

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

ALJ Case No: 2009-LCA-00019

ADMINISTRATOR, WAGE & HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR
Prosecuting Party

v.

LAW OFFICES OF SERGIO VILLAVERDE, PLLC
Respondent

Before: Jonathan C. Calianos, Administrative Law Judge

Appearances:

Darren Cohen, Esq., (U.S. Department of Labor, Office of the Solicitor)
New York, NY for Prosecuting Party

Karen D. Steinberg, Esq. (Law Office of Karen D. Steinberg)
New York, NY for the Respondent

DECISION AND ORDER

I. Procedural Background

This case arises from a request for hearing filed by the Law Offices Of Sergio Villaverde, PLLC (“Villaverde” or “Respondent”), which involves the enforcement of an H-1B Labor Condition Application by the Administrator, Wage & Hour Division, United States Department

of Labor (“Administrator” or “Prosecuting Party”) under section 212(n) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1101(a)(15)(H)(I)(b) and § 1182(n), and the regulations promulgated there under at 20 C.F.R. Part 655, Subparts H and I, 20 C.F.R. § 655.700 *et seq.* On February 13, 2009, the Administrator found that Villaverde failed to pay required wages to an H-1B employee, Balarama Manchala (“Manchala”) pursuant to 20 C.F.R. § 655.731. The Administrator also found the Villaverde failed to maintain documentation as required by 20 C.F.R. § 655.731(b). The Administrator determined that Villaverde owed back wages to Manchala totaling \$47,810.00, and in addition to ordering payment of the back wages, it assessed a civil penalty of \$2,250.00 because it found Villaverde’s conduct to be willful. *See* 8 U.S.C. § 1182(n)(2)(C)(ii); 20 C.F.R. § 655.810(b)(2). Villaverde was also debarred for a period of two years from participating in the H-1B program. *See* 20 C.F.R. § 655.855(c).

On March 12, 2009, Villaverde filed a request for hearing to review the Administrator’s determinations. *See* 20 C.F.R. § 655.820. On August 17, 2009, I conducted an evidentiary hearing in New York, New York pursuant to 20 C.F.R §§ 655.825 & 655.835. At the hearing, the official papers in the file were marked as ALJX 1-16, and all were admitted as full exhibits with the exception of ALJX-13 which was marked for identification only. The Administrator marked 14 exhibits as AX- 1-14 and all were admitted as full except AX-13.¹ Villaverde marked four exhibits, RX 1-4 and all were admitted as full with the exception of RX-3. The parties have filed post hearing briefs and the record is now closed. For the reasons set forth below, I find that Villaverde owes back wages to Mr. Manchala totaling \$31,954.00 for H-1B employment commencing January 1, 2004 and ending on June 30, 2006. I also find that Villaverde’s failure to pay the required wage under the Act was willful, and a civil penalty in the amount of \$2,250

¹ While I admitted AX-1 as a full exhibit, I ordered stricken from the exhibit three pages containing ESA Form WH-4. *See* Transcript (“TR”) at 136-37.

under 20 C.F.R. § 655.810(b)(2) is warranted along with a debarment from participation in the H-1B program for a period of two years.

II. Factual Background

Balarama Manchala, is an attorney licensed to practice law in India. *See* Transcript (“TR”) at 51. In 2003, he received a law degree from Temple University in Pennsylvania and began applying for jobs with law firms in the United States. *Id.* Sometime in January 2003, Manchala made his first contact with Villaverde to see if there were any openings available. TR at 52. In May 2003, he had an interview with Sergio Villaverde, Esquire the principal of the Respondent. *Id.* At the time of the interview, Attorney Villaverde maintained an office at his home in the Bronx, New York, had been practicing law full time since 2001, and was not actively seeking new employees. TR at 208-209, 213. During the interview, they discussed the H-1B visa program and Manchala explained that he needed an H-1B sponsorship to remain and work in the United States. TR at 53-55. If hired as a legal assistant, Manchala explained that the required salary under the program would be \$36,000 per year. *Id.* Attorney Villaverde said that he felt bad for Manchala and he figured he could use some help in his legal practice so he agreed to hire Manchala as a full time legal assistant at the rate of \$15.80 per hour. TR at 210 & 212.

