U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 31 March 2010

Case No.: 2009-LCA-00026

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,

Prosecuting Party,

and

GABRIELE WIRTH, M.D.,

Prosecuting Party,

v.

UNIVERSITY OF MIAMI, MILLER SCHOOL OF MEDICINE,

Respondent.

APPEARANCES:

Tremelle I. Howard-Fishburne
U.S. Department of Labor
Attorney for Prosecuting Party

Gabriele Wirth, M.D., Ph.D., *pro se*
Prosecuting Party

Enrique Gonzalez, III
Jennifer Holt Estrella
Attorneys for the Respondent

BEFORE:

ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER -- AWARDING ACCRUED WAGES AND DENYING RETURN TRANSPORTATION EXPENSE

This case arises under the H-1B visa program of the Immigration and Nationality Act of 1952 (Act), 8 U.S.C.A. § 1101, et seq, as amended, and its implementing regulations found at 20 CFR Part 655, Subparts H and I.

By correspondence dated May 28, 2009, and filed with the Office of Administrative Law Judges on June 2, 2009, the Administrator for the Wage and Hour Division, Employment Standards Administration, (Administrator), notified Respondent that an investigation under the H-1B provisions of the Act was completed and Respondent had committed two violations of the Act by (1) failing to pay wages for the periods September 1, 2006 through October 15, 2006 and September 1, 2007 through December 11, 2007, as required by 20 CFR § 655.731 and (2) failing to provide notice of the filing of the Labor Condition Applications (LCA) in violation of 20 CFR § 655.734. The Respondent was directed to pay $32,312.00 in back wages to one specific non-immigrant H-1B worker and was directed to comply with the provisions of 20 CFR § 655.734 in the future. No civil penalties were levied against the Respondent. (SX[1] 1)

On June 12, 2009, the Respondent filed a request for formal hearing with the Office of Administrative Law Judges on both alleged violation issues. On June 10, 2009, the non-immigrant H-1B worker filed a request for formal hearing with the Office of Administrative Law Judges.

A formal hearing was held in Ft. Lauderdale, Florida, December 15 and 16, 2009, with all Parties present. At the hearing the Administrator withdrew the allegation the Respondent failed to provide notice of the filing of the Labor Condition Applications (LCA) in violation of 20 CFR § 655.734 (TR 19-24). The Plaintiff, Dr. G. Wirth was again advised at the hearing[2] of the manner in which the formal hearing would be conducted, the right to testify on her own behalf and to call others to testify, the right to examine witnesses called by the other Parties and to object to questions asked by other Parties, the right to introduce documentary evidence on her behalf and examine and object to evidence submitted by the other Parties on the grounds of relevance, materiality and cumulativeness, the right to voluntarily enter stipulations of fact in the case and the effect of entering into a stipulation of fact, the opportunity to present a closing statement at the formal hearing, and the right to have an attorney present to help her in the case. Dr. Wirth appeared without retained legal counsel and was found to have knowingly and intelligently waived presence of a legal counsel. Her request to have Mr. V. Sciamarelli present at her table was granted, though he was precluded from examining witnesses and addressing the Court on Dr. Wirth's behalf. (TR 6-9)

At the formal hearing, Administrative Law Judge exhibits (ALJX) 1 through 12, Solicitor exhibits (SX) 1 through 12, Dr. Wirth's exhibits (WX) 1 through 41, 49, 52 through 55, and 58 through 86, and Defendant's exhibits (DX) 1 through 11, 14 through 22, 24, 25, 61, 62, through 64 were admitted without objection.(TR 9-11, 26, 27-28, 29-38, 288) Defendant's objections to

[1] "TR" denotes transcript page; "ALJX" denotes Administrative Law Judge exhibit; "SX" denote Solicitor's exhibit; "WX" denotes Plaintiff Dr. G. Wirth's exhibit; "DX" denotes Respondent's exhibit.

[2] Dr. Wirth had previously been advised orally during a pre-hearing telephone conference call. She subsequently identified Mr. V. Sciamarelli as a friend she wished to have present at the hearing by letter dated December 1, 2009. Mr. Sciamarelli was seated at Dr. Wirth's table throughout the formal hearing.

WX 42 through 48, 50, 51, and 56 were overruled. The objection to WX 57 was sustained and WX 57 was not admitted nor considered during deliberations. (TR 27-28) The Solicitor's and Dr. Wirth's objections to DX 12, 13, 23, 26 through 37, and 39 through 61[3], were overruled (TR 31-41, 181, 168, 252, 266, and 288) The objections to DX 38 was sustained as cumulative (TR 33). DX 65 was found not material and was not admitted nor considered (TR 288).

After presentation of closing arguments, this Administrative Law Judge set a date for the Parties to submit a case list for the issues raised in the case as well as a written post-hearing brief on the sole issue (TR 322):

> "Is Respondent liable for accrued compensation and/or transportation expenses to Dr. G. Wirth, M.D., for any portion of the period from August 17, 2007 through December 22, 2007, inclusive?"

The submission date was extended by Order dated January 12, 2010 (ALJX 14). Post-hearing briefs have been submitted by all Parties and were considered during deliberations. All evidence admitted at the hearing, stipulations entered by the Parties, and oral argument made on the record were also considered during the deliberations.

STIPULATIONS

The parties have stipulated to, and this Administrative Law Judge finds, the following as fact (TR 11-15):

1. On July 10, 2006, University of Miami Miller School of Medicine filed an original LCA with the U.S. Government to hire Dr. Wirth as an H-1B worker in the capacity of a visiting assistant professor of anesthesiology, ETA Case Number I-06191-2683429.
2. The rate of pay listed in the original LCA was $48,000.00 per year for a full-time position.
3. The listed prevailing wage listed on the original LCA was $29,830.00 per year based on Other Wage Source – OES for 2006.
4. The original LCA listed the employment period as September 1, 2006 to August 31, 2009; the occupational code as 090; and the job title as visiting professor of anesthesiology.
5. By letter dated July 19, 2006, the University of Miami Miller School of Medicine filed a Form I-129 petition for non-immigrant worker in support of the original LCA.
6. On August 3, 2006, the original LCA / I-129 was approved by the U.S. Immigration and Naturalization Service, Vermont Service Center, for the period September 1, 2006 through August 31, 2009 for Dr. Gabriele Wirth, in the occupancy code 090 and under ECA Number 06-224-52613.
7. On August 25, 2006, Dr. Wirth was issued a U.S. Visa in Munich, Germany, that was classified as R-H-1B for the period ending August 31, 2009, related to employment with the University of Miami Miller School of Medicine, under EAC Number 06-224-52613.

[3] At the hearing that section of the deposition set forth in Page 54, line 12 through Page 55, line 11 was withdrawn (TR 40-41, 168).

8. On August 27, 2006, Dr. Wirth arrived in Miami, Florida, with her minor daughter A. Wirth (Passport Number E1700752) and her minor daughter E. Wirth (Passport Number E1700753).
9. On September 6, 2006, Dr. Wirth applied for a Social Security card.
10. For the period August 27, 2006 through October 15, 2006, Dr. Wirth received no employment compensation from the University of Miami Miller School of Medicine.
11. For the period October 16, 2006 through April 30, 2007, the University of Miami Miller School of Medicine paid Dr. Wirth compensation for her work at the rate equivalent to $48,000.00 per year.
12. On March 20, 2007, Dr. Wirth received a restricted medical faculty certificate, number 1617, from the State of Florida for the effective period March 20, 2007 to March 19, 2009 or until employment with the University of Miami Miller School of Medicine is terminated, whichever end date is earlier.
13. On May 3, 2007, the University of Miami Miller School of Medicine filed an amended LCA with the U.S. Government to hire Dr. Wirth as an H-1B worker in the capacity of visiting assistant professor/assistant professor in ETA Case Number I-07123-3435641.
14. The rate of pay listed on the amended LCA was $96,000.00 per year for a full-time position.
15. The listed prevailing wage on the amended LCA was $29,830.00 per year based on Other Wage Source, OES Wage Survey for 2007.
16. The amended LCA listed the employment period as May 3, 2007 to May 2, 2010; the occupational code as 090; and the job title as visiting assistant professor/assistant professor.
17. On November 9, 2007, the amended LCA / I-129 was approved by the U.S. Immigration and Naturalization Service, Vermont Service Center, for the period November 8, 2007 through May 1, 2010 for Dr. Gabriele Wirth, the occupancy code was 090 under ECA Number 07-162-5500.
18. For the period May 1, 2007 to August 31, 2007, University of Miami Miller School of Medicine paid Dr. Wirth compensation at the rate equivalent to $96,000.00 per year.
19. By e-mail dated August 16, 2007, University of Miami offered Dr. Wirth $5,000.00 towards relocation expenses, plus payment of her and her children's return coach airfare one-way.
20. By letter dated April 16, 2009, the U.S. Immigration and Naturalization Service, notified University of Miami Miller School of Medicine that the petition for non-immigrant worker filed on August 1, 2006 and approved August 3, 2006, related to Dr. Gabriele Wirth, EAC Number 0622452613 is automatically revoked in accordance with 8 CFR 214.2(h)(11)(ii).
21. By letter dated April 16, 2009, U.S. Immigration and Naturalization Service, Vermont Service Center, notified University of Miami Miller School of Medicine that the petition for non-immigrant worker filed on May 3, 2007, and approved November 6, 2007, related to Dr. Gabriele Wirth, EAC Number 07-162-5500 is automatically revoked in accordance with 8 CFR 214.2(h)(11)(ii).

JUDICIAL NOTICE OF FACTS

This Administrative Law Judge entered the following judicial notice of facts (TR 283 and 289)

1. July 24, 2007, was a Tuesday.
2. August 17, 2007, was a Friday
3. $1,445.00 is a reasonable value of individual coach airfare from Miami, Florida to Munich, Germany, on December 16, 2009.

ISSUES

The following issues remain for adjudication (TR 15-26)

1. When did Dr. Wirth first become available to work at the University of Miami Miller School of Medicine?
2. When did Dr. Wirth begin job duties at the University of Miami Miller School of Medicine pursuant to the LCA?
3. What were Dr. Wirth's job duties at the University of Miami Miller School of Medicine?
4. Did the LCA occupancy code title accurately reflect the duties involved?
5. If not, what occupancy code title applied?
6. When did the University of Miami Miller School of Medicine change Dr. Wirth's duties to the Florida (restricted medical faculty certificate) authorization?
7. What were the revised duties?
8. Did the revised LCA occupancy code title accurately reflect the duties involved?
9. If not, what occupancy title code applied?
10. When did the University of Miami Miller School of Medicine notify the U.S. Government of adverse employment action related to Dr. Wirth?
11. When was Dr. Wirth's work visa revoked by operation of law and/or action of the U.S. Government?
12. When did Dr. Wirth depart the United States?
13. When was Dr. Wirth's employment termination from the University of Miami Miller School of Medicine effective?
14. Is Dr. Wirth entitled to compensation for any period from her arrival in the United States to the beginning of the first pay period actually paid by the University of Miami Miller School of Medicine?
15. If so, what is the amount due for the period between arrival and the first pay period ?
16. Is Dr. Wirth entitled to compensation for any period between August 31, 2007 and her departure from the United States ?
17. If so, what is the amount of compensation due for the period after August 31, 2007?
18. Is Dr. Wirth entitled to compensation for transportation expenses incurred for her return to Germany?
19. If so, what is the amount of compensation for transportation expenses due Dr. Wirth?
20. Did the University of Miami Miller School of Medicine tender return transportation to Germany to Dr. Wirth?
21. Is there an amount of compensation for transportation expenses due Dr. Wirth?

