<sup>6</sup>. Tr. 118-119.

I accord little weight to Mr. Potini's explanation that he went along with the Investigator because he was not qualified to make a "legal" judgment on this issue. I give little weight to Mr. Potini's testimony that he believed all of the jobs that he filled with H-1B visa employees were entry level positions, as that notion is contrary to Mr. Murray's understanding that Mr. Potini believed that he had used level III when determining the prevailing wage for computer programmers. This understanding is consistent with Potini's testimony that he believed that level IV was possibly the lowest level of programmer. I infer, then, from this testimony and Potini's conversation with Murray, that he believed that the employees would be at the next level above entry level, or OES level II. I also note that Potini testified that the duties of the non-

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<sup>6</sup> Because of the agreed wage determination, it was not necessary for the Administrator to request a wage determination, and Respondents would have had no grounds to appeal the agreed determination.

immigrant employees that Respondent hired could have been more than entry level duties. After admitting that he wrote the position descriptions that accompanied the visa petitions, Mr. Potini agreed that the jobs may not have been entry level in the following exchange with me:

JUDGE BULLARD: Let me jump in, Ms. Goldberg. Mr. Potini, did you consider this position description that you said you wrote to represent the duties of a brand new programmer? You testified that all of the programmers were entry-level. Do you consider these duties that you described compatible with entry-level?

THE WITNESS: Yes, their duties at their work locations.

JUDGE BULLARD: Are they entry-level duties that you have described, or something more than entry-level?

THE WITNESS: Maybe, maybe not. Depends upon the consultant, where he works.

JUDGE BULLARD: So there was the possibility that some people worked at a higher level than entry-level?

THE WITNESS: Maybe.

Tr. 249-250.

OES uses the following criteria for establishing level II occupations:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

AX-21 at 7<sup>7</sup>.

I find that the duties and requirements of the OES level II programmer are similar to the job descriptions contained in the visa petitions that Respondents sponsored. Lambents' letters all read, in pertinent part:

The programmer Analyst analyzes the data processing requirements to determine the computer software which will best serve those needs. Thereafter, he will design a computer system using that software which will process the data in the most timely and inexpensive manner, and implements that design by overseeing the installation of the necessary system software and its customization to the client's unique requirements. The actual computer programming may be performed with the assistance of the programmers.

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<sup>7</sup> A description of the qualifications for each OES occupational level is found at AX-21.

Through this process, the programmer Analyst must constantly interact with the management, explaining to it each phase of the system development process, responding to its questions, comments and criticisms, and modify the system so that the concerns raised by the clients are adequately addressed. Consequently, the programmer Analyst must constantly revise and revamp the system as it is being created to respond to unanticipated software anomalies [theretofore] undiscovered, to the extent that occasionally the system finally created bears seemingly little resemblance to that which was initially proposed.

AX-1 through AX-10.

Ms. Komirishetty testified that the work she did for clients of Respondents was at a higher level than entry level, and her testimony about Mr. Potini's interest in her experience was unrebutted. Respondents' letters all note that the work requires "a theoretical and practical application of acquired specialized knowledge. The minimum educational qualifications for this position is a Bachelor's degree in computer science, Technology, Engineering, Electronic, a related analytic or scientific discipline, or its equivalent in education or work-related experience." *Id.* In addition, in each of the letters, the non-immigrant employee is noted to be "...an excellent candidate[s] to fulfill the requirements"...based on their education and their "related experience within the field." *Id.* The job descriptions in Respondents' letters and the minimum qualifications describe work at a level greater than the routine and closely supervised type of work that OES describes as Level 1. See, AX-21 at 7. Mr. Murray credibly testified that he gave Respondents the benefit of the doubt by using Level II and not Level III. Potini admitted that some of the work of programmers would have exceeded entry level work. I credit Murray's testimony that Respondents agreed to Level II as the appropriate level for purposes of establishing a wage. I find that the preponderance of evidence supports a finding of a wage determination based upon OES Level 2 programmer/analyst.

## **2. Back wages**

The record establishes that Respondents paid the non-immigrant employees with a combination of monthly salary, plus a percentage of their billable hours. Respondents' records identify the percentage payment as a "per diem". Mr. Murray credibly testified that Mr. Potini informed him that employees were being paid on the basis of "short-term placement". The regulations allow an employer to make short-term placements or assignments of non-immigrants at worksites not listed in the approved LCA without filing a new LCA under certain circumstances. If appropriate, the regulations require the employer to pay the required wage plus actual costs of lodging, travel, meals and incidental expenses for both workdays and non-workdays. 20 C.F.R. § 655.735(a) and (b)(i) through (iii). In addition, a short-term assignment may not exceed more than 30 days, or in special circumstances, more than 60 days. 20 C.F.R. § 655.735(c).

There is no evidence of record to substantiate that the payments identified as "per diem" represented reimbursement for actual expenses. Although some employees told Mr. Murray that they had been reimbursed for some expenses, I fully credit the employees who stated that they were not required to submit receipts or other proof of expenses for food and lodging. No

documentation of such expenses was provided to Mr. Murray during his investigation. In addition, some of the employees worked for long periods of time in one location, and were paid in the same manner, a combination of wages and 1099 income. (See, AX-15; AX-3; AX-6; AX-7; AX-9).

I find that the evidence demonstrates that employees were paid on the bases of salary, plus a percentage of their billed hourly rate, which has been described as the “80/20” method of wage payment. Respondents made payments to employees outside of regular payroll, and based the payments upon a percentage of their hourly rate. Employees were sent 1099 forms as a record of these payments. Respondents did not make deductions for taxes from these payments. The per diem amounts documented by Respondents closely resemble the income reported on 1099s that Respondents issued to employees in lieu of actual wages. The record supports a finding that no employee met the regulatory criteria for short-term placement.

Back wages were calculated based upon the difference between the wages paid and the prevailing wage at OES level II for the geographic area where employees worked. No credit was given for the payments made outside of payroll and reported on Form 1099, because these payments do not meet the criteria of 20 C.F.R. § 655.731(c)(2). The regulations provide that “[t]he required wage must be paid to the employee, cash in hand, free and clear, when due...” 20 C.F.R. § 655.731(c)(1). The regulatory definition of “cash wages paid” requires that appropriate withholdings for taxes and other legal deductions be taken from earnings. 20 C.F.R. § 655.731(c)(2)(i) through (v). For an employer’s payments to count toward the required wage, they must be shown in the employer’s payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due. 20 C.F.R. § 655.731(c)(2). Additionally, the payments must be reported to the Internal Revenue Service, with appropriate withholding for the employee’s federal income tax and FICA obligations. 20 C.F.R. § 655.731(c)(2); Administrator v. Synergy Sys., Inc., ARB No. 04-076, ALJ No. 2003-LCA-022 (June 30, 2006).