On June 1, 2003, Manchala began working for Villaverde and Manchala enlisted the help of Ramakrishna Dalagummi, a friend from a New York immigration law firm to assist with the H-1B petition. TR at 57. Mr. Dalagummi completed the petition and presented it to Machala, who in turn gave it to Attorney Villaverde to sign and file. TR at 58 & 210. The H-1B petition was approved and was effective from December 11, 2003 until July 15, 2006. *See* AX-12; TR at 60-62.

Manchala testified that as a legal assistant, he would often go to court for Attorney Villaverde to file papers or inform the court when Attorney Villaverde would be arriving for a particular matter. TR at 62-63. He also stated he made appearances in small claims court and was the main contact for clients. TR at 63. From June 2003 until about September 2004, Manchala worked out of Villaverde's home office in the Bronx. TR at 63-64. After that, Attorney Villaverde relocated his office to Madison Avenue in New York and Manchala worked out of the Madison Avenue office until his resignation on June 30, 2006. *See* TR at 64; AX-7.

Manchala stated that on average, he worked fifty hours per week for Villaverde, and for the initial three months of 2003 (June, July and August) he filled out weekly time sheets and submitted them to Attorney Villaverde. TR at 66, 73-74. After the initial three months, he stopped submitting time sheets because he was working more than eight hours per day and no one asked him to continue the practice. TR at 77-78. Manchala also stated that he occasionally worked as much as 65 hours per week and he never worked less than 40 hours per week for the entire time he was employed by Villaverde, other than his first week of employment. TR at 66-67. According to Manchala, he took time from work on two occasions to study for the New York Bar Exam—a one week period in July 2005 and a four to six week hiatus in February 2006. TR at 91. The only other time he claims to have been absent from work during his three years with Villaverde are ten sick days. TR at 92.

For the initial six to nine months of his employment, Manchala claims that he received net pay of \$1,000 per month. *See* TR at 78; AX-4. In March 2004, his net salary increased to \$1,470 per month and remained at that level until he resigned in 2006. TR at 78-79; AX-2. The W-2 wage statements provided by Villaverde show gross wages of \$12,750 for 2004, \$21,600 for 2005, and \$10,800 for 2006. *See* AX-4, 5, & 6. Manchala claims he was never paid the

prevailing wage as required and contends that Attorney Villaverde led him to believe that any shortfall in salary would be made up in the form of a bonus at year end. TR at 129-130.

III. Position of the Parties

The Administrator contends, that based upon the agreed prevailing wage of \$15.80 per hour, Villaverde failed to pay Manchala wages totaling \$31,954.00 for the period of January 1, 2004 to June 30, 2006. The Administrator allowed Villaverde credit for 8 weeks of time that Manchala did not work while studying for the New York Bar Exam-two weeks in 2005 and four weeks in 2006. Other than those credits, the Administrator contends that Villaverde was required to pay Manchala \$15.80 per hour for full-time employment pursuant to the Labor Condition Application (“LCA”) filed by Villaverde. The Administrator also argues that Villaverde’s failure to pay the required prevailing wage was willful and I should uphold the civil penalty of \$2,250 imposed by the Administrator under 20 C.F.R. § 655.810(b)(2)(ii). In support of a finding of willfulness, it points to the fact that Mr. Villaverde is an attorney who runs a law office that specializes in immigration law. If Manchala’s employment status changed from full time to part time, Villaverde should have known to file a new LCA indicating the change in the H-1B employment. The Administrator posits that Manchala worked full time and Villaverde intentionally profited from paying the lower wage.

Villaverde contends that Manchala was paid the prevailing wage for the hours he actually worked. The office paid Manchala for a work week “of approximately 26.5 hours per week” and “he was often paid for more hours than he actually worked.” Respondent’s Brief at 6. Attorney Villaverde testified that Manchala requested a reduction in his work hours to study for the New York Bar and they both agreed to the reduction. TR at 213. He also stated that Manchala was never asked to start work before 9:30 in the morning and he never worked until midnight on

office work. TR at 215. Attorney Villaverde recalled that Manchala's sat for the New York Bar on four occasions and took time on each occasion to study rather than merely two occasions as Manchala asserts. TR at 218.