22. Is Dr. Wirth entitled to compensation for unused vacation time periods?
23. Is Dr. Wirth entitled to interest payments for monetary amounts past due and payable to her at the simple interest rate set forth in 28 U.S. Code Section 1961?
24. Was a housing allowance a condition of employment for Dr. Wirth with the University of Miami Miller School of Medicine?
25. If so, is Dr. Wirth owed any accrued compensation for housing allowance for any period of time by the University of Miami Miller School of Medicine?

POSITIONS OF THE PARTIES

Position of the Solicitor (TR 289-296, 321-322; post-hearing brief)

The Solicitor's counsel framed the issues as whether Dr. Wirth was owed wages for the period from when she entered the United States and made herself available for work and whether Dr. Wirth is owed wages for the period from when she ceased to work for the University of Miami until the University notified the Federal Government, U.S. Department of Homeland Security that she was no longer employed by the University.

Counsel submits that Dr. Wirth entered the country August 27, 2006, with her children on Labor Day weekend, and notified Ms. M. Quesada that she was in town and available to work and was directed to obtain a Social Security card. Dr. Wirth obtained the Social Security card but did not begin work until October 16, 2006. She argues that the burden is on the University to contact the H-1B worker on a start date and since the Respondent did not act before October 16, 2006 it is liable to pay Dr. Wirth for the entire time she was in the United States and available for work. She argues that "Dr. Wirth is entitled to compensation from September 6, 2006 through October 15, 2006" because that was the time period she was available for work and not paid."

Counsel submits that Dr. Wirth's work was changed in the May 2007 timeframe to include clinical duties and that her performance issues lead to a meeting July 24, 2007, where termination, retraining and resignation were discussed. Dr. Wirth continued "in some form to show up whenever she did for a [period of time through August the 31st." Dr. Wirth was not continued on the payroll after August 31, 2007 and the University did not notify the U.S. Department of Homeland Security of the change in employment status as required by federal regulation for "100 days afterward." She argues that "Dr. Wirth is entitled to wages for the time period after August 31, 2007 through December 11, 2007, the time when the University of Miami actually put pen to paper and notified the Department of Homeland Security that Dr. Wirth was no longer an employee."

Counsel submits that Dr. Wirth is entitled to $32,312.00 in total unpaid wages.

In her post-hearing brief, the Solicitor's counsel argues that the Administrative Review Board has ruled that in order to have a bone fide termination and end the requirement to pay wages stated in the LCA under the Immigration and Naturalization Act, there must be notice give to the Immigration and Naturalization Service that the H-1B employment relationship has been

terminated.[4] Counsel submits that recent Administrative Review Board decisions analyze the notification and bone fide termination provisions of the Act and conclude that notification to the Department of Homeland Security is a critical element of a bone fide termination, that other evidence may be used to establish that a bone fide termination occurred, but that without notice to the Department of Homeland Security a bone fide termination has not occurred sufficient to release the employer from the requirement to pay wages under the approved terms of the LCA. She submits that the termination was not effective until the Respondent send notification to the government on December 11, 2007, and that "Dr. Wirth is due back wages for the period of September 1, 2007 through December 11, 2007 at her rate of $46.16 per hour at 40 hours per week." Counsel also argues that the evidence fails to establish that Dr. Wirth voluntarily ended her employment on July 24, 2007, and that her employment ended on or about September 6, 2007, by termination of employment by the Respondent such that the Respondent is "liable for the reasonable costs of the H-1B non-immigrant's return transportation" pursuant to 8 USC §1184(c)(5)(A) and 8 CFR §214.2(h)(4)(iii)(E). Counsel urges award of interest on the unpaid wages due Dr. Wirth.

Position of the Plaintiff, Dr. Wirth (TR 320; post-hearing brief and e-mail):

Dr. Wirth waived making a closing statement at the formal hearing.

In her post-hearing brief Dr. Wirth submits that a bone fide termination did not occur and that the liability for the payment of wages under the approved amended LCA continued from August 31, 2007 until the amended LCA expired on May 1, 2010. She refers to case law similar to that noted by the Solicitor's counsel[5] to stand for the proposition that there are three requirements for a bone fide termination: (1) notice to the employee that the employment relationship has ended, (2) notice to the Department of Homeland Security that the employment relationship has ended, and (3) payment for transportation home to the employee. She refers to March 18 and 20, 2009 letters by Respondent's counsel to the USCIS and the April 16, 2009 letter from the USCIS to indicate that proper authorities were not notified of the employment change until the March 2009 letters were received and USICS indicated in the April 2009 letter that the LCA and amended LCA were "now" automatically revoked pursuant to 8 CFR 214.2(h)(11)(ii).[6] She submits that her employment after August 31, 2007 was pursuant to the amended LCA and that the December 11, 2007 letter sent by the Respondent to the federal government only addressed the original

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[4] Citing *Amtel Group of Florida, Inc. v. Rungvichit Yongmahapakorn [Rung],* ARB Case No. 04-087 (Sep. 29, 2006); *Administrator v. Avenue Dental Care, et al.,* ARB Case No. 07-101 (Jan. 7, 2010); *Neeraja Rajan v. International Business Solutions, Ltd.,* ARB Case No. 03-104 (Aug. 31, 2004); *Zhaolin Mao v. George Nasser and Nasser Engineering & Computing Services,* 2008 WL 5079135, ARB Case No. 06-121 (Nov. 26, 2008); *Administrator v. Ken Technologies, Inc.,* ARB Case No. 03-140 (Sep. 15, 2004)

[5] Citing *Amtel Group of Florida, Inc. v. Rungvichit Yongmahapakorn [Rung],* ARB Case No. 04-087 (Sep. 29, 2006); *Ravikumar Gupta v. Jain Software Consulting,* ARB Case No. 05-008 (Mar. 30, 2007); *Administrator v. Ken Technologies, Inc.,* ARB Case No. 03-140 (Sep. 15, 2004)

[6] On March 3, 2010, Dr. Wirth submitted an e-mail "Client Alert" from Respondent's counsel's law firm dated March 1, 2010 and titles "Some Employer Report Petition Revocation Notices after USCIA Site Visits." Upon review this Administrative Law Judge finds the document not relevant. Accordingly, the document has not been considered. It is attached to the record as ALJX 14.

LCA that was superseded in May 2007 by the amended LCA. She argues that a bone fide termination could not have occurred prior to April 16, 2009, based on the requirement for notice to the Department of Homeland Security. She also argues that she was never notified by Respondent or USCIS that her visa had been revoked until a fraud unit became involved in January 2009.

Dr. Wirth submits that "no notification of termination was made to myself and that no letter of resignation or termination exists … [and] no Faculty member of the University of Miami can be forced to resign against her/his will and that I am still officially an employee of the University of Miami." She asserts that no return transportation is required since she has not been terminated from her employment with the University of Miami Miller School of Medicine.

Dr. Wirth submits that since there has been no bone fide termination she should be paid back wages based on the prevailing wages paid to practicing anesthesiologists from September 1, 2006 through expiration of the amended LCA on May 1, 2010.[7]

As an additional matter, Dr. Wirth objects "to the Court's refusal to permit Mr. Victor Sciamarelli to act as a representative with me at the formal hearing." She submits that the provisions of 29 CFR §18.34 requires the Court to have accepted him as her representative at the formal hearing. She reports that Mr. Sciamarelli "is a U.S. citizen, a career airline pilot with a flawless record who has participated in airline termination issues and participated briefly as a volunteer with the ACLU." She argues "that the Court could have extended the same latitude to me by allowing Mr. Sciamarelli to more directly assist me during the hearing, especially in the questioning of witnesses and questioning me in rebuttal during my own testimony."

Position of the Respondent (TR 296-320; post-hearing brief):

Respondent's counsel argues that Dr. Wirth did not make herself available to work or come under the control of the University of Miami Miller School of Medicine when she first entered the United States. He submits that advising Dr. Wirth of the Social Security recommendation to wait ten days after arrival to apply for a Social Security card was not exercising control over Dr. Wirth but merely communicating the policy of the Social Security Administration. He submits that Dr. Wirth was granted compassionate accommodations to her personal life (transportation, housing, children schooling issues) that delayed her actually beginning work until October 18, 2006. He argues that the 30-day provision of 20 CFR §655.731(c)(3)(iii)(C)(6)(ii) requiring the payment of wages after arrival in the United States does not apply because Dr. Wirth was voluntarily non-productive from September 27, 2006 through October 15, 2006 under 20 CFR §655.731(c)(3)(iii)(C)(7)(ii).

Counsel argues that federal regulations do not impose on an employer the payment of relocation expenses for an H-1B employee, though an employer may such benefits provided to all similarly situated employees. He submits the evidence establishes that relocation and housing benefits are not extended to "visiting assistant professors" like Dr. Wirth but are extended to employees with "permanent assistant professor" appointments, a status not extended to Dr. Wirth. He submits

[7] Citing *Innawalli v. American Information Teechnology Corp*, ARB Case No. 04-165 (Sep. 29, 2006); *Administrator v. Family Health Center of Columbia County, Inc*., ALJ Case No. 2005-LCA-00001 (Aug. 2, 2005)

that federal regulations at 8 CFR §214.2(h)(4)(iii)(E) makes the employer liable for transportation costs to the H-1B employee only "if the alien is dismissed from employment by the employer before the end of the period of authorized admission" and is not liable if the "beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition." He acknowledged that the University offered and tendered money for return air tickets to Dr. Wirth and her children and the proffer was rejected. He argues that Dr. Wirth knowingly and willingly resigned at a meeting on July 24, 2007, so that the University is not liable for her return transportation expenses.

Counsel argues that the University is not liable for wages from September 1, 2007 through December 11, 2007, because "there has been a bone fide termination of the employment relationship" and payment need not be made under 20 CFR §655.731(c)(3)(iii)(C)(7)(ii). He submits that it does not matter on the issue of wages whether the employment ended through voluntary resignation or termination by the University. He acknowledges that notice of Dr. Wirth's change in employment condition was submitted in an untimely manner; but argues, the evidence demonstrated that a bone fide termination had occurred by August 31, 2007 and notice to the U.S. Government is not required to effect a bone fide termination of an employment relationship; such notice is merely additional evidence of termination of the employment relationship. He submits that the regulations do not require wages to be paid after a bone fide termination of employment and to do so in this case will result in an unjust enrichment of Dr. Wirth.

Counsel submits that Dr. Wirth is not entitled to unpaid vacation time since she had 18 days of vacation time at the July 24, 2007 meeting and used up her vacation time by August 18, 2007; but was still continued on the payroll through August 31, 2007.

As to work classification, Counsel submits that the University of Miami Miller School of Medicine is an institution subject to the Higher Education Act and must pay prevailing wages, under the American Competitiveness to the Workforce Act of 1999, as set forth in the EBC data base. The EBC does not provide classification for "anesthesiologist" at academic institutions but the term is classified by the Agency for Workforce Innovation "as post-secondary teacher, health specialties."