Although the percentage payments were reported to IRS on Form 1099, and were excluded from the employees’ regular earnings, Potini admitted that they were based on the hours that employees worked. Tr. at 59-60; 88. Accordingly, these earnings should have been treated as wages. The fact that they were not makes them ineligible to qualify as cash wages paid pursuant to the prevailing regulations. Although it may appear to unjustly enrich employees who received the 1099 payments, Respondents declined to take advantage of the opportunity to reclassify the payments as wages and make the necessary deductions. Tr. 92, 190-1; 83-84.

W-2 forms from 2006 and 2007 submitted to the record at the hearing show that some employees were paid amounts that were more than the wages reflected in Employer’s payroll records. See, RX-4 through RX-16; A-13. However, Respondents’ payroll records and other documentation do not support these payments. I accord more weight to the evidence provided to the Administrator contemporaneously with its Investigation.

I find that back wages are due, but I do not fully accept the Administrator's calculations of the back wages. See, AX-15. Employers are required to pay an H-1B worker beginning on the date when the nonimmigrant first "enters into employment" with the employer. 20 C.F.R. § 655.731(c)(6). An employee is "considered to enter into employment when [he] first makes [himself] available for work or comes under the control of the employer such as by waiting for an assignment, reporting to orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter." 20 C.F.R. § 655.731(c)(6)(i). In the absence of such activity, if an employer has an approved H-1B petition for the employee, then the employer is required to pay wages to the employee beginning 30 days after the date the nonimmigrant is first admitted into the United States. 20 C.F.R. § 655.731(c)(6)(ii). If the employee is in the United States, the employer must begin to make payments 60 days after the person is eligible to work, based on the date of need on the approved petition. *Id.* The employer is relieved of the requirement to pay when an employee voluntarily makes himself unavailable, or the employment relationship is terminated. 20 C.F.R. § 655.731(c)(7). Otherwise, employers are required to pay H-1B employees the required wage for both productive and non-productive time, even where there is no work. 8 U.S.C. § 1182(n)(2)(c)(vii); 20 C.F.R. § 655.731(c)(7)(i).

Because the regulations require employees to be paid for non-productive time and to pay employees when they become eligible to work, I reject the pro-rated calculations that were used to compute back wages for periods when employees did not work an entire month.<sup>8</sup> Pursuant to the regulations, an Administrative Law Judge ("ALJ") has the authority to "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." 20 C.F.R. § 655.840(b). I find no justification to divide back wages into productive time and non-productive time, as I find that Respondents were responsible to pay employees their monthly prevailing wage in these circumstances. In addition, I have adjusted some of the back wage calculations for reasons that I shall address with respect to each affected employee. Back wages in the total amount of **\$185,247.81** are due as follows:

### **Swarna Latha Dheeravath**

The LCA prepared for this employee identifies the work location as Schaumburg, IL, but the employee worked in **Birmingham, AL**, where the prevailing wage ("PW") was \$53,248.00 for a level II programmer, or \$145.88 per day. Respondents' records show that the employee was paid nothing for the months of September and October, 2006 (AX-13), which is somewhat consistent with the recollection of the employee (see, AX-1, tab A). \$3,500.00 was paid in each of the next two months<sup>9</sup>. I vacate the Administrator's pro-rated calculations, and find that this employee is due back wages in the amount of **\$10,797.36** ( $145.88 \times 30 + 145.88 \times 31 + 145.88 \times 30 - 3,500.00 + 145.88 \times 31 - 3,500.00$ ).

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<sup>8</sup> I note that the pro rated amounts are probably not accurate in any event, because the Administrator used a monthly wage rate by dividing the annual prevailing wage by twelve. This obviously would not give an accurate daily wage, as the number of days in each month is variable.

<sup>9</sup> Form W-2 for 2006 confirms that this employee earned a total of \$7,000.00. RX-7.

## Harshal Doshi

W-2 for 2006 reflects that this employee was paid \$12,000.00 in wages and W-2 for 2007 reflects wages of \$48,000.00. RX-8. This is consistent with payroll records. AX-13. The LCA prepared for this employee identifies the work location as Houston, TX, but the employee worked in locations with higher prevailing wage rates. From 05/06 through 06/06, the employee worked in **Los Angeles, CA**, where the prevailing wage was \$59,883.00 or \$164.06 per day. I reject the pro-rated calculation of back wages for 5/06, as the LCA identifies the work need start date as 6/23/05 (AX-2, tab B), and there is no record evidence regarding the employee's voluntary unavailability for work. I credit the employee's statement that he was always available for work, and had not voluntarily excluded himself from assignments. AX-2, tab A. \$1,085.86 is due for 5/06 ( $\$164.06 \times 31$  days (-)  $\$4,000.00$  in earnings). I find an additional \$4,921.80 is due for 6/06 ( $\$164.06 \times 30$ ), as records reflect no payment was made<sup>10</sup>. AX-13. \$5,085.86 is due for 07/06 ( $\$164.06 \times 31$ ), where no payment was made. The records reflect that the employee next worked in **Charlotte, NC** beginning on 8/21/06. No wages were paid in 8/06. I therefore find it appropriate to calculate back wages on a pro-rata basis at the Los Angeles rate for the first 20 days of 8/06, for a total of \$3,281.20 ( $\$164.06 \times 20$ ).

The prevailing wage for **Charlotte, NC** is \$60,445.00 or \$165.63 per day. No wages were paid for work performed from 8/21/06 to 8/31/06, and back wages of \$1821.93 due ( $\$165.63 \times 11$ ). Wages of \$4,000.00 documented paid for 9/06, and back wages of \$968.90 due for that period ( $\$165.63 \times 30$  (-)  $\$4,000.00$ ). No wages paid for 10/06, and back wages of \$5,134.53 are due ( $\$165.63 \times 31$ ). Wages of \$4,000.00 documented paid for 11/06, and back wages of \$968.90 due for that period  $\$165.63 \times 30$  (-)  $\$4,000.00$ ). Although no wages appear to have been paid for 12/06, two wage payments of \$4,000.00 each were on the payroll in 1/07. I attribute one of those to 12/06, and calculate back wages of \$1,134.53 are due ( $\$165.63 \times 31$  (-)  $\$4,000.00$ ). No work was performed during the period from 1/1/07 through 1/28/07, and the employee next performed work in Amherst, MA on 1/29/07. I therefore find it appropriate to pro rate back wages for this period based on the number of days in each location. The prevailing wage for **Amherst, MA** is \$50,856.00 or \$139.33 daily. The employee was paid \$4,000 for 1/07, but should have been paid \$5,055.63 ( $\$165.63 \times 28$  days in NC (+)  $\$139.33 \times 3$  days in MA). Back wages of \$1,055.63 are due for 1/07 ( $\$5,055.63$  (-)  $\$4,000.00$ ).