IV. Discussion

The H-1B visa program stems from the Immigration and Nationality Act, as amended (the "Act")², and allows employers to hire non-immigrant professionals to work temporarily in the United States in specialty occupations. *See* 20 C.F.R. § 655.700 *et seq.* The Act defines a specialty occupation as one "requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher." 8 U.S.C.A. § 1184(i)(1). A legal assistant fits within the definition of a specialty occupation. To get the process started, the Employer must complete and file with the United States Citizenship and Immigration Services branch of the Department of Homeland Security (hereinafter "USCIS") an H-1B petition which consists of the Form I-129, various supplements, and a labor condition application ("LCA"). *See* 8 U.S.C. § 1182(n); 8 C.F.R. § 214.2(h)(2). The petition is then either approved or denied in a written decision by the USCIS. *See* 8 C.F.R. §§ 214.2(h)(9) & (10). If approved, the petition is used to obtain a visa from the Department of State for a period of up to three years. *See* 8 C.F.R. § 214.2(h)(9)(iii)(A)(1). Before the expiration of the three year term, an employer may seek an extension of the alien professional's term, however, no extension may extend the total period of admission beyond six years. *See* 8 C.F.R. §§ 214.2 (15)(ii)(B) & (h)(13)(iii)(A). An alien professional can become eligible for a new six year terms under the H-1B program by remaining outside of the United States for at least one year. *See* 8 C.F.R. § 214.2(h)(13)(iii)(A).

² 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b) and 1182(n) (West Supp. 2008).

Manchala's completed H-1B petition is found at AX-1 and was approved by USCIS for a term commencing on December 11, 2003 and ending on July 15, 2006. *See* AX-12.

In completing the petition, the employer makes several attestations, including that it will pay the alien professional the greater of the job's actual wage or the prevailing wage³ throughout the entire period of authorized employment and it will pay for any non-productive time as well. *See* 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(c)(7)(i). The regulation states that:

The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.

20 C.F.R. § 655.731(c)(1). With regard to periods of non-productive work status, the regulations do exempt an employer from paying wages to an alien professional in one specific instance—when the period of non-productive status is “due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience.”

20 C.F.R. § 655.731(c)(7)(ii). The regulations include four examples of when wages may be exempt from payment by an employer: “touring the U.S., caring for ill relative..., maternity leave, [and] automobile accident which temporarily incapacitates the nonimmigrant.” *Id.*

(A) Hours Worked by Mr. Manchala

There is no dispute that Villaverde agreed to pay the prevailing wage of \$15.80 per hour to Manchala, and according to the H-1B petition, Manchala was to be employed full time. *See* AX-1, p. A-51. This equates to a gross annual salary of \$32,864.⁴ Manchala was paid well below

³ The prevailing wage is typically the average wage paid to professionals engaged in similar employment within the same location as where the alien professional will be working, and it is customarily obtained by the employer contacting the state employment security agency that has jurisdiction over the area where the H-1B employee will be stationed.

⁴ The math is as follows: \$15.80 x 40 hours per week = \$632 per week x 52 weeks per year = \$32,864 per year.

what was required under the approved H-1B petition for full time employment--\$12,750 for 2004, \$21,600 for 2005, and \$10,800 for 2006. *See* AX-4, 5, & 6. The only evidence of the hours actually worked by Manchala is the testimony of Mr. Villaverde and the testimony of Manchala. While Villaverde did call Sonia Talavera to help illuminate the hours worked by Manchala, her testimony proved to be of little assistance. Ms. Talavera was employed as a legal assistant to Attorney Joel B. Mayer, a professional who shared office space on Madison Avenue with Villaverde. TR at 193. Talavera was not employed by Villaverde nor did she provide any services to Villaverde. TR at 193-96. She could not provide any dates for when Manchala was working for Villaverde, she had no knowledge of what his job duties were, and she did not know whether Machala had a key to the office. TR at 196-197, 201-204. She also worked a different schedule, often arriving later in the morning. TR at 199. At best, Talavera testified that she saw Manchala studying for the Bar Exam because “you would see books” and “sometimes he would close the door and asked not to be disturbed because he was focusing on, on studying.” TR at 200. She claims this happened at the beginning of 2006. *Id.* When asked if she recalled any other dates that Manchala told her that he was studying, Talavera was non-specific in her answer, only stating that he would alert her most of the time when he studied. TR at 200-201. The fact that Manchala studied for the bar exam in 2006 is not disputed, and Ms. Talavera’s testimony does nothing to help establish the hours worked by Manchala.