Counsel argues that Respondent should not be found liable for wages during the period September 1, 2006 through October 15, 2006; for any relocation expenses into the United States as a benefit; for any housing allowance as a benefit; for return transportation from the United States; or for wages during the period August 31, 2007 through December 11, 2007.

In his post-hearing brief, Respondent's counsel submits that there was a bona fide termination of employment on July 24, 2007, and that imposing a notice requirement to complete a bona fide termination would result in unjust enrichment of Dr. Wirth and amount to punishment for a clerical delay by the Respondent. He relies on the Black's Law Dictionary definition of the term "bona fide" and argues that the language in 20 CFR §655.731(c)(7)(ii) does not add a requirement to notify the U.S. Customs and Immigration Service about employment termination in order for there to be a bona fide employment termination of a non-immigrant H-1B employee. He submits that notification to USCIS is just one indicia that may be considered to determine

whether a bona fide employment termination has occurred. Additionally, he submits that imposing the payment of wages after December 12, 2007 is contrary to regulations related to when the validity period of an LCA ends and the obligations there under also end for non-immigrant H-1B workers whose employment has been terminated. He argues that Dr. Wirth's July 24, 2007 resignation was before the end of the amended LCA validity period and notification of her employment termination by letter of December 11, 2007 automatically revoked the operative LCA and required Dr. Wirth to depart the United States immediately thereafter. He submits that Respondent is not liable for return transportation costs because Dr. Wirth "resigned on July 24, 2007 with an effective date of August 31, 2007" and refused to accept relocation expense payment of $5,000.00 and the offer to pay for return flights for her and her children. He argues that federal regulations require payment for reasonable transportation expenses only when an H-1B non-immigrant employee is dismissed by the employer prior to the end of the LCA validity period and is not liable for such expenses when the employee voluntarily terminates the employment. In the alternative, counsel submits that federal regulations only provide for return transportation for the H-1B non-immigrant worker and not cost associated with return of household goods or other family members who may have accompanied the H-1B worker to the United States. He concludes that Respondent is not liable for payment of wages after August 31, 2007 or for transportation expenses back to Germany.

STAUTORY AND REGULATORY FRAMEWORK

The Act provides for the professional employment of non-immigrant individuals with specialized knowledge and a recognized degree of specific specialty for specific periods of employment under the H-1B visa program, 20 CFR Chapter V, Part 655, Subpart H. To employ a non-immigrant professional under the H-1B visa program, an employer must submit a Labor Condition Application (LCA) to the Department of Labor (DOL) for certification. By submitting the LCA, the employer agrees to (1) pay the H-1B employee the greater of the actual wage and benefits paid to similarly situated employees or the prevailing wage for the job classification, unless excused from such payment by statutory and regulatory provisions [20 CFR §655.371] and (2) afford working conditions to the H-1B employee on the same basis as provided similarly situated employees [20 CFR §655.372] for the "duration of the alien's authorized period of stay" [8 CFR §214.2(h)(4)(iii)(B)(2)]. The employer reaffirms these duties when it submits the certified LCA with an I-129 Petition for Nonimmigrant Worker to the USCIS in order to obtain authorization from the Department of Homeland Security (DHS) for the non-immigrant worker to enter the United States under the H-1B classification [20 CFR §655.705(c); 8 CFR §214.2(h)(4)(iii)(B)]. In the case of physicians (not of national or international renown), the petitioning employer "must establish that the alien physician is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency, and that no patient care will be performed, except that which is incidental to the physician's teaching or research" or has passed the Federation Licensing Examination or equivalent, or is a graduate of a United States medical school [8 CFR §214.2(h)(4)(viii)(B)].

When a form I-129 Petition for H-1B visa "is approved before the date the [employer] indicates the services or training will begin, the approved petition and approval notice shall show the

actual dates requested by the [employer] as the validity period …. [if] approved after the date the [employer] indicates that the services or training will begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and end with the date requested by the [employer]" provided in either case, that validity period does not exceed the limits specified in USCIS policy or 8 CFR §214.2(h)(9)(iii). See 8 CFR §214.2(h)(9)(ii) The employer is required to immediately notify the USCIS of any changes in the terms or condition of employment of an H-1B non-immigrant worker including when the employer no longer employs the non-immigrant worker [8 CFR §§214.2(h)(2)(i)(E) and 214.2(h)(11)(i)]. The approval of a visa petition, and necessarily the validity period, is automatically revoked when the employer goes out of business or files a written withdrawal of the petition [§8 CFR 214(h)(11)(ii)]. The U.S. Government may also revoke a visa petition at any time using revocation notice procedures [8 CFR §214.2(h)(11)(iii)].

An employer may not permit a H-1B non-immigrant worker to begin work until after the DHS has granted authorization for the alien to work in the United States for the petitioning employer and then, work only for the authorized visa petition validity period [8 CFR §214.2(h)(13)(i); 20 CFR §655.705(c)(4)]. An H-1B non-immigrant worker "enters into employment" when the individual first makes him/herself available for work or otherwise comes under the control of the employer; but, even if the H-1B non-immigrant has not "entered into employment", an employer who has had the LCA certified and I-129 visa petition approved for the H-1B non-immigrant worker "shall pay the non-immigrant the required wage beginning 30 days after the date the non-immigrant first is admitted into the U.S. pursuant to the petition" [20 CFR §655.731(c)(6)].

The employer must continue to meet the wage payment requirements when the H-1B employee is not performing work and is in a nonproductive status due to a decision by the employer [20 CFR §655.731(c)(7)(i)]. Unless required by an employee benefit plan or other statutes, the employer is excused from the wage payment requirements when the H-1B employee "experiences a period of nonproductive status due to conditions unrelated to employment which take the non-immigrant away from his/her duties at his/her voluntary request and convenience … or render the non-immigrant unable to work … [or] there has been a bona fide termination of the employment relationship" [20 CFR §655.731(c)(7)(ii)]. See also 144 *Cong. Rec*. E2326 (Nov. 12, 1998) for discussion of prohibited acts of "benching" under the Act.

In order for there to be a "bona fide termination of the employment relationship" under the Act, there must be (1) notice to the employee that the employment relationship has ended; (2) notice to the USCIS that the employment relationship has ended; (3) revocation of the LCA validity period during which the non-immigrant H-1B worker can remain in the United States to work for the specific employer; and (4) payment for transportation of the non-immigrant H-1B worker back to his/her last place of foreign residence "if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to Section 214(c)(5) of the Act" but payment of transportation of the alien is not required "if the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition … [and thereby] has not been dismissed." [§214(E)(5)(A) of the Act; 8 CFR §214.2(h)(4)(iii)(E)] See also – *Pegasus Consulting Group v. Administrative Review Board, U.S. Department of Labor*, 2008 WL 920072 (D. NJ, Mar. 31, 2008), *unpub*; *Amtel Group of Florida, Inc. v. Rungvichit Yongmahapakorn*, ARB Case No. 04-087 (Sep. 29, 2006); *Mao v. George Nasser and Nasser*

Engineering & Computing Services, ARB Case No. 06-121 (Nov. 26, 2008); *Administrator v. Avenue Dental Care, et. al.*, ARB Case No. 07-101 (Jan. 7, 2010); *Rajan v. International Business Solutions, Ltd.*, ARB Case No. 03-104 (Aug. 31, 2004); 8 CFR §§ 214.2(h)(11)(i)(A), 214.2(h)(11)(ii), and 214.2(h)(4)(iii)(E) While unmarried minor children of an H-1B non-immigrant employee "are entitled to H nonimmigrant classification" as provided in 8 CFR §214.2(h)(9)(iv), there is no separate statutory or regulatory provision requiring payment of transportation for such minor children in the event the sponsoring parent has been dismissed from employment before the end of the H-1B visa validity period.

SUMMARY OF RELEVANT EVIDENCE

Testimony of Dr. Gabrielle Wirth, M.D. (TR 85-128, 213, 280-281; WX 30, 33, 37; DX 14, 15, 30, 32, 36, 43, 45, 46, 48, 57)

Upon direct examination by the Solicitor's counsel, Dr. G. Wirth testified at the formal hearing that she was not currently employed and had remained unemployed since leaving her employment with the University of Miami. She reported arriving in the United States with her two children on August 27, 2006 and contacting Ms. Quesada at the University of Miami and advising her that she had arrived and inquired about her duties with the University of Miami and how to next proceed. She testified that she was to open a bank account and apply for a Social Security card in order to work. She opened the bank account and applied for the Social Security card on September 6, 2006. She stated that she met people from faculty affairs and had telephone contact with the University before beginning her duties on October 18, 2006. During the period after Labor Day and before October 18, 2006, she attended to personal affairs including obtaining a leased car, finding housing, finding a school and finding babysitters for her two children. Ms. Quesada assisted with the vehicle lease and discussed school issues with her.

Dr. Wirth testified she "was asked not to show up any longer on September 5, 2007 [or] they would call the police." She stated that she "didn't receive any termination" and "didn't agree to resign." She reported that at a July 2007 meeting with Dr. Birnbach and Dr. Lubarsky, "they tried to force me into resignation." She stated that she did not accept resignation and continued working through September 5, 2007.

Upon cross-examination by Respondent's counsel, Dr. Wirth testified that she learned of a job at the University of Miami through an e-mail from Dr. Candiotti in April 2006. She received the approved I-129 in Germany and came to the United States on August 27, 2006, with her two children, ages 9 and 14. She used a friend's apartment on arrival. One of her children requires special-needs schooling which was not arranged prior to arrival. She met with several schools after arrival and before mid-October. She acknowledged DX 57 was her personal statement to Mr. D. Neira-Flor. She stated that she was dealing with personal matters until she called Ms. C. Saldarriaga at the University of Miami on Thursday or Friday, mid October 2006, and stated "I'm ready now" but was told not to show up for three days "because everybody has left for a conference out of town." She reported her apartment lease began on October 1, one child started school the end of September and the other started at the same school the beginning of October. She had a driver's license from Germany and Europe and obtained her U.S. driver's license on

September 20, 2006. Between her arrival and October 16, 2006, she visited the Faculty Affairs section of the University of Miami as well as Ms. Quesada's office "at least three, four or five times" but never advised anyone she was ready to start work.

Dr. Wirth identified DX 30 as a May 1, 2007 e-mail to Dr. Spahn indicating that she had made "a mistake coming to Miami from the very beginning … the school situation for my children here will remain unsatisfactory for the foreseeable future, so I'm considering returning to Europe in late summer." She identified DX 32 as a May 10, 2007 e-mail to the International School of Rome stating "since we are planning to relocate from Florida to Rome, we are very interested to learn more about the school."

Dr. Wirth testified that she had a meeting with Dr. Lubarsky in late June 2007 in which she reported she was not available to work on the resident's night schedule but would have been able to work on the attending physician's assistant professors' night schedule. She stated to Dr. Lubarsky that she was opposed to peer evaluations and continuous monitoring of her clinical skills. She identified DX 36 as her June 29, 2007, e-mail to Dr. B. Brucker requesting an opportunity to talk because she was "at the point of quitting."