Wages of \$4,000.00 were paid for 2/07. No back wages are due for this period. ( $\$139.33 \times 28$  (-)  $\$4,000.00$ ) Wages of \$4,000.00 were paid for 3/07. Back wages of \$319.23 are due ( $\$139.33 \times 31$  (-)  $\$4,000.00$ ). Wages of \$4,000 were paid for 4/07. Back wages of \$179.90 are due ( $\$139.33 \times 30$  (-)  $\$4,000.00$ ). Wages of \$4,000.00 were paid for 5/07, when the employee performed no work in Amherst, and partial work in New York, NY. I therefore find it appropriate to pro rate wages for this period based on the number of days in each location. The prevailing wage for **New York, NY** is \$61,235.00 or \$167.77 daily. The employee should have been paid \$4,802.61. ( $\$139.33 \times 14$  days in MA (+)  $\$167.77 \times 17$  days in NY). Back wages of \$802.61 are due for 5/07 ( $\$4,802.61$  (-)  $\$4,000.00$ ).

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<sup>10</sup> This is corroborated by the employee's statement that he was not paid for several months in 2006. AX-2, tab A.

Wages of \$4,000.00 were paid in each of the three months from the period 6/01/07 through 8/31/07. Back wages of \$1,033.10 due for 6/07 (\$167.77 (x) 30 (-) \$4,000.00). Back wages of \$2,401.74 due for 7/07 and 8/07 (\$167.77 (x) 31 (-) \$4,000.00 (x) 2). No wages were paid for 9/07, and therefore back wages of \$5,033.10 are due (\$167.77 (x) 30)<sup>11</sup>. The employee returned to **Charlotte, NC** and began work on 10/15/07. I therefore find it appropriate to pro rate wages for this period based on the number of days in each location. The prevailing wage for **Charlotte, NC** was \$65,083.00 or \$178.31 daily. The employee was paid \$4,000.00 for 10/07, but should have been paid \$5,380.05. (\$167.77 (x) 14 days in NY (+) \$178.31 (x) 17 days in NC). Back wages of \$1,380.05 are due for 10/07 (\$5,380.05 (-) \$4,000.00). Back wages of \$1,349.30 are due for 11/07 (\$178.31 (x) 30 days (-) \$4,000.00). Back wages of \$1,527.61 are due for 12/07 (\$178.31 (x) 31 days (-) \$4,000.00). The employee is due back wages totaling **\$39,485.78**.

### **Venkata Gunna**

Forms W-2 for this employee reflect that he earned wages of \$49,640.00 in 2006, and \$53,600.00 in 2007, which is generally consistent with payroll records. RX-9; AX-13. Employee first worked in **Phoenix, AZ**, where the prevailing wage was \$48,526.00 or \$4,043.83 per month. Because there are no instances where the employee worked in two different locations in any month, I accept the Administrator's use of a monthly prevailing wage when calculating back wages. Wages of \$3,200 were paid for 9/05 and 10/05 and back wages of \$843.83 are due in each of those months (\$4,043.83 (-) \$3,200.00). Wages of \$4,000.00 were paid for 11/05 and 12/05 and back wages of \$43.83 are due for each of those months (\$4,043.83 (-) \$4,000.00). No payment was made for 1/06 and back wages in the amount of \$4,043.83 are due<sup>12</sup>.

The employee next worked in Los Angeles, CA, where the prevailing wage was \$59,883.00 or \$4,990.25 per month. Wages of \$4,000.00 were paid for 2/06 and back wages of \$990.25 are due (\$4,990.25 (-) \$4,000.00). Wages of \$4,165.00 were paid for each of the eleven months comprising the period from 3/06 through 1/07. Back wages of \$825.25 are due for each of those months, for a total of \$9,077.75 (\$4,990.25 (-) \$4,165.00 (x) 11). In February, 2007, wages of \$4,500.00 were paid and back wages of \$490.25 are due (\$4,990.25 (-) \$4,500.00). Wages of \$3,935.00 were paid in 3/07 and back wages of \$1,055.25 are due (\$4,990.25 (-) \$3,935.00). Wages of \$4,200.00 were paid in each of the five months comprising the period from 4/1/07 through 8/31/07. Back wages of \$790.25 are due in each month, or \$3,951.25 (\$4,990.25 (-) \$4,200.00 (x) 5). Wages of \$5,000.00 were paid in each of the four months of the period from 9/1/07 through 12/31/07. No back wages are due for this period. Total back wages of **\$21,383.90** are due.

### **Venkatesh Inturi**

Forms W-2 for this employee shows that he was paid wages of \$8,000.00 in 2006 and \$20,000.00 in 2007, which is generally consistent with Respondents' payroll records. RX-10; AX-13. This employee worked from 11/06 through 5/31/07 in **Burlingame, CA**, where the

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<sup>11</sup> The Administrator did not calculate back wages for this period, but communications with the employee did not indicate that he had chosen to voluntarily be non-productive. See, AX-15.

<sup>12</sup> The Administrator did not calculate back wages for this period, but communications with the employee did not indicate that he had voluntarily been non-productive during this time.

prevailing wage was \$70,741.00 (\$5,895.08 per month). There are no instances where the employee worked in different locations in the same month, and I therefore accept the Administrator's use of a monthly prevailing wage for purposes of calculating back wages. Because the LCA for this individual notes a start date of 5/31/05, I decline to pro-rate his earnings as did the Administrator. Wages of \$4,000.00 were paid for his work in each of the seven months of this period. Back wages of **\$13,265.56** are due (\$5,895.08 (-) \$4,000.00 (x) 7).

### **Venkateswara Kakula**

Forms W-2 for this employee shows wages of \$49,000.00 paid in 2005, and \$24,000.00 in 2006, which generally is consistent with payroll records. RX-11; AX-13. There were no instances of the employee splitting his employment between locations in any month covered by this investigation, and therefore a monthly prevailing wage was used to calculate back wages. He worked from 7/05 through 9/05 in **Louisville, KY**, where the prevailing wage was \$62,421.00 or \$5,201.75 per month. Wages of \$4,000.00 were paid in each month, and back wages of \$3,605.25 are due for that period (\$5,201.75 (-) \$4,000.00 (x) 3).