It is incomprehensible that Villaverde failed to keep records of the hours worked by Mr. Manchala, especially where it is paying wages substantially less than required under the approve H-1B petition, and the difference is allegedly attributable to a voluntary reduction in hours requested by Manchala. Under the regulations, Villaverde is required to make payroll records

available in the event of an enforcement action, and here, they are non-existent.⁵ See 20 C.F.R. § 655.760(a)(3). Villaverde suggests that the reduction in work hours from 40 hours per week to 26.5, stems from Manchala’s voluntary request to work less to study for the bar exam. As such, Villaverde seeks refuge in the regulation’s exemption.

First off, the exemption relieving an employer from paying for non-productive work requires that the conditions leading to the non-productive status be “unrelated to employment.” Examples of such circumstance included within the regulation are caring for a sick relative and touring the United States. A paralegal working in a law firm and taking time from work to study for the bar exam may not qualify as conditions “unrelated to employment” because passing a bar exam could be beneficial to both the employer and employee. But even putting that aside, if I accept Villaverde’s argument that the exemption applies, I would have to find that entire period covered by the H-1B petition (December 11, 2003 until July 1, 2006) was a period in which Manchala voluntarily worked reduced hours to study for the bar exam. Even Villaverde does not make this contention and such a finding is not supported by the evidence or the law.

The regulation speaks to a “*period* of nonproductive status” and as such envisions a limited, temporary time frame within the alien professional’s approved term where the professional is voluntarily not working. See 20 C.F.R. § 655.731(c)(7)(ii) (emphasis added). Indeed the examples provided enforce this concept—“touring the US” or an “automobile accident which *temporarily* incapacitates the non-immigrant.” *Id.* (emphasis added). There is an expectation that once the period is over, the alien professional will return to full time status earning the prevailing wage. The exemption is not intended to apply to the entire employment period as would be required if I follow the path forged by Villaverde in this case.

⁵ There was a suggestion by Villaverde that Manchala was somehow responsible for the lack of records in this proceeding. There was no credible evidence presented to support the contention and I find that the responsibility for the lack of records produced at trial rests solely with Villaverde.

Turning to the evidence, from December 2003 until March 2004, Manchala received net pay of \$1,000 per month. Villaverde does not attempt to square this sum with any hours worked. Villaverde does say that Manchala worked “approximately” 26.5 hours per week for the net pay of \$1,470 he started receiving in March 2004; however, no rationale is provided for why it paid Manchala \$1,000 per month in the prior months. Additionally, looking at the objective evidence provided for the period that Manchala was paid \$1,470 per month, the numbers do not make sense. Focusing on 2005, the only full year Manchala received \$1,470 per month for all twelve months, *see* AX-2, pp. 84 to 95, Villaverde reported gross annual wages of \$21,600. *See* AX-5. The W-2 also indicates that withholdings for state and local taxes totals \$3,931.12.⁶ *Id.* This leaves Manchala with annual net pay of \$17,668.80 which equates to a monthly net pay of \$1,472.40 per month—not \$1,470. Villaverde offered no explanation for \$2.40 difference per month in the calculation.

While the differential of \$2.40 may seem trivial at first blush, when combined with the other evidentiary inconsistencies, it is very telling. Manchala was employed on a full time basis. It is incredible to think that from day one on the job, he agreed to reduce his hours to 26.5 hours a week and maintain that same schedule every week for the entire two and one-half years he was employed by Villaverde. We also have several months where Manchala received \$1,000 in net pay without explanation. It is more likely that when faced with the gross wages actually paid based on the W-2s, Villaverde backed into the hourly calculation of “approximately” 26.5 hours per week, and hence the difference of \$2.40 in the net monthly wages.