Dr. Wirth testified that she attended a meeting on July 24, 2007 with Dr. Lubarsky and Dr. Birnbach during which time her performance was discussed. She indicated that her recollection is that there was no spot in the residency program and that she did not say "I quit" during the meeting. She reported "they tried to push me and threaten me with incredible things." She identified DX 42 as a 2:33 PM, July 24, 2007 e-mail to L. Diaz stating "I'm fired anyway today." She identified DX 43 as a July 24, 2007 e-mail to Dr. Brucker stating "I'm fired today." She denied she was searching for employment with Catania University on July 26, 2007 (DX 45) because she had been terminated from the University of Miami. She acknowledged DX 46 as a July 26, 2007 e-mail to W. Kieffer stating "I'm fired because I'm doing things differently." She acknowledged that she inquired about employment with the Medical University of Vienna on July 27, 2007 (DX 51) and as an anesthesiologist in Italy on August 6, 2007 (DX 48). She explained her August 6, 2007 e-mail to Mr. V. Sciamerelli was to see if she should approach Dr. Lubarsky on extending her employment with the University of Miami through the month of September 2007.

Dr. Wirth testified that she received an August 16, 2007 e-mail from C. Saldarriaga (DX 14) confirming an offer from Dr. Lubarsky to pay for her and her children's airfare as well as $5,000.00 for relocation costs and requesting she submit the cost of the airfares by August 24, 2007. She stated that she never submitted the requested information about airfares because she did not leave the country. She acknowledged receiving an August 20, 2007 e-mail from C. Saldarriaga (DX 15) that "you should no longer be working in the OR and you should be taking the remainder of your days as vacation until the end of August." She testified that she reported for work every day between July 24 and August 31, 2007. She acknowledged receipt of the September 6, 2007 letter from Dr. Lubarsky (WX 30) that contained the wording "despite our mutual agreement, on July 24, 2007, when you agreed to resign effective the last day of August 2007 with zero vacation and the University agreed to pay for your return airfare and the children's airfare, and to provide you with $5,000.00 in relocation expenses, you have chosen not to honor this agreement, and have continued to show up for work. In light of your refusal to

abide by the terms of our agreement, you have left the University with no agreement but to reinforce the terms of your resignation and request that you leave the premises and turn in all your University keys, access cards, and any other University property" to C. Saldarriaga. She testified that after receiving the September 6, 2007 letter she never returned to the University of Miami because she was told that they would call the police. She acknowledged receipt of the November 28, 2007 letter from the Executive Vice President and Provost for the University of Miami (WX 33) and the December 12, 2007 letter from the Assistant General Counsel for the University of Miami (WX 37). Dr. Wirth testified that she did not leave the United States during the period from August 2007 through December 13, 2007.

On examination by the Court, Dr. Wirth testified that she left the United States for a few weeks on July 14, 2008, but does not recall the cost of the airfare involved. She reported paying about 1,300 Euros to move her household goods to the United States in 2006 and that the household goods are still in the United States. She testified that she did not take one day of vacation time while she worked for the University of Miami and that she has not turned in keys, cards or University property requested in the September 6, 2007 letter. She testified that she left the United States for a period at the end of September 2008 because of her parents' health situation. She reported that the last time her children left the United States was April 2009 but she does not recall the airfare prices involved.

Dr. Wirth testified that her duties under the $96,000.00 per year pay scale in May, June and early July 2007 were working in the operating room providing anesthesia to patients and did not involve work in the classrooms and that she did get an assignment as a resident fellow. She stated that during the month of August 2007 she "showed up there every morning at seven to get the OR schedule and when not assigned to any OR room, I spent my time in the [library/clinic area]" 40-hours per week; "but I was available all the time."

On re-direct examination by the Solicitor's counsel, Dr. Wirth testified that she did not agree to resign and had told various levels of individuals at the University of Miami that she had not resigned and refused to resign, before she filed her complaint with the Department of Labor.

During her examination of Dr. Lubarsky, Dr. Wirth reported "that my child wasn't in any treatment at the center and that [she] was never treated at Jackson except for one broken ankle one time during the whole time of employment." She was advised that her statement would be considered as testimony. (TR 213)

After the close of the Solicitor's and Respondent's respective case-in-chief and the Solicitor's report of not having evidence in rebuttal, Dr. Wirth was offered the opportunity to retake the stand and submit additional testimony. She was advised that the Court would consider Munich, Germany as her point of departure for her August 27, 2006 journey to Miami, Florida. Dr. Wirth elected to not submit additional testimony or additional evidence. (TR 280-281)

May 3, 2007 Letter by Dr. G. Wirth, M.D. (DX 31)

By letter dated May 3, 2007, Dr. Wirth indicated her acceptance of Dr. Lubarsky's "offer to join the Department of Anesthesiology as a Visiting Professor with added clinical responsibilities as

of May 1, 2007, working part-time in obstetrics and Sylvester. That gives me the opportunity over the next three months to demonstrate clinical skills."

July 11, 2008, Statement of Dr. G. Wirth, M.D. (DX 57)

On July 11, 2008, Dr. G. Wirth provided a written statement to U.S. Department of Labor, Wage and Hour Division, Compliance Specialist D. Neira-Flor.

Dr. Wirth reported that she was in Miami April 12, 2006, with her daughter for daughter's medical treatment when Dr. Candiatti contacted her about a position with the University of Miami. She reports interviewing with Dr. Candiatti on May 3, 2006 at the Jackson Memorial Hospital. She stated Dr. D.A. Lubarsky "was the person that offered me to apply for this position. Dr. Fhurer supported my petition." She stated she arrived in Miami on August 27, 2006 and "within the following week I notified the University of Miami that I had arrived in Miami … Quesada … told me I needed to get a Social Security [card] in order for me to work." From "September 27, 2006 until October 18, 2006 I was looking for a house, arranging babysitters for my daughters, a drivers license. One week approximately I called the University of Miami and told them I was ready and available to start working … Saldarriaga told me that all the personnel were in a meeting in a conference out of town. On October 18, 2006 I reported to Dr. Lubarsky's office."

Dr. Wirth reported that during the period to March 20, 2007, she worked without medical certification from Florida and could not work with patients. She observed other doctors, prepared a lecture that she did not give, and did research in December 2006 that was published. There would be a daily 20 minute morning meeting of anesthesiologists then she would observe doctor rounds of patients that were going to have a procedure performed that day. Sometime, she would read in the library. When in the operating room, she would observe the actions of the doctors.

Dr. Wirth reported receiving paperwork from Germany so she could apply for her medical certification. She reported being assigned to the Sylvester Unit as a resident/fellow on June 1, 2007 and that she could touch patients and administer medicine. She was assigned to the operating room full-time and did not do lectures or research. She reported that her "medical licensing certification does not allow me to work with patients. Dr. Boeru, Patin and Furgang told me I could not work independently because I was only a resident." She stated that Dr. Boeru had placed her on the resident schedule to work on-call at Sylvester but she needed additional compensation to pay for babysitters which was denied.

Dr. Wirth reported her pay at $4,000.00 per month from October 18, 2006 until changed to $8,000.00 per month on May 1, 2007. She asserts that the University of Miami moving guidelines provide for moving expenses both ways but that the University did not pay her expenses from Germany and "tried to deposit in my bank account on September 28, 2007, five thousand dollars as a bonus" but she refused the money and returned it to the University.

Curriculum Vitae of Dr. G. Wirth, M.D. (DX 3, 25; WX 1)

The two page curriculum vitae in DX 3 and 25 carries a February 23, 2006 date. The one page curriculum vitae in WX 1 is undated but references an H-1B visa being extended such that the one-page curriculum vitae must have been generated after the May 2007 submission of the amended LCA.

DX 3 and 25 reflect completion of medical school at Technische University, Munich, Germany and a certificate as a general physician on November 13, 1986, followed by a Doctorate in pharmacology in 1987. Internship in pharmacology and toxicology in 1986 and 1987, internship in internal medicine, oncology and radiology in 1988 to 1990, residency in an anesthesiology department in 1990 to 1995, and a certificate in anesthesiology November 8, 1995 are reported. Also reported is a period of ten years, 1995 to 2005, as "anesthesiologist in independent practice at the Munich University Hospital." Dr. Worth reported her teaching and academic experience as including "supervision of medical students, interns and residencies … several publications and lectures in pharmacology, oncology and anesthesiology." She reported her languages as "German, English, French" and her maiden name as "Riess."

WX 1 lists a "Profile" of "Senior Anesthesiologist working a 15-year incident-free contract at the Ludwig-Maximillians-University (LMU), Munich, Germany … accomplishments include teaching and supervising medical students, interns and residents in addition to several publications and lectures in pharmacology, oncology and anesthesiology." Dr. Wirth reports a medical degree in 1986 from Technische University and a Ph.D. in pharmacology, magna cum laude, in 1987 from LMU. She reports being board certified in anesthesiology in 1995, a senior anesthesiologist at LMU from 1995 to 2005 and an "anesthesiologist; licensed for private practice in Munich, Germany" for 2001 to 2006. Her last listed lecture was in 1992 and last listed publication was in 1988.

Testimony of D. Neira-Flor (TR 45-85; SX 11, 12; DX 57; WX 30)

Mr. Neira-Flor testified that he was the assigned investigator to Dr. Wirth's complaint from January 2008 to July 16, 2008. He identified SX 12 as the H-1B intake complaint that he filled out from information from Dr. Wirth and Dr. Lubarsky and University of Miami School of Medicine payroll records and work payment records. During the investigation he learned what each doctor was making. He reported that when Dr. Wirth began working at $48,000.00 per year that was the same level of income for similar doctors. Mr. Neira-Flor testified that his interview with Dr. Lubarsky set Dr. Wirth's termination for not performing at the University's level as the last day of August 2007.

He identified SX 11 as a spreadsheet he prepared for wages paid and not paid to Dr. Wirth. The bottom, first addressed portion of the spreadsheet, reflects $48,000.00 per year based on the first LCA on a 40-hour workweek for September 2, 2006 through October 14, 2006. The top portion of the spreadsheet addressed the period after Dr. Wirth was removed through December 11, 2007, because a notice letter was sent to INS and all computations for back wages ended. He calculated that Dr. Wirth was due $32,312.00 in back wages through December 11, 2007 and entered that information on SX 10.

On cross-examination by Respondent's counsel, Mr. Neira-Flor testified that SX 12 were forms completed by an employee in the intake section of the Department of Labor. The November form was handwritten as usual. The December form was typed by Dr. Wirth, which is not usual. He reported that his computations on SX 11 indicate that Dr. Wirth was due 8-hours of wages for the week ending on September 2, 2006. He reported that his conclusion that Dr. Wirth was available for work from September 6, 2006 was based on her statements, and that the last date of employment of August 31, 2007, was based on University payroll records. He reported his findings that Dr. Wirth's employment ended on August 31, 2007 and that a bona fide termination was complete on December 11, 2007, when INS was notified.

Mr. Neira-Flor testified that he obtained Dr. Wirth's immigration papers from Respondent's counsel and that his supervisor requested Dr. Wirth's papers from Homeland Security "to do clarification." He reported Mr. Honeycutt runs the H-1B program and faxed copies of petitions to Homeland Security to him in February 2009. He stated that all of the records he requested of the University of Miami were produced in about three weeks.

Mr. Neira-Flor identified DX 57 as an employee personal interview statement from Dr. Wirth that he prepared in his handwriting. He noted it was taken on July 11, 2008 and signed by Dr. Wirth. He interpreted the statement to means Dr. Wirth was available for employment.