The employee next worked in **Apple Valley, MN**, where the prevailing wage was \$54,059.00 or \$4,504.91 per month. During the months of 10/05 and 11/05, wages of \$4,000.00 were paid. Back wages of \$1,009.82 are due (\$4,504.91 (-) \$4000.00 (x) 2). Wages of \$5,000.00 per month were then paid in each month during the period from 12/31/05 through 3/31/06, and no back wages are due for that period.

The Administrator has identified the \$5,000.00 wage as an "actual wage". The regulations at 29 C.F.R. § 507.731 mandate that an employer seeking to employ an H-1B non-immigrant shall pay the required wage rate. The employer is required to pay the greater of the actual wage rate or prevailing wage. The actual wage is the amount of wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage rate based on the best information available as of the time of filing the application. 29 C.F.R. § 507.731(a). Where an employer has no similarly qualified employees at the employing facility, the actual wage rate is not available for comparison, and the employer is relegated to basing the wage determination on the "best information available." 29 C.F.R. § 507.731(a)(1) and (2). Section 655.731(a)(1) provides that where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B non-immigrant by the employer. The higher of the prevailing wage rate or the actual wage is referred to by 20 CFR § 655.731(a) as the required wage rate. No back wages are due to this employee in the months in which wages of \$5,000.00 were paid for his work in either Apple Valley, MN or Plymouth, MN, where he was paid more than the prevailing wage.

No wages were paid for the months of 5/06 and 6/06, and back wages of \$10,000.00 are due for those months based on the actual wage. The employee was paid \$4,000.00 for 8/06, and \$1,000.00 in back wages are due, based on the actual wage paid. In addition, no wages were paid for 9/06, and \$5,000.00 is due. I decline to pro-rate the wages in 9/06, as the record is not clear that the employee stopped working on September 9, 2006 of his own accord. Back wages in the amount of **\$20,615.07** are due.

## Susan Katuri

Forms W-2 for this employee show wages of \$36,000.00 in 2006 and \$28,000.00 in 2007, which is confirmed by Respondents' payroll records. RX-12; AX-13. This employee spent some portion of some months in different locations, and I therefore find it appropriate to calculate back wages on the basis of a daily prevailing wage. She first worked in **Des Moines, IA**, where the prevailing wage is \$49,109.00 or \$134.54 per day. Wages of \$4,000.00 were paid in each of the four months she worked in Des Moines. Back wages of \$36.20 are due for 4/06 (\$134.54 (x) 30 (-) \$4,000.00); back wages of \$170.74 are due for 5/06 (\$134.54 (x) 35 (-) \$4,000.00); back wages of \$36.20 are due for 6/06 (\$134.54 (x) 30 (-) \$4,000.00); back wages of \$170.74 are due for 7/06 (\$134.54 (x) 35 (-) \$4,000.00)<sup>13</sup> for a total of \$413.88 for this period.

The employee next worked in **San Diego, CA**, where the prevailing wage was \$63,627.00 per year or \$174.32 per day. She began work at that location on 8/14/06, and I therefore find it appropriate to pro rate back wages for this period based on the number of days in each location. The employee was paid \$4,000 for 8/06, but should have been paid \$4,886.78. (\$134.54 (x) 13 days in IA (+) \$174.32 (x) 18 days in CA). Therefore, back wages of \$886.78 are due for 8/06.

The employee was paid wages of \$4,000.00 in each of the eleven months comprising the period from 9/06 through 7/07. Back wages are due for each of those months based upon \$174.32 (x) the days in the month (-) \$4,000.00: 9/06 = 1229.60; 10/06 = \$1403.92; 11/06 = \$1229.60; 12/06 = \$1403.92; 1/07 = \$1403.92; 2/07 = \$880.96; 3/07 = \$1403.92; 4/07 = \$1229.60; 5/07 = \$1403.92; 6/07 = \$1229.60; 7/07 = \$1403.92, for a total of \$6,496.64 for this period. Total wages of **\$15,523.54** are due.

## Manoj Koduri

Forms W-2 for this employee reflect wages of \$44,290.00 in 2005, \$48,450.00 in 2006, and \$54,660.00 in 2007. RX-13. These amounts are consistent with payroll records. AX-13. This employee worked in one location only, Houston, TX, and I find it appropriate to rely upon the monthly average of prevailing wage used by the Administrator, based upon the prevailing wage of \$61,454.00 (\$5,122.00 per month). Wages of \$4,165.00 were paid for 4/06 and back wages of \$957.00 are due for this period (\$5,122.00 (-) \$4125.00)<sup>14</sup>. Wages of \$4165.00 paid for the period 5/1/06 to 5/31/06 and back wages of \$957.00 calculated based on PW (-) wages. Wages of \$3,400.00 paid for 6/1/06 to 6/30/06 and back wages of \$1,722.00 were calculated based upon the difference between the PW and wages paid. In each of the ten months comprising the period from 7/1/06 through 4/30/07, \$4,165.00 in wages were paid, with \$957.00 in back wages calculated based upon PW (-) wages, for a total of \$9,570.00. In each month in the period from 5/1/07 through 7/31/07, \$4,500.00 was paid in wages, and back wages of \$622.00 calculated for each month based upon PW (-) wages for a total of \$1,866.00. Back wages of \$561.81 for the period 8/1/07 through 8/28/07 were calculated based upon 28 out of 31 days (x) PW (-) 28 out of 31 days (x) wages, because of new LCA effective 8/29/07, setting the prevailing wage at \$63,400.00 (\$5,286.66 per month).

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<sup>13</sup> I rejected the investigator's pro rata calculation based on the actual days worked.

<sup>14</sup> I reject the Administrator's pro rata calculation based on the number of days apparently worked in this month.

Back wages for the period 8/29/07 through 8/31/07 of \$76.31 based upon 3 out of 31 days (x) PW (-) 3 out of 31 days (x) wages (\$4,500.00). \$4,500.00 in wages paid for period 9/1/07 through 9/20/07, and back wages of \$786.66 calculated on basis of PW (-) wages paid. Wages of \$5,000.00 paid in each of the three months comprising the period from 10/1/07 through 12/31/07, with back wages of \$286.66 per month calculated based upon PW (-) wages paid, for total in that period of \$859.98. Total back wages of **\$17,356.76** are due.