In order to determine the actual hours worked by Manchala, I first need to understand what burdens the parties bear. The Supreme Court has held when an action is brought for unpaid

⁶ Specifically: \$1,600 for federal income tax withheld, \$1,339.20 for Social Security tax withheld, \$313.20 for Medicare tax withheld, \$500 state income tax withheld, and \$178.80 for local income tax withheld. *See* AX-5.

wages under the Fair Labor Standard Act, the employee has the initial “burden of proving that he performed work for which he was not properly compensated.” *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87, (1946), superseded on other grounds by statute as stated in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 41 (2005). The employee’s burden is met if “he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” *Id.* at 687-88. Testimony by the employee alone regarding hours worked and wages paid had been found to be sufficient evidence to meet this burden. *See Administrator, Wage and Hour Division v. Pegasus Consulting Group, Inc.*, ARB Nos. 03-032 & 03-033, 2001-LCA-29 (ARB June 30, 2005).

The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Mt. Clemens Pottery, 328 U.S. at 687-88. In setting the standard, the Court recognized that an employer has an obligation to keep proper records of hours worked and wages paid and that an employee seldom keep such records themselves. *Id.* The Court commented that an employer “cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements... of the Act.” *Id.* at 688. While *Clemens Pottery* involved a case under the Fair Labor Standards Act, it has been applied in the context of LCA cases. *See e.g., Pegasus Consulting Group, Inc., supra; Administrator, Wage and Hour Division v. API Accounting & computer Consulting.*, 2006-LCA-0026 (ALJ Apr. 26, 2007); *Administrator, Wage and Hour Division v. Wings Digital Corp.*, 2004-LCA-00030 (ALJ Mar. 21, 2005).

Applying the standard, I find that the Administrator has met its initial burden. Manchala testified that during his employment with Villaverde, he worked forty (or more) hours per week, with the exception of one week when he commenced work. He also acknowledged that he voluntarily took between six and eight weeks off from work to study for the New York Bar Exam. I find that Manchala's testimony is credible and the Administrator has established that Manchala worked full time for Villaverde (i.e. at least 40 hours per week) from January 1, 2004 through June 30, 2006 when Manchala voluntarily terminated his employment. I also find that there were two periods of non-productive status totaling eight weeks where Manchala voluntarily did not work in order to study for the New York Bar Exam. While I question whether this truly fits within the exemption contemplated under 20 C.F.R. § 655.760(a)(3) because the non-productive status could arguably benefit both Villaverde and Manchala, the Administrator has not raised this issue and in fact has conceded the eight weeks in the calculations proffered. Accordingly, I find that Villaverde is entitled to a credit of eight weeks under 20 C.F.R. § 655.760(a)(3).

Turning to the rebuttal evidence offered by Villaverde, I find it has failed to offer any convincing evidence to establish the precise amount of work performed by Manchala. *See Clemens Pottery*, 328 U.S. at 687. Mr. Villaverde testified that at some unknown date in early 2004, Manchala requested a reduction in hours to study for the bar exam and he acquiesced in this request. TR at 213. When asked how many hours per week Manchala worked in January 2004, Mr. Villaverde answered "Forty. ... in January 2004 possibly forty hours, twenty—it was always forty or less." TR at 215-16. This is not the type of precision required for rebuttal under the *Clemens Pottery* standard. Having failed to produce any credible evidence in rebuttal, I find

that the Administrator has carried its ultimate burden of persuasion on the number of hours worked by Manchala.

In determining the back wages owed based upon the hours worked, I accept the Administrator's calculations. Using the prevailing wage of \$15.80 per hour, and finding that Manchala worked 40 hours per week, Manchala's annual gross salary should have been \$32,864 per year. In 2004, according to the W-2 produced, Manchala earned gross wages of \$12,750—a difference of \$20,114 from the prevailing annual wage. For 2005, the W-2 indicates gross earnings of \$21,600—a difference of \$11,264. Finally for the partial year worked in 2006, Villaverde reported gross wages of \$10,800. Considering Manchala's employment ceased on June 30, 2006, the difference between what was paid and the prevailing annual wage is \$5,632. Adding the numbers, the back wages due Manchala total \$37,010 without considering any periods of voluntary non-productive work that may be exempt from payment. Accounting for the eight weeks of non-productive status used to study for the bar exam, the total back wages owed Manchala for the period of January 1, 2004 through June 30, 2006 are \$31,954.⁷