Upon cross-examination by Dr. Wirth, Mr. Neira-Flor testified that he saw an e-mail indicating termination because the e-mail stated she needed "to give back all the keys, all the credentials, all the equipment that they issued you." He referred to WX 30 and reported that the September 2007 letter does not mention the word "termination." He stated that his conclusion that Dr. Wirth's employment was ended because her professional performance was not up to University of Miami standards was based on "verbal interviews at the University of Miami Medical School" and not written evaluations. He reported that he received a copy of the December 11, 2007 letter the University sent to INS Mesquite Texas Section on July 17, 2008. He stated that he was not aware that the University also sent NIS a December 11, 2007 letter to the Vermont Service Center.

Mr. Neira-Flor testified that he did not have copies of WX 52, 53, 54, or 55 during his investigation. He acknowledged that he did have a copy of WX 60 during the investigation. He reported that he used the wages set forth on the LCAs when he completed his computation of back wages and that he did not have any idea of the salary paid American doctors in the position of an assistant professor of anesthesiology.

On examination by the Court, Mr. Neira-Flor testified that he interviewed four doctors, H. Fisher, D.J. Patin, D.H. Penning and D.A. Lubarsky. He testified that Drs. Fisher, Patin and Penning were H-1B doctors. No H-1B doctor indicated that a housing allowance is part of their benefits. He stated that his computation of the amount owed Dr. Wirth by the University did not include transportation, only back wages.

On re-direct examination by Solicitor's counsel, Mr. Neira-Flor testified that one H-1B doctor interviewed was paid a similar $48,000.00 per year initial rate as a visiting assistant professor of anesthesiology at the beginning and the wage was increased when the H-1B doctor assumed

clinical duties. He reported that a good termination of employment of Dr. Wirth would require "notifying Immigration and supplying her fares for relocation to Germany."

On re-cross by Respondent's counsel, Mr. Neira-Flor testified that his investigation indicated that Dr. Wirth refused to accept $5,000.00 from the University for return transportation. He stated that if an individual voluntarily resigns, the employer need not pay return transportation.

December 8, 2009, Deposition Testimony of Mary Quesada (DX 61; DX 1, 2; WX 4)

On December 8, 2009, Ms. M. Quesada testified on direct examination by Respondent's counsel in deposition that she was employed by the University of Miami School of Medicine from 1974 until her retirement in November 2008. During the period from November 1994 through November 2008 she worked as Director of Administration and Finance in the Department of Anesthesiology. For five years prior to November 1994 she worked as the Director of Finance for the Department of Medicine. As Director in 2006 to the end of 2007 her duties were to assist in the appointment of faculty on payroll at the University, including faculty from other countries and states. She did the annual budget for the Department of Anesthesiology and financial reporting. She worked under the Department Vice Chairman for Financial Affairs, Mr. S. Williams, and the Department Chairman, Dr. Lubarsky.

Ms. Quesada testified that her interaction with Dr. G. Wirth began in the summer of 2006 when she was asked by Dr. Lubarsky and Dr. Birnbach "to go over with her the procedure for foreign faculty coming over to the United States and how the University handled it." The actual interview and job offer would be made by Dr. Lubarsky and the chiefs through the Dean's office. Payroll matters would have been with her office, through the Faculty Affairs office, with Ms. E. Coker and Mr. J. Wigoda. When a foreign faculty member arrived they would go to Faculty Affairs and show their original visa paperwork in order to be put on payroll. She would obtain a copy of the visa papers from Faculty Affairs. Ms. Quesada stated she was sure she had seen Dr. Wirth's visa paperwork (DX 3 and 5).

Ms. Quesada testified that faculty members are paid once a month, on the last day of the month. She reported Dr. Wirth began work for the University in October which "was a little bit later than normally when faculty come in." She had two children and had to get settled. It was very difficult in Miami to find a school for her child with special needs. She came into Ms. Quesada's office a few times and was sent over to Faculty Affairs. One time she came in with the babies to let the office know she "was getting settled basically." Dr. Birnbach was Dr. Wirth's supervisor then and "he usually wanted everybody to start right away when he hired them." Dr. Wirth was to help Dr. Birnbach with research and teaching while waiting for her state faculty medical certificate. Most of her communication with Dr. Wirth in September and October 2006 was by telephone.

Ms. Quesada testified that she assisted Dr. Wirth in processing a faculty medical certificate from Florida, which is a regular procedure for foreign medical graduates. It is a medical license from the state for the doctor to practice medicine in the teaching hospitals, Miller and Jackson. There were a lot of faculty members in the Department of Anesthesiology processed for faculty medical certificates. Dr. Wirth was processed the same way – normally the foreign medical

graduates would talk to Drs. Lubarsky and Birnbach; they would make an offer to the individuals; the individuals "could not do anything clinical until they were able to receive the Florida Medical Faculty Certificate, that usually took anywhere from three to six months"; the individuals would work in teaching and research as "visiting assistant professor salary, which is a non-clinical position at a non-clinical salary" while waiting for the certificate. When the faculty medical certificate was issued, the individuals would meet with their supervisor, Dr. Birnbach or Dr. Lubarsky, and "be assigned to a clinical area." The visa would be amended to include clinical responsibilities through Faculty Affairs and the legal counsel office. With Dr. Wirth's application for faculty medical certificate there was a short holdup on one issue that required her to contact a supervisor in Germany.

Ms. Quesada testified that the Department of Anesthesiology has several work groups with different specialties, such as OB/GYN and the Cancer Center. Dr. Wirth worked for Dr. Birnbach in OB/GYN. She stated that she was aware of several e-mails in the summer of 2007 which expressed concern that Jackson Hospital was too hectic for Dr. Wirth and that working for Dr. Patin in the quieter Sylvester Cancer Center for a period of time might help bring her clinical skills up to speed. Ms. Quesada testified that she began turning over duties to C. Saldarriaga in the summer of 2007. During that period she was asked "to find out, a number of times, from Faculty Affairs the procedure to give notification to Dr. Wirth and to be fair to her" and that she turned the matter over to Faculty Affairs. She reported that she did not have any additional communication with Dr. Wirth after information was entered by her office to remove Dr. Wirth from the payroll.

Ms. Quesada testified that she processed "probably a half-dozen" H-1B requests for foreign faculty each year. When an LCA was created it was posted in the Faculty Lounge and another one would be handled by Faculty Affairs. The individuals were helped with things like leasing cars, verification of employment, and working with Faculty Affairs on visas. Dr. Wirth needed accommodation to get settled.

Ms. Quesada identified WX 4 as something she wrote when Drs. Lubarsky and Birnbach sent Dr. Wirth to her after their early June 2006 meeting, in order to explain how salary works before she accepted a position. She indicated the salaries reflected the visiting assistant professor non-clinical research and teaching the residents for the period up to the medical faculty certificate. Then there are average salaries for a clinical position after receipt of the medical faculty certificate. When in a foreign graduate clinical position, there are "some people [who] work a lot of overtime, and some don't." The housing allowance was up to $10,000.00 for relocation expenses. The $150,000.00 salary was definitely for a clinical position. The salaries on WX 4 "were very consistent with our foreign medical graduate salaries." All visiting assistant professors who had non-clinical responsibilities were paid the same rate. An offer of employment is not handled in a meeting like that of early June 2006; but involved an offer letter signed out by the Dean and would state the exact salary involved.

On cross-examination by Dr. Wirth, Ms. Quesada confirmed it was her handwriting in WX 4 and reported that the salaries listed were just average salaries that foreign medical graduates can receive and not what may have been discussed by Dr. Lubarsky or approved by the Dean. She stated that the $140,000.00 entry consisted of a base salary and non-base salary and additional

duty pay. She reported her belief that no one did anything to delay Dr. Wirth's faculty medical certificate, though "Florida is a very difficult state to get licensed … they require a lot of application, and confirmation, and verification." No one would have interfered with Dr. Wirth getting her faculty medical certificate.

On cross-examination by the Solicitor's counsel, Ms. Quesada testified that the LCAs are posted in the Faculty Lounge with a date posted and a date to take down with a copy put in the office files. It was the responsibility of Ms. M. Fonseca to place a copy in the file. She reported that Dr. Wirth called in after her initial arrival and had to get settled, get transportation, and lease a car; but did not remember the date she called in. With respect to WX 4, she stated the plan was the first three months at $4,000.00 per month doing research and then three months doing clinical teaching at $4,000.00 per month. After six months the faculty medical certificate would be hopefully obtained and the H-1B could be amended for a clinical position. Then the average salary for the foreign graduate clinical position would be $140,000.00 with up to $10,000.00 reimbursement for documented relocation expenses. The $140,000.00 was composed of a base salary and extra hours worked in the operating room.

Ms. Quesada testified that Dr. Wirth called one time about when Dr. Birnbach wanted her to come in to work but did not have a recollection of a date when she was ready to come in. She reported Dr. Wirth did come into the office and discussed the different schools for her children and the need to find an apartment in the school district she could enroll her daughter.

On redirect examination, Ms. Quesada testified that DX 1 was an LCA with "7/28 to 8/10" in the right upper corner which indicated that "it was posted from 7/28 to 8/10." She identified DX 2 as another LCA with the notation "5/16 to 5/31" to reflect posting the LCA on those dates. She identified the two LCAs as being those related to Dr. Wirth's initial non-clinical position and subsequent clinical position. She testified that Dr. Wirth was never appointed to the position of assistant professor of clinical anesthesiology. Faculty Affairs handled why she was not so appointed. She stated that she and her office had no authority to tell Dr. Wirth not to report to work before October 16, 2006, and would not do so.

On re-cross examination by Dr. Wirth, Ms. Quesada testified that when a faculty member comes in, they have to produce a social security card in order to be put on payroll. She stated "we always do" advise individuals to get a social security card. It would be up to Faculty Affairs to say a person cannot start work without a social security card.

Testimony of Cynthia Saldarriaga (TR 152-168; DX 14, 15)

On direct examination by Respondent's counsel, Ms. Saldarriaga testified that she has worked for the University of Miami since 1998 and with the Department of Anesthesiology since 2001. She was a Manager III and in August 2006 became a Clinical Administrator. As Clinical Administrator she assists the Vice Chair with faculty recruitment, monthly call schedules for attendings to administer anesthesia at the four different hospital sites, manage credentials, academic credential, reappointments and promotions for the faculty. In 2006 and 2007, academic credentials, medical faculty certificates and visas were M. Quesada's responsibility before she left in 2008.

Ms. Saldarriaga testified that during the period of 2006 and 2007 she was in charge of scheduling anesthesia attendings at the four hospitals, scheduling vacations, sick time, meetings and calls. She reported Dr. Wirth requested vacation time in 2007 but it was disapproved by Dr. Candiotti because there were no vacation time spots available in June or July 2007. Dr. Wirth was given the option to request vacation time in August but did not so request. She reported that she did not know whether Dr. Wirth was terminated or resigned. She identified DX 14 as an e-mail she was directed by Dr. Lubarsky to send to Dr. Wirth after her meeting with Drs. Lubarsky and Birnbach. She identified DX 15 as an August 20, 2007, e-mail she was instructed to send to Dr. Wirth telling her that she should no longer be in an OR and to remind her of her vacation.