### **Shilpa Komiresetty**

Forms W-2 for this employee show earnings of \$12,000.00 for 2006 and \$4,000.00 for 2007. RX-6. Although Respondents' reconstructed pay documentation and the employee's testimony suggests that a check was voided, there is no explanation for the issuance of a W-2 showing wages of \$4,000.00. I accord weight to this document as the best evidence that the employee was paid that amount of wages for the only month she worked in 2007 for Respondents. This employee worked in one location, and I therefore accept the Administrator's use of a monthly average of the prevailing wage to calculate back wages. Prevailing wage for **Sunnyvale, CA**, was \$76,211.00 (\$6,350.91 per month). I accord weight to the Administrators' pro-rated calculation for the month of 8/06, because the employee was voluntarily in non productive status, having refused an assignment to Rochester, New York. See, AX-8; Tr. at 269-70; 297; 317-18; 323. No wages paid for period 8/21/06 through 8/31/06, and back wages of \$2,253.55 calculated based upon 11 out of 31 days (x) PW. \$3,500.00 in wages paid in each of the two months comprising the period from 9/1/06 through 10/31/06 and back wages of \$2,850.91 calculated in each month, for a total of \$5,701.82. No wages were paid for 11/06, and back wages of \$6,350.91 were calculated at PW. Wages of \$5,000.00 were paid for 12/06 and back wages of \$1,350.91 were calculated at difference between PW and wages paid. Wages of \$4,000.00 were paid for 1/07, and back wages of \$2,350.91 are due (\$6,350.91 (-) \$4,000.00). Total back wages of **\$18,008.10** are due.

### **Ramesh Kondru**

W-2 forms reflect wages of \$44,000.00 in 2005; \$48,000.00 in 2006; and \$60,000.00 in 2007. RX-14; RX-15. There are no instances where this employee worked in different locations in any month, and I therefore accept the Administrator's use of a monthly average of the prevailing wage. He worked in **Lake Forest, CA**, from 7/05 through 9/06. The prevailing wage was \$58,178.00 (\$4,848.16 per month). Wages of \$4,000.00 were paid in each of the fourteen months comprising the period from 7/1/05 through 9/30/06, with back wages of \$848.16 calculated for each month based upon the difference between PW and wages, for a total of \$11,874.24. Although W2 for 2005 reflects payments of \$44,000.00, the back wage calculations are based upon information from payroll for the period covered by the Administrator's investigation.

The employee then worked in Glendale, CA, where the prevailing wage was \$57,990.00 (\$4,832.50 per month). Wages of \$4,000.00 were paid in each of the four months comprising the period from 10/1/06 through 1/31/07, with back wages of \$832.50 calculated for each month based upon the difference between PW and wages, for a total of \$3,330.00. Wages of \$5,000.00 per month were paid in each of the five months comprising the period from 2/1/07 through

6/30/07, with no back wages due. In addition, no back wages are due for period of employment in Phoenix, AZ, because the employee was paid more than the prevailing wage. Total back wages of **\$15,204.24** are due.

### **Lavanya Selvaraj**

W2 for 2007 reflects that this employee was paid \$11,250.00 in 2007, which is consistent with Respondents' payroll. RX-16; AX-13. This employee worked only in **Cambridge, MA**, and I therefore accept the Administrator's use of an average monthly prevailing wage. The prevailing wage was \$68,058 (\$5,671.50 per month). Wages of \$3,500.00 were paid for 12/06 and back wages of \$2,171.50 were calculated based on difference between PW and wages. Back wages of \$5,671.50 are due for the period 1/1/07 to 1/31/07 due to a voided pay check. Wages of \$3,750.00 were paid in each of the three months comprising the period from 1/1/07 to 3/31/07, and back wages of \$1,921.50 are due for each month, for a total of \$5,764.50. Total back wages of **\$13,607.50** are due.

### **3. Respondents misrepresented material facts on Labor Condition Applications; failed to maintain records and make them available for inspection as required by the Act; and failed to file LCAs for all work sites where non-immigrant employees were expected to perform work.**

It is undisputed that Respondents failed to file accurate and valid LCAs for all employees for all job locations where employees worked. Upon certification of an LCA, the regulations impose on the employer the responsibility of developing and maintaining "sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its labor condition application and the accuracy of information provided in the event that such statement or information is challenged." 20 CFR § 655.710(c)(4). "DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application." 20 CFR § 655.740(c). Because the burden of proof is on the employer to establish the truthfulness of the information, 20 CFR § 655.740(c), the burden is one of production rather than persuasion.

The uncontradicted evidence establishes that the LCAs prepared by Mr. Potini on behalf of Lambents did not contain accurate information regarding prevailing wages. In many cases, the prevailing wage stated on the LCA bears no relationship between the required prevailing wage and the geographic site of the work performed. See, AX-1 through AX-10. The LCAs also note SESA as the source, but Potini admitted that he used wages reported on previously filed LCAs, and did not actually attempt to correlate the qualifications of workers with the needs of the intended work. Tr. at 206. I decline to give merit to Respondents' claim of ignorance of the law and regulations pertaining to the H-1B visa process. Respondents' entire business consists of procuring employees through the process and providing non-immigrant workers to various clients.

I find that the prevailing wage and the source of the wage are material facts that were misrepresented by Respondents. I am unable to conclude that Respondents misrepresented a material fact when identifying locations of work. I fully credit Mr. Potini's explanation that he needed workers to fill short-term contracts that were available at the time he filed the LCAs but no longer available when the employees' visas were finally approved and they were available for work. Tr. 208. However, Respondents failed to amend existing LCAs to reflect the actual location of employees and the correct corresponding wage rate. I have found, and I reiterate, that Respondents have not met the requirements for the short-term placement provisions set forth at 20 C.F.R. §655.735. Therefore, they were not relieved of the responsibility to file LCAs for every work location. 20 C.F.R. § 655.731(a)(2)(viii); § 655.730 and § 655.735. The record establishes that Respondents failed to file LCAs for each geographic location occupied by Lambents' employees.

It is clear that Respondents failed to retain all documents required for inspection in violation of 20 C.F.R. § 655.760(a) and (c). Mr. Murray credibly testified that he had difficulty extracting information from Respondents, and the documentary evidence supports his contention that some records were reconstructed by Respondents, and some were not available. I also find that Respondents were in violation of § 655.805(a), based upon Respondents' failure to retain documentation required by section 655.760(a)(4). This documentation includes the wage data relied upon to establish the prevailing wage for the occupation in which the H1-B worker was sought, as I find that the prevailing wage data is "required wage information" under subsection (c). The Act provides for the imposition of penalties when there was a "substantial failure" to maintain documentation. 8 U.S.C. § 1182(n)(1)(D) and (n)(2)(C). The Administrator did not assess penalties against Respondents for their failure to make records available, and I concur with that determination.