(B) Willfulness and the Assessment of a Civil Monetary Penalty & Debarment

The Administrator contends that Villaverde's failure to pay the required wage pursuant to 20 C.F.R. § 655.731(c) was willful and warrants the imposition of a civil monetary penalty in the amount of \$2,250. The regulation provides that the Administrator may assess a civil monetary penalty up to \$5,000 for "a willful failure pertaining to wages/working conditions" or "willful misrepresentation of a material fact on the labor condition application." *See* 20 C.F.R. § 655.810(b)(2). Willful failure is defined as "a knowing failure or a reckless disregard with

⁷ Eight weeks at forty hours per week is 320 hours of time that should go on the credit side of Villaverde's balance sheet. Multiplying the 320 hours by the prevailing wage of \$15.80, produces a credit of \$5,056. Subtracting the credit (\$5,056) from the total back wages due (\$37,010) produces the final back wage number owed to Manchala--\$31,954.

respect to whether the conduct was contrary to” the Act. 20 C.F.R. § 655.805(c). “The word ‘willful’... is generally understood to refer to conduct that is not merely negligent.” *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The standard of willfulness adopted by the Supreme Court in *McLaughlin* is whether “the employer either knew or showed reckless disregard... [that] its conduct was prohibited by the statute. *Id.*

“In determining the amount of the civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors.” 20 C.F.R. § 655.810(c). The non-exclusive list of factors included within the regulation are: (1) The previous history of violations by the employer; (2) The number of workers affected by the violation; (3) The gravity of the violation; (4) The employer’s good faith efforts to comply; (5) The employer’s explanation; (6) The employer’s commitment to future compliance; (7) The employer’s financial gain due to the violation, or potential financial loss, injury or adverse effect to others. *See id.* Under the statutory scheme, I have the ability to determine the appropriateness of a civil penalty and I can “affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.” 20 C.F.R. § 655.840(b); *see also Administrator v. Itek Consulting, Inc.*, 2008-LCA-00046 (ALJ May 6, 2009); *Administrator, Wage and Hour Division v. Law Offices of Anil Shaw*, 2003-LCA-00020 (ALJ May 19, 2004). Under the facts of this case, I find that Villaverde acted with reckless disregard of the Act’s requirements by not paying the required wage, and the assessment of a penalty in the amount of \$2,250 is appropriate as is the two year debarment under 20 C.F.R. § 655.810(d)(2).

Sergio Villaverde is a practicing attorney and principal of the Respondent. In December 2003, when he hired Manchala, he was a solo practitioner working out of his home in the Bronx, having established the practice a few years earlier in 2001. TR at 208 & 214. In 2004,

Villaverde had between 100 -125 cases, with the bulk of his practice involving family law issues. TR at 224. In 2005 according to Attorney Villaverde's testimony, he began practicing immigration law and started out with 5 or 10 cases. TR at 225. As part of the H-1B petition, Attorney Villaverde included a support letter on the firm's letterhead dated June 16, 2003. *See* AX-1 pp. 60-65. The letter states that the "Petitioner is a full-service law firm offering services in the area of Military Law, Family Law, Personal Injury Law, Immigration and Nationality Law, Election Campaign and Political Law." *Id.* at 60. Later in the letter, he describes his immigration practice as follows: "The Petitioner represents clients before the Bureau of Citizenship and Immigration Services and provides guidance in matters relating to immigration and naturalization, visas, citizenships, asylum, employment, and deportation. The Petitioner has *extensive* experience in interpretation and compliance with the immigration Reform and Control Act, and the INA." *Id.* at 61 (*emphasis added*).