On examination by the Court, Ms. Saldarriaga testified that the information in DX 14 and 15 came from Dr. Lubarsky. She reported that in August and September 2007 she was the person who would create an Excel spreadsheet to schedule the attending operating room anesthesiologists in written form and disseminate them for posting. She still has copies of those spreadsheets. She testified that Dr. Wirth was not an attending anesthesiologist so she would not be on the spreadsheet schedules. During June, July and August 2007, Dr. Wirth was supposed to be at the Sylvester Cancer Center as a resident or fellow. Since Dr. Wirth was not on the attending anesthesiologist schedule, the only way to confirm that she was in an operating room would be to look at anesthesia billing records or the operating room records because any attending, resident or fellow entering the operating room has to be recorded.

On cross-examination by Dr. Wirth, Ms. Saldarriaga testified that she was not the person who would send out a termination letter

On redirect examination by Respondent's counsel, Ms. Saldarriaga testified that the University of Miami has Jackson Hospital, Bascom Hospital, Sylvester Hospital, University of Miami Hospital and Jackson South Hospital. When she does scheduling of anesthesiologists for the hospitals, she has no way of knowing if the physicians show up, unless the chief clinician calls in to say someone did not show up.

Testimony of Elizabeth Coker (TR 132-151; DX 17, 18)

On direct examination by Respondent's counsel, Ms. Coker testified that she is employed by the University of Miami, Miller School of Medicine and has served as the Director of the Office of Faculty Affairs since 2005. As Director her duties involve overseeing "the hiring of faculty positions, … posting positions, oversee the visa process for faculty, as well as overseeing the hiring process, the payroll process for faculty, and the reappointment promotion attendant process." She stated that she was involved with Dr. Wirth's visa process. She identified DX 18 as a letter sent "to Immigration notifying them that a faculty has been separated from the University." She reported she composed the letter and signed it, signifying Dr. Wirth had been separated on August 31, 2007. She identified DX 17 as a letter sent from the University legal counsel's office to USCIS. She reported her belief that DX 18 was to withdraw the first H-1B visa and DX 17 was to withdraw the amended H-1B visa. She testified that the normal process for withdrawing an employee's H-1B visa would be to generate a letter to INS notifying them that the person has been terminated once they had been removed from the payroll system. She

stated she handles 50 to 60 H-1B visas a year for faculty. She reported that the notice to INS was sent in December 2007 instead of September 2007 because of an administrative error.

On examination by the Court, Ms. Coker testified that DX 18 was sent by regular mail to the Texas Service Center in Mesquite, Texas, because that was the address her office knew to send the notice. She stated that Ms. M. Quesada had advised her that Dr. Wirth was no longer employed by the Department sometime in late August 2007. She reported that she had no input to DX 17 and her office does not get involved with transportation and relocation of H-1B physicians from foreign countries.

On cross-examination by Dr. Wirth, Ms. Coker testified that she is the person the University designated as responsible to notify Immigration when an H-1B physician is no longer employed by the University.

On re-direct examination by the Respondent's counsel, Ms. Coker testified that she is the University's authorized representative on immigration matters and understands that the University's immigration lawyers can act on behalf of the University. She reported that DX 18 is from a template form that had not been updated for some time.

On cross-examination by the Solicitor's counsel, Ms. Coker testified that prior to becoming Director of Faculty Affairs in 2005 she served as manager for the H-1B program. She was managing the related visa process, payroll process and payroll document. She had not received any formal training on the H-1B process. She testified that she has had to terminate the H-1B visa for other faculty members over time. The length of time taken to terminate an H-1B visa "fluctuates." The termination notice is sent to Immigration "once someone is fully terminated in the system."

Testimony of Dr. D.H. Penning, M.D. (TR 175-186; DX 12, 35, 44)

On examination by Respondent's counsel, Dr. Penning testified that that his medical profession is anesthesiology and that he began work at the University of Miami in January 2007 and serves as the Director of Obstetrical Anesthesia in the Department of Anesthesiology. He received his medical degree, post-graduate training and anesthesia training at the Queen's University in Kingston, Ontario, Canada. After work in Canada he worked at the University of Iowa and Duke University before returning to the University of Toronto as the Anesthetist-in-Chief at Sunnybrook Hospital. He then became the Director of Obstetrical Anesthesia at John Hopkins University and then move to the University of Miami as a full professor and Director of Obstetrical Anesthesia. As Director he "teach[es] residents, fellows, and other attendings how to look after patients with obstetrical conditions and … also care for [the patients] directly …"

Dr. Penning testified that when he arrived at the University of Miami, Dr. Wirth "was there observing in her capacity as a visiting professor." He understood the Dr. Wirth "was visiting to learn and be observed [in relation to] her capacity as an obstetrical provider and we would be … observing her and grading her and training her in obstetrical anesthesia." He reported that he was not impressed by Dr. Wirth's professional performance and "did not feel confident that she really understood the complexity of the patients that we were dealing with and … was not

confident in her ability to act independently to care for patients without direct supervision." He stated that the obstetrical patients at the University of Miami are among the most complicated patients seen, "it's anything but routine and it requires a lot of judgment and seasoning and medical knowledge and skill." In his opinion Dr. Wirth does not have the judgment and skills necessary to function at the minimally acceptable level for obstetrical anesthesists. He explained that he discussed with Dr. Wirth her becoming "more involved in the day-to-day operations of the floor, get more involved with our routine patients and our complex patients, get more involved with consults that we had, get more involved with the research that we were trying to perform" and "just didn't seem to be able to get through to her." Dr. Wirth was not allowed to work independently with patients because she was not ready to be left unsupervised, "she fell way outside the norms in terms of [Dr. Penning's] assessment of someone who was ready to practice independently" based on his observations.

Dr. Penning identified DX 12 as a July 19, 2007, e-mail he wrote to Dr. Lubarsky stating that "after an extensive personal evaluation involving daily clinical conferences, obstetrical, ward and operating room supervision and after discussion with her clinical mentor … I have decided that [Dr. Wirth] is not an appropriate addition to our faculty in the OB anesthesia division." Dr. Wirth was transferred to the Sylvester Comprehensive Cancer Center which was a more controlled and safer environment for observation than the sometimes chaotic and busy obstetrics ward.

Dr. Penning testified that he is a member of the Clinical Leadership Committee at the Department of Anesthesiology and that the committee advises the department Chair on clinical and academic matters through monthly meetings. He identified DX 35 as documents from a June 25, 2007 committee meeting which he attended. The committee recommended that "upon successful reorientation into the clinical arena and after having obtained satisfactory evaluations from senior faculty, Dr. Wirth will commence her role as an assistant professor of clinical anesthesia within the obstetric division of anesthesia … given that Dr. Wirth is pending [Jackson Memorial Hospital] privileges, she will continue to be monitored at the [Sylvester Comprehensive Cancer Center] site. Evaluations of clinical performance will be monitored by Dr. Patin and other senior faculty."

Dr. Penning identified DX 44 as documents from a July 24, 2007, Clinical Leadership Committee meeting which he attended. The committee recommended that "based upon the negative feedback of residents and faculty who have interacted with [Dr. Wirth], and based upon the discretion of the Director of Obstetrical Anesthesia, and based upon a recommendation of department leadership not to pursue the faculty appointment for Dr. Wirth, Dr. Lubarsky will subsequently terminate her appointment." Dr. Penning opined that Dr. Wirth did not possess the minimum level of competency required and expected of someone to be appointed as an assistant professor.

Neither the Solicitor's counsel nor Dr. Wirth examined Dr. Penning under oath.

June 5, 2008, Written Statement of Interview by Dr. D.H. Penning, M.D. (DX 23)

On June 5, 2008, Dr. Penning was interviewed by Department of Labor Compliance Specialists and signed a written summary of interview. He reported that he worked with Dr. Wirth from January 2007 through May or June of 2007 when she was assigned to the Sylvester Comprehensive Cancer Center. She had not received her Medical Faculty Certificate in January 2007 and as such, "could not perform clinical work or take care of patients" but was expected to contribute to the obstetrics anesthesia team on rounds by "answering questions from residents and faculty, attending lectures, preparing and giving lectures, and conducting research." Dr. Wirth would not answer questions nor ask questions during rounds. When asked direct questions, "her responses were basic and shallow." She was able to communicate in English without any barriers. "She would disappear without telling anyone where she had gone. We also frequently observed that she was not familiar with some of the equipment used in anesthesiology." She was not an active participant on rounds, did not prepare lectures, did not actively interact with residents or students, did not do research, and "did not show any interest in learning her specialty in order to achieve any degree of independence." Dr. Penning indicated that "during the time I supervised [Dr. Wirth], I never achieved a level of comfort and confidence that would allow me to have her take care of patients without any supervision."

Testimony of Dr. D.A. Lubarsky, M.D. (TR 187-244; DX 8, 37; WX 6, 8, 24, 25, 27, 28, 30)

On examination by Respondent's counsel, Dr. Lubarsky testified that his medical profession is anesthesiology and that he began work at the University of Miami in January 2001 as the Chair of the Department of Anesthesiology. He received his medical degree from Washington University and did his clinical training in cardiothoracic anesthesia at New York University. He spent fourteen years at Duke University becoming a tenured professor and Vice-chair of the department for seven years before reporting to University of Miami as Chair of the Department of Anesthesiology. The Department of Anesthesiology is the largest such training in the world with 132 interns, residents and fellow as well as 80 to 100 faculty members. The Department is about 500 people. The Department trains the largest number of anesthesiologists in the world as well as education for medical students with the Miller School of Medicine.

Dr. Lubarsky testified that his initial meeting with Dr. Wirth was not routine because she showed up at his office asking to see him and he normally does not interview or offer graduated employment to someone who just shows up at the office. He testified that at the meeting Dr. Wirth reported being an expert in OB anesthesia after working in a women's hospital in Germany, having been out of clinical setting for a little under two years, and had a daughter who had been injured in an anesthetic mishap. He reported that because of the time Dr. Wirth had been out of clinical practice and the difference between the German patient population and the very high-risk obstetric population served by the University of Miami, he would set up a program for Dr. Wirth "as we sometimes do for people coming from a different country or different type of hospital practice … [where] we could assess her skill set, help her obtain the skill set that was necessary to provide education and training and some degree of clinical care to patients in our obstetric anesthesia division and eventually proceed to where she could practice independently of oversight, and that was the plan that we set up, where she would essentially function as a fellow … The only reason she was not hired with the specific title of a fellow … is

because Jackson Memorial Hospital had an issue with the training license national division and we were unable to offer foreign applicants fellowships at that particular point in time, and yet, at the same time, we could not offer [Dr. Wirth] an assistant professor's position because she didn't have the requisite skill set that we could assess … She was offered the visiting assistant professorship position because that was … the closest thing that met with the type of skill set that she had at that time." There were no clinical responsibilities with that position.

Dr. Lubarsky testified that a "huge number of accommodations" were made for Dr. Wirth. She was given secretarial support and an offer to fly to Germany to obtain documents that were delaying her Florida medical certificate. She was excused from routine clinical call because of her reported family situation and "instead of letting her resigned, I arranged at departmental expense to pay someone else to take on her responsibilities." She was offered a training position with the Department when it was obvious that she lacked the acceptable qualifications to work "in any capacity … at a level that would provide training and education to those under her." No one else would have been offered such a program. Even raising her pay to $96,000.00 was an accommodation "because she really hadn't even earned that increase."