#### **4. Failure to provide notice of filing of LCAs**

The notice requirement of an LCA mandates that employers post notice of their intent to hire non-immigrant workers. Under 20 C.F.R. § 655.805(a)(5), an H-1B employer must provide notice of the filing of an LCA. See also 20 C.F.R. § 655.734. The employer must provide such notice in one of the two following manners. "A hard copy notice of the filing of the LCA may be posted in at least two conspicuous locations at each place of employment where any H-1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity)". 20 C.F.R. § 655.734(a)(1)(ii)(A). Alternatively, "electronic notice of the filing of the LCA may be posted by providing electronic notification to employees in the occupational classification (including both employees of the H-1B employer and employees of another person or entity which owns or operates the place of employment) for which H-1B non-immigrants are sought, at each place of employment where any H-1B nonimmigrant will be employed." 20 C.F.R. § 655.734(a)(1)(ii)(B).

In addition, "the employer shall, no later than the date the H-1B nonimmigrant reports to work at the place of employment, provide the H-1B non-immigrant with a copy of the LCA certified by ETA and signed by the employer (or by the employer's authorized agent or representative)." 20 C.F.R. § 655.734(a)(3). The notice shall indicate "that H-1B non-immigrants are sought; the number of such non-immigrants the employer is seeking; the

occupational classification; the wages offered; the period of employment; the location(s) at which the H-1B non-immigrants will be employed; and that the LCA is available for public inspection at the H-1B employer's principal place of business in the U.S. or at the worksite." 20 C.F.R. § 655.734(a)(1)(ii). Notification must be given on or within 30 days before the date the LCA is filed and should remain posted or available for a total of 10 days. 20 C.F.R. § 655.734(a)(1)(ii)(A)(3) and (a)(1)(ii)(B).

I credit Mr. Murray's testimony that he did not observe any notice of LCA filings at Respondents' principal place of business or at worksites. Tr. at 124. Potini testified that he posts LCAs at his office, and advises his clients to post at the job sites, but he believed that his consultants did not take that seriously. Tr. at 239. He admitted that he did not send notice to client locations. Tr. at 240. The lack of filing of notice is corroborated by Respondents' attempts in 2007 to have employees post LCAs at their geographic worksite. Tr. 124. Respondents' written closing argument merely states that Respondent was not aware that the company was required to post notice at the place of employment, and asks for reconsideration of the penalty imposed by the Administrator for this violation. Penalties were assessed against Respondents at the rate of \$500.00 per 27 LCAs, reduced by 10% for a total of \$12,150.00. Tr. at 123.

Accordingly, I find that Respondents did not provide notice of the intent to hire non-immigrant workers in violation of 20 C.F.R. § 734(a)(1). I note parenthetically that even if notice had been made as required, the notice would have been of little usefulness, since the LCAs that Respondents prepared bore little relationship to the actual job locations where employees worked.

## **5. Willfulness of Misrepresentations**

The filing of an LCA by an Employer which misrepresents a material fact is a violation of the Act. 20 C.F.R. § 655.805(a)(1) (noting that Federal criminal statutes provide penalties of up to \$10,000 and/or imprisonment of up to five years for knowing and willful submission of false statements to the Federal Government). "Upon determination that an Employer has made a willful misrepresentation of a material fact on the LCA, a civil money penalty may be imposed that is not to exceed \$5,000 per violation." 20 C.F.R. § 655.810(b)(2)(ii). Willful failure is defined by 20 C.F.R. § 655.805(c) as "a knowing failure or a reckless disregard with respect to whether the conduct was contrary to the Act."

An employer must attest on the LCA that it will pay the H-1B non-immigrant the required wage. The Administrator found that Respondents willfully misrepresented material facts on LCAs by misrepresenting the place of intended employment; by misrepresenting the prevailing wage rate; and by misnaming the specific source relied upon to determine the wage. The Administrator assessed civil money penalties in the amount of \$60,750.00 and ordered Respondents to file corrected LCAs and maintain future compliance with the regulations.

I have found that the evidence does not establish that Respondents did not have work at the locations named in LCAs. Further, although Respondents were unable to establish that the employees at issue met the requirements for “short-term placement” employees, I have accorded weight to Mr. Potini’s testimony that he believed he did not have to file new LCAs for employees who were performing work on brief assignments. Although I have found that Respondents misrepresented facts, I find that the evidence is insufficient to establish willfulness. Respondents’ familiarity with short-term placement regulations, although flawed, suggests negligence more than willful disregard. Accordingly, I find that a penalty for Respondents’ failure to name accurate work locations is not warranted.

Respondents’ rationale for using the prevailing wages reported on LCAs that they filed was variable and not in any way consistent with the regulatory intent. Respondents input information randomly, or in the alternative, relied upon wage determinations reported in previously approved LCAs. Respondents listed prevailing wages that did not correspond to the geographical location of employees, and that did not correspond to the type of work that the employees were expected to perform. Although Mr. Potini testified that he is not a lawyer and did not seek legal counsel, the LCAs under investigation were not the first that he filed. In addition, his company’s business was to provide H-1B non-immigrant workers to clients in the United States. A firm specializing in recruiting non-immigrant workers under the H-1B program should have had knowledge of the prevailing regulations. The evidence is clear that Respondents gave little regard to complying with regulatory requirements. Hence, I find Respondents’ misrepresentation on the LCAs were knowing, willful, and designed solely for the purpose of fraudulently circumventing required wage requirements. Civil money penalties are appropriate.

## **6. Willful Failure to Pay Required Wages**

The role of DOL in approving the LCAs is administrative, and is limited to a determination that the LCA is complete and “not obviously inaccurate.” 29 C.F.R. § 507.740(a)(1). DOL makes no determinations as to whether or not the stated wage rate is the appropriate one for the stated occupation. *Id.* A representation to this effect is made on the face of the LCA. The employer is the ultimate attestor of the truth of the information reported on the LCA. Certification of the LCA by the ETA does not warrant that reported information is correct. 29 C.F.R. § 507.740(c). It is for this reason that the LCA requires the applicant to sign a Declaration under penalty of perjury that the information on the LCA is correct and true. The representations on the LCA regarding wages are meant to provide a clear understanding to all employees of the terms of employment permitted by the grant of an H-1B specialty visa for a particular non-immigrant employee to work in a stated occupation for a specific time for compensation similar to that paid to qualified employees in the employer’s workforce.

I find that Respondents exercised reckless disregard for the responsibility to identify the appropriate prevailing wage for employees involved in the Administrator’s investigation. Respondents did not make a good faith effort to file accurate LCAs, despite attesting that the information contained therein was accurate. The record establishes that Respondents made no attempt to correlate the prevailing wage with the occupational and geographical requirements of an appropriate source. The wage determinations listed by Respondents constitute more than

errors or inaccuracies, as they were randomly selected and reported. I find that civil money penalties are appropriate for this blatant violation of the basic tenets underlying the H-1B visa program.