In finding a willful failure in failing to pay the required wage and assessing a penalty of \$2,250, the investigator for the Wage & Hour Division of the Department of Labor, Luis Bermudez testified that he put emphasis on the fact that the Respondent is a law firm and it advertised on its website that its attorneys have comprehensive knowledge of immigration laws and regulations. TR at 179, 188-89. During his investigation, sometime in 2008, he looked at Villaverde's website which indicated the firm specialized in immigration law. *See* TR at 175; AX-14. Mr. Bermudez admitted, however, that he had no knowledge whether Villaverde practiced immigration law between 2003 and 2006, the relevant timeframe for this case. TR at 176-77. Bermudez concluded that even if Villaverde began practicing immigration law in 2007, he still would have made a finding of willfulness based on the fact that the Respondent is a law firm. TR at 191-92.

In mitigation of the penalty assessment, Attorney Villaverde highlighted his distinguished career as an emergency medical technician and a police officer for the City of New York, and the fact that he served twenty-three years in the Coast Guard Reserves. TR at 206-07. Attorney Villaverde also testified about the many commendations he received in his prior duties before deciding to practice law on a full time basis. *Id.* What he did not highlight, but probably equally as important is his inexperience in running a business with employees and all the attendant obligations required by such an endeavor.

In analyzing the applicable factors, there are certainly some that would swing in Villaverde's favor. This was Villaverde's first offense and it only involved one employee. Beyond that, everything else tips the scales in favor of imposing a penalty. Attorney Villaverde is a practicing attorney with a diverse practice. By his own pen, he indicated in 2003 in the H-1B petition that he has "*extensive* experience in interpretation and compliance with the immigration Reform and Control Act, and the INA." AX-1 pp. 61. This proceeding falls under the INA. He certainly had to be familiar with the contents of the statute and regulations to make a claim that his firm had "extensive experience" in compliance with the INA. At best Villaverde's failure to pay the required wage is a reckless disregard of the Act's requirements, at worst it was intentional to reap the financial gain of paying the lower wage. Regardless of where on the spectrum Villaverde's conduct lies, it is willful under the regulation. The unpaid wage in this case is substantial, and I think the Administrator gave Villaverde the benefit of many doubts in setting the penalty at \$2,250. Certainly as a solo practitioner and a decorated public servant, Villaverde's attentions may have been more focused on helping others rather than keeping his own house in order. However, the simple task of keeping records, could have easily aided in this difficult dispute. Based upon the foregoing, I find that Villaverde's conduct in failing to pay the

required wage meets the definition of willful under 20 C.F.R. § 655.805(c), and a civil monetary penalty in the amount of \$2,250 pursuant to 20 C.F.R. § 655.810(b)(2) is appropriate under the circumstances.

With regard to debarment, the regulation requires that a petitioner be disqualified from approval of any petitions for a period of at least two years for a violation under 20 C.F.R. § 655.810(b)(2). *See* 20 C.F.R. § 655.810(d)(2). Having found the violation, the disqualification for two years as requested by the Administrator is mandated. Villaverde shall be disqualified from filing new H-1B petitions for a period of two years pursuant to Section 655.810(d)(2).

While almost complete, I need to touch upon Villaverde's failure to maintain documents as required under 20 C.F.R. § 655.760(c). Under the regulation, Villaverde was required to maintain payroll records for a period of three years running from the date the record was created. *Id.* Villaverde's inability to produce records showing the hours worked or how Manchala's wage was calculated establishes a violation of 20 C.F.R. 655.760(c). Given the penalty imposed and the mitigating factors discussed *supra*, no additional penalty for this violation is warranted.

Based upon the foregoing, it is hereby **ORDERED** that:

- (1) The Law Offices of Sergio Villaverde, PLLC shall pay the Administrator for distribution to Villaverde's employee, Balarama Manchala, back wages in the amount of \$31,954.00 pursuant to 8 U.S.C. § 1182(n)(2)(D) and 20 C.F.R. § 655.810(a);
- (2) The Law Offices of Sergio Villaverde, PLLC shall pay the Administrator a civil monetary penalty in the amount of \$2,250.00 for a willful failure to pay required wages to Balarama Manchala pursuant to 8 U.S.C. § 1182(n)(2)(C)(ii) and 20 C.F.R. § 655.810(b)(2)(i); and

- (3) The Law Offices of Sergio Villaverde, PLLC is disqualified from filing for H-1B petitions for the duration of two years, as set for by 20 C.F.R. § 655.810(d)(2).

SO ORDERED.

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JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts

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

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

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