Dr. Lubarsky testified that on numerous occasions he, Dr. Penning and Dr. Birnbach discussed her performance with Dr. Wirth. She was never allowed to work independently with patients, even after receiving her medical certificate from Florida "because she never demonstrated the insight or knowledge in a minimally acceptable level that would allow us to feel comfortable that she was a safe practioner. … We will never allow someone who does not have the correct skill set or the correct knowledge to practice without oversight. … there were several episodes that were relayed to me of a failure to respond to significant life-threatening issues that made us very concerned and did not allow us to progress [Dr. Wirth] in her performance level." He reported that Dr. Wirth was assigned to the Sylvester Comprehensive Cancer Center because it is the most stable staff environment with an operating room outpatient basis that offered "a more comfortable environment" for her to have the caseload that would provide the maximal chance of success by doing "the simplest of cases and then move on and then reintegrate .. into her chosen area which was obstetric anesthesia which was the only place we actually needed a person to be a part of our faculty at that time." Her performance did not improve at Sylvester Comprehensive Cancer Center and "she was not performing at a level, frankly, that was better than the greenest, most junior resident in terms of the ability to react and appropriately diagnose and address the serious issues in the operating room. She could not be left alone at all."

Dr. Lubarsky testified that Dr. Wirth was not ever appointed to the position of assistant professor of clinical anesthesiology. He reported that there is a vote taken by the Clinical Leadership of the Department whenever there is a decision being made to appoint someone. The faculty has to agree that the individual is someone they want to work with. The vote on Dr. Wirth being appointed was a very rare "no" vote. He identified DX 37 as a report of the July 1, 2007 Leadership Committee vote to accept all faculty appointments before the committee except that of Dr. Wirth. Half of the people abstained from voting appropriately because they had not worked with Dr. Wirth. Before an appointment can be made, the faculty has to accept the individual, the Department Chair has to accept the individual, the Dean has to accept the individual and the Provost has to sign off on the final appointment. The people who had direct knowledge of Dr. Wirth's activities and performance were they ones who voted and

"unanimously expressed an opinion that it would be an inappropriate move to appoint her to the faculty and, by extension, suggesting that she could neither train nor teach nor practice anesthesia in our Department." He stated "I believe [Dr. Wirth] may be the only faculty appointment that we have ever brought to the committee who was not approved."

Dr. Lubarsky testified that for the foreign faculty employees hired without a Florida faculty medical certificate, they are first hired as a visiting assistant professor, visiting instructor or visiting research professor. Dr. H. Fisher was from Israel and first brought on as a visiting assistant professor and was subsequently appointed to the position of assistant professor. Dr. Fisher had to be closely evaluated in administering anesthesia because he had been doing a fellowship in critical care and had been removed from clinical anesthesiology for some time. We had to make sure he could teach and train the residents. Dr. Fisher started at the same salary level and benefits as Dr. Wirth started.

Dr. Lubarsky testified that he met with Dr. Wirth in his office on July 24, 2007, after she had been evaluated at Sylvester Comprehensive Cancer Center, with Dr. Birnbach present. The purpose of the meeting was to discuss her failure to progress as a competent anesthesiologist with minimally acceptable qualifications to perform as a faculty member and that it did not appear she was going to be able to progress without going back and repeating her full training. At the meeting Dr. Wirth's performance, lack of teaching, lack of research, lack of participation in any intellectual realm around clinical care, inability to perform acceptably on the operating room floor after receiving her medical certificate, and inability to perform acceptably in the simplest of cases at Sylvester Comprehensive Cancer Center were discussed. Dr. Wirth was presented the opinions of (1) being terminated for cause since her skill sets were inconsistent with continuing as a faculty member; (2) simply resign and return to Germany; or (3) take a spot in the resident training program at Department expense, because she was unable to perform as a fully trained physician. Dr. Wirth declined the resident program trainee position because she couldn't and wouldn't accept the low salary. Dr. Wirth elected to resign and return to Germany. Dr. Lubarsky reported he believed he had to pay for her and her children's return flight to Germany and "threw in $5,000.00" to help pay for her household goods as an accommodation to make it easier for her to relocate back to Germany. He stated that the issue of vacation came up and directed Dr. Wirth that "as of now you're on vacation" and to finish out her vacation because her "last day was going to be whatever we decided her last day was going to be." There was no point to come to work because she could not be left alone, did not have clinical abilities, and was not going to continue teaching or doing research. Dr. Wirth was asked not to come to work. He reported that he informed Ms. Saldarriaga and Ms. Quesada of his department of the events and directed them to handle the paperwork involved. Dr. Lubarsky testified that Dr. Wirth had "resigned more than once, it was only on July 24th that I accepted it."

Dr. Lubarsky testified that everyone who comes to work on faculty in a visiting role or as full faculty has a large component of there job as giving lectures, doing rounds, performing clinical research, and writing abstract case reports. Dr. Wirth added nothing to her daily morning rounds with residents and added nothing at all to the teaching or intellectual environment. Hers was a knowledge deficit issue.

Dr. Lubarsky testified that the Department does not offer visiting professors relocation expenses or a housing allowance. Such benefits are offered to assistant professors in accordance with the University of Miami guidelines. Dr. Wirth was not appointed to assistant professor.

On examination be the Court, Dr. Lubarsky testified that he accepted Dr. Wirth's resignation at the meeting on July 24, 2007 with Dr. Birnbach present and that Dr. Wirth did not perform any work duties after that meeting, to his knowledge. The actual exit date would be the last day of employment and would have included vacation time being used after July 24, 2007. He reported that the hard and fast policy of the University is that no one can accumulate more than 22 vacation days.

On cross-examination by Dr. Wirth, Dr. Lubarsky testified that the University accommodated her when ever she needed time to care for her child and assigned his central office administrative staff, Ms. Saldarriaga and Ms. Quesada, to help her with transcripts and paperwork for her medical faculty certificate. He also reported a conversation where he offered to fly Dr. Wirth to Germany to get her medical college transcripts if needed, something never done for other staff members. Dr. Lubarsky stated that how long it took for an individual to receive a Florida medical faculty certificate depended on where the person is coming from, the degree of training done in a first world country verses a third world country, and ease of translation of transcripts. Germany was usually not an issue on time and three months for the paperwork would be expected.

Dr. Lubarsky testified that on July 24, 2007, he offered Dr. Wirth the options of resigning, enter a training program to increase her skill set, or to be terminated for her inability to perform. He examined WX 27 and reported he could not recall seeing the document before it was handed to him in court; but that he was aware that Dr. Wirth had made a complaint through Dr. Goldschmidt and he considered that Dr. Wirth had already resigned at that point. He examined WX 28 and reported that he did not know if he had seen the specific letter; but was aware that Dr. Goldschmidt had investigated the complaint and decided not to pursue the matter further. He identified the September 6, 2007 letter in WX 30 as one he wrote to Dr. Wirth. He testified that he did not know if he received a letter of resignation from Dr. Wirth but "do know I received your stated clear and explicit agreement to resign in lieu of us actually pursuing termination because of the effect for cause and for lack of performance which would have actually been a negative blot on your record. … you did resign, very clearly, very explicitly, and without a doubt."

Dr. Lubarsky testified that he is familiar with some parts of the University of Miami Faculty Manual. He reviewed the portion of the Faculty Manual in WX 25 and reported that he had followed the Faculty Manual because her performance was discussed with her and "you chose to resign rather than have us pursue the rest of the procedure. There was no rest of the procedure because that was your option, to either go down the pathway of being exposed for someone who had no skill sets in anesthesiology or resigning and not practicing." He testified that the procedure set for to discuss the matter in personal conference and resolve by mutual consent was followed because with Dr. Wirth "there was mutual and absolute witnessed consent to proceed in the manner in which we did." He identified WX 8 as a letter he wrote prior to Dr. Wirth arriving

at the University. He identified WX 24 as a letter he wrote [to Homeland Security to amend the original LCA].

Dr. Lubarsky testified that there is a structure for divisional chiefs to evaluate people, including trainees and faculty members, in each division. He stated he discussed with Dr. Penning the conference he was to have with Dr. Wirth because of her lack of performance, on several occasions. To remedy the lack of performance, Dr. Wirth was to do "more reading, more participation, more initiative shown on rounds, [and] more contribution and participation and teaching of junior residents on the OB service [and] during lecture formats. None of which actually occurred and so your evaluation was done and the deficiencies were noted, a remedy suggested, and a failure to perform to a minimal acceptable level was noted to you. … a paper trail does not exist for each and every encounter for any faculty member at this professional level of performance. … I never anticipated that we would fail in our quest to make you into a functional, contributing anesthesiologist, teaching and doing research and doing clinical care in our Department. … you are the only person that has ever not made it through the system."

On examination by the Court, Dr. Lubarsky examined WX 8 and added a clarifying statement that the University of Miami was in great need of an anesthesiologist with experience in obstetrics, that such medical specialty was not a board recognized specialty, that Dr. Wirth represented that "she had extensive experience, knowledge and expertise in women's anesthesia, including, specifically, high risk obstetric anesthesia" and had been out of clinical practice a little under two years. He reported that he later learned that "the last time she practiced clinically in Germany was something like five years." With WX 24, he stated that the letter to Homeland Security sets for future job responsibilities to qualify for the $96,000.00 salary; but that Dr. Wirth never performed any of the duties set forth in the letter. He testified that the University of Miami uses recognized academic ranks and that the initial "visiting" rank is "a temporary title in transit to becoming a full-fledged faculty member" because the individual has not gone through any of the requirements to become a faculty member.

On reexamination by Respondent's counsel, Dr. Lubarsky testified that a visiting assistant professor is still considered part of the faculty because the University of Miami is primarily an academic institution.

On cross-examination by the Solicitor's counsel, Dr. Lubarsky testified that DX 8 was an August 20, 2007 e-mail sent to Dr. Wirth because on a particular day she showed up even though the Department thought her employment had ended. She had no schedule, no work assignments and no academic responsibilities; but had just showed up." He reported that he did not have any recollection if Dr. Wirth did or didn't have an assigned work period under "very, very super close supervision" after the July 24, 2007 meeting, which he thought ended the employment relationship, excepted for unused vacation time. He reported that he had no direct knowledge that Dr. Wirth had been out of clinical practice for about five years; but "that the demonstration of her skill set was absolutely and incontrovertibly inconsistent with the idea that she had been a practicing anesthesiologist doing high-risk OB anesthesia at an advanced hospital in the vicinity of … Munich" based on his experience with other German anesthesiologists.

Dr. Lubarsky testified that Ms. Coker is not a member of his staff. On examination of the LCA in WX 6, he reported he signed the document and that he did not recall any formal training regarding the employer's requirements under the LCA.

On reexamination by Respondent's counsel, Dr. Lubarsky testified that between the July 24, 2007 meeting and the end of August 2007 Dr. Wirth had shown up at the hospital for work one day and it was a matter of concern. She did not ask for an extra month of employment but did ask for relocation expenses which we granted.