## 7. Civil Money Penalties and Debarment

The Administrator “may” assess civil monetary penalties up to \$1,000 for non-willful violations and up to \$5,000 for willful violations of the INA. 8 U.S.C. § 1182(n)(2)(C)(i)-(ii); 20 C.F.R. § 655.810(b)(1)-(2)(i)-(iii). “Seven factors may be considered in determining the amount of a monetary penalty: previous history of violations by the employer; the number of workers affected; the gravity of the violations; the employer’s good faith efforts to comply; the employer’s explanation; the employer’s commitment to future compliance; the employer’s financial gain due to the violations; or potential financial loss, injury or adverse effect to others.” 20 C.F.R. § 655.810(c). In addition, the statute at 8 U.S.C. 1182(n)(2)(C) provides that civil monetary penalties are to be assessed for a failure to post LCAs only if the failure is found to be a substantial violation of the requirement.

The ALJ’s authority to review the Administrator’s assessment specifically includes a determination of the appropriateness of a civil penalty. See Administrator, Wage and Hour Division v. Law Offices of Anil Shaw, 2003-LCA-20 (ALJ May 19, 2004) (citing Administrator v. Chrislin, Inc., 2002 WL 31751948 (DOL Adm. Rev. Bd.)).

The Administrator assessed \$60,750.00 in civil money penalties for willful misrepresentation of a material fact on the LCA. AX-19. Investigator Murray computed the penalty of \$2,500.00 for 27 LCAs that misrepresented material facts, and discounted the total by ten percent because of Lambents’ small size. Tr. at 122-123. I find that the Administrator’s calculation of penalties for these violations is appropriate. In the instant circumstances, it is clear that Respondents recklessly ignored regulatory mandates regarding determining wages, paying wages, and posting notice. Respondents recklessly provided inaccurate information on LCAs without an appropriate source. Respondents misrepresented wage determination rates and misidentified geographic locations of intended work. Respondents made little effort to comply with the regulatory scheme, and accordingly I find that Respondents are liable for a civil money penalty in the amount of **\$60,750.00** for violations of 20 C.F.R. § 655.730. Additionally, I find it appropriate to Order Respondents to file amended LCAs that reflect the appropriate locations, wage determination, and source information.

The Administrator assessed civil money penalties in the amount of \$22,500.00 for violations related to failure to pay required wages. AX-19. Investigator Murray testified that he assessed a penalty of \$2,500.00 per employee, but reduced the total by 10 percent because of Lambents’ small size. Tr. at 121. I find that the circumstances warrant civil money penalties. However, because Respondents made payments to employees that were not treated as wages, with the complicity of the employees, I find it appropriate to reduce the civil money penalties by half. Both Respondents and the employees benefited from the classification of some wages as 1099 income because appropriate deductions from wages were not made. Although Respondents declined to correct the payroll by amending tax returns to reflect accurate payments, there is no evidence that Respondents could have accomplished this without the agreement of the

employees. In addition, the evidence from employee statements reflect that they were paid in accordance with an agreement with Respondents, and a later reclassification of their pay could be construed as breach of contract. Accordingly, I find it appropriate to reduce the assessed civil money penalties by half, and therefore, Respondents are liable for penalties in the amount of **\$11,250.00** for violations of 20 C.F.R. § 655.805(a)(2).

Although Respondents consistently failed to file notice, I find that the assessment of civil monetary penalties for this violation is not warranted. There is no evidence that the Respondent has a history of prior violations, and the Respondent achieved no financial gain through its failure to post notices at its client's business locations. Although I have found that Respondents did not meet the criteria for short-term placement, Respondents' belief that it might qualify for that status is entitled to some weight, considering the brevity of most of the employees' assignments. I find that there was no injury or adverse effect on any party by the failure to post. The nature of the short assignments suggests that American workers would not be significantly affected, and only one employee was posted at each location. In addition, the employees themselves consented to be paid in a manner inconsistent with the regulatory scheme, and in some instances earned in excess of the prevailing wage, although Respondents may not be credited with the payments made outside of regular payroll. In addition, the record reflects that Respondents have taken steps to correct its notice deficiencies.

I further find that an assessment of civil money penalties for a violation of 20 C.F.R. § 655.734 would excessively punish Respondents. The regulations mandate that the Department of Homeland Security (DHS) shall invalidate any current LCAs held by employers who make willful misrepresentations of a material fact on LCAs; who willfully fail to pay required wages; and who substantially fail to post notices of LCA filings. In addition, DHS' invalidation includes rejection of future LCAs for a period determined by DHS. 8 U.S.C. § 1154 and § 1184(c); 20 C.F.R. § 655.855(a), (c) and (d). Considering the size of The Lambents' Group, their attempt to correct LCA deficiencies, and the amount of civil money penalties assessed for willful violations of the Act and regulations, I find that the Administrator's assessment of \$12,150.00 in penalties for violations of 20 C.F.R. § 655.734 is unwarranted.

**8. Whether Respondent Venkat Potini is individually liable for back wages and civil money penalties due to Lambents' violation of the Act.**

The Administrator named Venkat Potini individually liable for back wages and penalties relating to Lambents' violations of the Act. AX-19. The Administrator argues that Potini is the alter ego of the Lambents Group and therefore had an employment relationship with the H-1B employees covered by the Administrator's investigation. The definition of "employer" includes "the *person*...which files a petition on behalf of an H-1B non-immigrant..." 20 C.F.R. § 655.715. Mr. Potini does not become the liable employer simply because he signed the LCAs and H-1B petitions for the employees affected by Respondents' violations of the Act. All of the documentation supporting the H-1B visa applications identified The Lambents Group as the employer and all were clearly signed by Potini in his capacity as an officer of the company rather than in his personal capacity. (AX-1 through AX-10). The evidence does not establish that Potini recruited the H-1B non-immigrants in a personal capacity, and I find that personal liability cannot be attached to him solely upon the definition of *employer* found at 20 C.F.R. § 655.715.

Mr. Potini can be found responsible for the obligations of Lambents only if he can be found to have been the “alter ego” of the company. If the evidence demonstrates that “the corporate veil was pierced” because of the actions of Mr. Potini, then, ipso facto, Potini stands in the same stead as The Lambents Group, and may be held responsible for the compensation due to the employees and the civil money penalty assessed by the Administrator.

Under the Act, the corporate veil can be pierced where appropriate. U.S. Dep’t of Labor v. Kutty, ARB No. 03-022, 2005 WL 1359123 (May 31, 2005). In that case, the Administrative Review Board (“ARB”) affirmed the Decision of an ALJ who relied upon Tennessee law and concluded that it was appropriate to pierce the corporate veil so that an individual could be held personally liable for back wages and civil money penalties. Kutty, slip op. at 18-19, (citing Administrator, Wage & Hour Division v. Kutty, ALJ Nos. 2001-LCA-00010 to -00025, slip op. at 101 (Oct. 9, 2002)). Federal statutes do not preempt state corporation law unless specifically provided. United States v. Bestfoods, Inc., 524 U.S. 51, 63 (1998). There is no provision in the Act establishing preemption of State law. See Kutty, ARB slip op. at 17 n. 14. The Lambents Group is headquartered in New York, and therefore, the law of that state applies to this question.

New York state law does not establish firm guidelines that identify the circumstances that would pierce the corporate veil, but generally requires a plaintiff to show that the owner of a corporation exercised complete domination over the corporation in respect to the transaction at issue. Morris v. N.Y. State Dep’t of Taxation & Finance, 82 N.Y.2d 135, 141 (1993). Further, it must be proved that the owner’s complete domination was used to commit a fraud or wrong resulting in an injury to the plaintiff. Walkovszky v. Carlton, 18 N.Y.2d 414, 418 (1966); Morris, supra.

In examining this question, courts have looked at the totality of the situation and examined the individual’s relationship to the operation of the corporation. Morris, supra. at 142. Some of the circumstances that courts have considered in determining whether or not “complete domination” exists include whether the corporation is adequately capitalized; whether corporate formalities are observed; whether the party to be held personally liable used corporate assets for her own purposes; whether a fraud has been perpetrated on the party seeking to pierce the veil; and whether assets have been transferred out of the corporation after the alleged injury occurred. See American Fuel Corp. v. Utah Energy Development Co., 122 F.3d 130, 134 (2d Cir. 1997) (listing possible factors showing domination); (discussing inadequate capitalization and shell corporations). The opinions of record make it clear that no one factor on its own establishes the element of “complete domination”.

The record establishes that Venkat Potini is the owner and President of The Lambents Group. AX-20; Tr. 77; 120-121; 202; 244-245; 169. Mr. Potini controlled the day to day operation of the firm and prepared and signed all of the LCAs at issue in the instant adjudication. AX-1 through AX-10; AX-11; AX-12; AX-16; Tr. 54-58; 63-64; 121; 202; 204; 215; 221; 235; 244-245; 252. Mr. Potini personally selected the wage rates listed in the LCAs and made the decision to pay the non-immigrant employees both wages and income reported on 1099s. Tr. 56; 59-60; 96-97; 103-104; 179. Mr. Potini was responsible for hiring non-immigrants and for

terminating their employment and canceling their H-1B visas. AX-1 through AX-10. Respondents have not identified any other employee responsible for the decisions that led to the violations of the Act uncovered in the Administrator's investigation. Employees were not paid proper wages, and therefore suffered harm as the result of Potini's actions.

I find that the circumstances underlying Respondents' actions with respect to filing LCAs are similar to those noted by the ARB in its Decision and Order in the Kutty matter. The ARB found that Kutty was personally liable for back wages and civil money penalties because he was the sole owner, made all decisions on behalf of the corporations, and exercised sole control over the corporate entities that submitted LCAs. Kutty, supra. The evidence demonstrates that the corporate veil has been pierced, and that Venkat Potini is an "alter ego" of The Lambents Group. Accordingly, I find that Venkat Potini is individually and personally liable jointly with The Lambents' Group to pay the back wages and civil money penalty pursuant to this Decision and Order.

### III. CONCLUSION

For the foregoing reasons, I affirm the Administrator's determination that The Lambents Group willfully failed to pay required wages to H-1B non-immigrants in violation of 8 U.S.C. § 1182(n)(1)(A) and 20 C.F.R. § 655.731(c). In addition, I find that Respondents willfully made misrepresentations of material fact on LCAs in violation of 10 C.F.R. § 655.730. See, 20 C.F.R. § 655.805(a)(1). Respondents failed to provide notice of the filing of LCAs in violation of 20 C.F.R. § 655.734. Respondents failed to make available for public examination the LCA and necessary documents in violation of 20 C.F.R. § 655.760(a). See, 20 C.F.R. § 655.805(a)(14). Respondents also failed to establish working conditions by filing LCAs for all worksites of employees in violation of 20 C.F.R. § 655.730 and § 655/735. See, 20 C.F.R. § 655.805(a)(16).

I affirm the Administrator's assessment of back wages, although I have recalculated the amount due for the reasons set forth, infra. I find that Respondents are liable to pay back wages in the total amount of **\$185,247.81**. I further affirm Respondent's assessment of civil money penalties, although I have reduced the amount assessed to **\$72,000.00**. I also find that Venkat Potini is an alter ego of The Lambents Group, and is individually and personally liable, jointly with The Lambents Group, to pay the back wages and penalties.

### ORDER

**IT IS HEREBY ORDERED** that:

1. Respondents The Lambents Group and Venkat Potini shall pay the stated back wages in the total amount of **\$185,247.81** to the following employees, pursuant to the instructions set forth in the Administrator's Determination letter dated July 1, 2008:

**Swarna Latha Dheeravath (\$10,797.36)**

**Harshal Doshi (\$39,485.78)**

**Venkata Gunna (\$21,383.90)**

**Venkatesh Inturi (\$13,265.56)**  
**Venkateswara Kakula (\$20,615.07)**  
**Susan Katuri (\$15,523.54)**  
**Manoj Koduri (\$17,356.76)**  
**Shilpa Komiresetty (\$18,008.10)**  
**Ramesh Kondru (\$15,204.24)**  
**Lavanya Selvaraj (\$13,607.50)**

2. Respondents The Lambents Group and Venkat Potini shall pay civil money penalties to the United States Department of Labor in the amount of **\$72,000.00** pursuant to the instructions set forth in the Administrator's Determination letter of July 1, 2008.
3. Respondents shall pay prejudgment compound interest on the award of accrued back wages at the applicable rate of interest which shall be calculated by the in accordance with 26 U.S.C. § 6621.
4. Respondents shall be assessed post judgment interest under 26 U.S.C. § 6621 until satisfaction.
5. The Administrator, Wage and Hour Division, Employment Standards Division, U.S. Department of Labor, shall forthwith 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, which calculations, however, shall not delay Respondents' obligation to make immediate payment of back wages and civil money penalties.
6. This Decision and Order shall supersede the Administrator's findings regarding the amount of back wages and civil money penalties due.

**A**

Janice K. Bullard  
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite 5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

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

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