June 5, 2008, Written Statement of Interview by Dr. D.A. Lubarsky, M.D. (DX 23)

On June 5, 2008, Dr. Lubarsky was interviewed by Department of Labor Compliance Specialists and signed a written summary of interview. Dr. Lubarsky stated that Dr. Wirth showed up at his office while her daughter was being treated at the Jackson Memorial Hospital and indicated that she "had extensive experience in OB-GYN/Obstetrics Anesthesiology in Germany and had the qualification to work as a faculty member at the University of Miami Miller School of Medicine." He offered her H-1B sponsorship and a position as a visiting assistant professor at $48,000.00 per year. He explained that she would need a Medical Faculty Certificate for the Florida Board of Medicine for clinical duties and that "once she obtained the Medical Faculty Certificate and demonstrated that she could work as an independent doctor without supervision, she would be entitled to an increase in salary." He indicated her duties as a visiting assistant professor would be "to conduct research, attend and participate in rounds, attend and give lectures, and act as a resource for our residents."

Dr. Lubarsky indicated that "during the whole time [Dr. Wirth] was under my supervision, she could not prove to me that she was able to work with high-risk patients or convey her knowledge to other team members. She did not conduct research, her contributions during daily rounds were very basic and minimal … she did not arrange or give any lectures, and she did not serve as a resource or a role model to our residents and medical students." At one time he relieved Dr. Wirth of on-call duties so she would not incur additional child care expenses. When she received her Medical Faculty Certificate she was assigned to a more relaxed setting at Sylvester Comprehensive Cancer Center and her pay was raised to $96,000.00 per year. He reported that in late July 2007, after Dr. Wirth was evaluated by the OB-GYN Anesthesia team and Sylvester Comprehensive Cancer Center, he "offered her the opportunity for further training. She refused this offer [and] we then reached an oral agreement whereby she would resign her position by the end of August 2007. Dr. Wirth then refused to honor her agreement to resign and kept showing up to work [and] I was left with no alternative but to enforce the agreement by asking her to leave the premises."

Meeting Notes of Dr. D.A. Lubarsky, M.D. (DX 54)

This exhibit contains electronic notes of select meetings involving Dr. Lubarsky where Dr. Wirth was either in attendance or a topic of discussion. On June 22, 2007, "Dr. Wirth stopped by the office to reveal that she would be unable to perform call duties … and to request more money since she had been a 'fellow' for more than six months, despite never having worked clinically." On June 25, 2007, "Dr. Wirth stated in an informal office visit that 'teachers were not reasonable

judges of her skills' and that she was opposed to peer evaluations and continuous monitoring of her clinical skill set. … During the course of the meeting she offered to resign, but we refused and convinced her to go to Sylvester and refresh her skills, wanting to give her every chance to succeed." On June 27, 2007, Dr. Lubarsky noted that Dr. Wirth was given the opportunity to work and refresh her skills at Sylvester where the "expectation was that she would progress and soon be independent and moonlighting there one day per week as a faculty member while honing her OB anesthesia subspecialty skills in the care of high-risk JMH population. Her salary of $96,000 was predicated on that arrangement." His notes on the July 24, 2007 meeting with Dr. Wirth reflect that Dr. Wirth "was told that she would not be considered a candidate for the clinical faculty under the present circumstances … [and Dr. Lubarsky] offered her a spot in our residency program … [which] she declined and informed us that she was not happy and wanted to leave anyway. We agreed that she would leave at the end of August."

Testimony of Dr. D.J. Patin, M.D. (TR 245-258, DX 13, 35, 44)

On direct examination by Respondent's counsel Dr. Patin testified that his medical profession is anesthesiologist and that he founded the Sylvester Comprehensive Cancer Center Anesthesia Department at the University of Miami in 1992 and has been its Division Chief since 1992. He received his medical degree from the University of Miami and served in the U.S. Navy until he retired. He completed his anesthesiology residency at the University of Miami in 1992. He also serves as an Associate Professor of Clinical Anesthesiology. His duties include clinical and medical direction of the operating room, supervision of staff, working with nursing and other providers vital to running the operating room – anesthesia staff, faculty, fellows, residents, medical students, anesthesia assistants and technicians.

Dr. Patin testified that Dr. Wirth was assigned to the Sylvester Center in the summer of 2007. He observed Dr. Wirth and also received reports of others from the operating room as Division Chief. He reported that Dr. Wirth's skills, judgment, knowledge, communication, and ability to interact with team members were not adequate or suitable for independent practice and did not meet the minimum level of competency required and expected of someone to be appointed as an assistant professor at the University of Miami School of Medicine.

Dr. Patin identified DX 35 and his signature as an attendee at the Clinical Leadership Committee meeting of June 25, 2007. He reported that after the meeting, Dr. Wirth was assigned to his division. He identified DX 13 as his July 24, 2007, letter to Dr. Lubarsky reporting that in his opinion as Division Chief and that of Dr. M. Boeru and Dr. F. Furgang of the division, Dr. Wirth "was deemed not able to assume independent practice in the dynamic and highly stressful environment [and] anesthesia knowledge, technical performance, and communications skills were lacking."

On examination by the Court, Dr. Patin testified that Dr. Wirth was assigned to his division as a result of the June 25, 2007 Clinical Leadership Committee meeting; but could have been in the division briefly before the committee meeting. While in the division, Dr. Wirth was not an independent provider and was treated as a resident or in a fellow capacity so she would be supervised by faculty, the attending anesthesiologist would be responsible for the case involved. She was treated as an extra and was to observe cases and the four operating rooms; but the

division was not dependent on her presence to do anesthesia. He did not recall whether Dr. Wirth left the division the same day as the July 24, 2007 meeting with Dr. Lubarsky or worked in a supervised capacity for a period after that. Dr. Patin reported that had Dr. Wirth remained at the Sylvester Center, she would have been supervised by Dr. Boeru or himself. He reported that since cases were not dependent on Dr. Wirth providing anesthesia, her presence in July or August would not show up in an anesthetic record or operative record of a procedure and there was no sign-in / sign-out sheet for H-1B physicians.

On re-direct examination by Respondent's counsel, Dr. Patin testified that the Clinical Leadership Committee meets monthly and it is possible that Dr. Wirth was assigned to the division before the June 25, 2007 meeting because "we don't have to wait for a meeting like that [to] move personnel around." He examined DX 44 and reported that his signature is not on the July 24, 2007 Clinical Leadership Committee meeting sheet because he did not attend the meeting. He stated he was not party to any communication to Dr. Wirth concerning her employment status.

June 5, 2008, Written Statement of Interview by Dr. D.J. Patin, M.D. (DX 23)

On June 5, 2008, Dr. Patin was interviewed by Department of Labor Compliance Specialists and signed a written summary of interview. He indicated that he was Dr. Wirth's supervisor for June to August 2007 at the Sylvester Comprehensive Cancer Center. Dr. Wirth was assigned to Sylvester Comprehensive Cancer Center in order "to provide her with an environment in which she could progress and achieve a level of independence that would allow her to take care of patients without any supervision. She never achieved this goal." He indicated that he routinely works with physicians and students who come to the United States from other countries and that it takes several months of training to reach the level of performance and independence that the University of Miami requires. He reported Dr. Wirth was assigned to the operating room but was not allowed to touch patients without supervision. He classified her judgment as "very elementary" where "many times the nurses were more knowledgeable than Dr. Wirth." Her participation on rounds was very minimal, she showed no initiative, and did not prepare or give lectures. Dr. Patin indicated "we again offered her additional training and support to improve her knowledge and level of participation to be able to work independently. She did not recognize that she needed the additional help and turned down the offer."

Testimony of Dr. D.J. Birnbach, M.D. (TR 259-280, DX 29)

On direct examination by Respondent's counsel, Dr, Birnbach testified that his medical specialty is anesthesiology and he serves at the University of Miami as the Vice Provost of all faculty affairs, Director of the Center for Patient Safety, and Professors in the Departments of Anesthesiology, Patient Safety, Obstetrics and Gynecology. He trained in anesthesiology and completed a fellowship in anesthesiology at Harvard University, became a full professor in anesthesiology, obstetrics and gynecology at Columbia University and was later recruited to the University of Miami to head the women's anesthesia and serve as associate director of the Center for Women's Health and vice chair of the Department of Anesthesiology. He reported extensive writing in the field of obstetric anesthesiology.

Dr. Birnbach testified that he was introduced to Dr. Wirth in 2006 by Dr. Lubarsky when she was in Dr. Lubarsky's office seeking work in obstetric anesthesia. Dr. Wirth was assigned to Dr. Birnbach's department after being hired by the University of Miami. He reported concerns about patient safety related to Dr. Wirth's medical knowledge deficit when compared to medical students, first through third year residents and fellows assigned to his tutelage. He expected Dr. Wirth "to be at the level of a senior resident or a fellow … [but] early on was not even functioning at the level of a very junior resident." Before Dr. Wirth had a Florida medical license, she had to learn how to teach, how to do research, needed to be with residents and needed to learn everything done in the Department so "that by the time [she] got [her] license, the first day [she] can go in and [be] on the job and that job means supervisor." He reported that obstetrics at Jackson Memorial Hospital is the highest risk of the high-risk units in the world with no margin for error because of the chaotic nature and sick patients involved. His impression was that "she would come in a visiting assistant professor [like other foreign physicians, and] would have to prove [her self like other foreign physicians] over a three, six, nine, month period … [while being treated] as one of my fellows during that training period."

Dr. Birnbach reported that Dr. Wirth's English "was absolutely fluent" but she would not participate in rounds unless called upon and when asked an easy question on rounds, she would answer incorrectly more often than not. She demonstrated an attitude towards others she felt judged her, was unfriendly to residents, and couldn't be found on many occasions. There was a constant rash of complaints from the people who worked on obstetrics. Dr. Birnbach stated he finally wrote a letter to Dr. Lubarsky stating that Dr. Wirth's actions were a patient safety problem and she "needed to go to a low acuity area to get her wings, to try and find out what she did and didn't know, [and] to teach her some basics before she came back to OB." He reported that he was later promoted and was replaced by Dr. Penning, who is a more mellow and low-keyed. Dr. Wirth was moved to Sylvester Cancer Center.

Dr. Birnbach identified DX 29 as the April 5, 2007, letter he sent to Dr. Lubarsky concerning his assessment of Dr. Wirth that she was not ready to work in obstetrics and he was concerned about her performance. He reported that Dr. Wirth's start with the University was delayed of her choosing. She became unable to work nights when two-thirds of the deliveries and many emergencies occur, and thus she couldn't be properly trained in emergencies. He reported that Dr. Wirth was instructed by Dr. Lubarsky that she had to work nights "because that was part of the way her salary was generated, that was part of the way that we were teaching our residents, and that was part of the way that we were teaching her at this point, and she refused and said if you make me work at night I'll quit." She was accommodated and a resident was paid to do her night call. He reported that in 25 years of his experience "no one has ever not done call on OB who practices OB."

Dr. Birnbach testified that he served as Vice Chair of the Clinical Leadership Committee which is also known as the Executive Committee. He reported that he was present at a committee meeting in July 2007 when a vote was taken not to appoint Dr. Wirth because "it would not be safe to have her working on patients without a one-on-one supervisor." He stated his fear from asking questions of Dr. Wirth on rounds was "she was just not learning."

Dr. Birnbach testified that he was present at a July 2007 meeting with Dr. Wirth and Dr. Lubarsky and "I recall it as if it was yesterday." The meeting was to discuss with Dr. Wirth "what our potential future plans could be …why things were so problematic at this point and what options we could have." He reported that things had come to a head prior to the meeting, he feared "that she was not safe working with patients" and when given a little more independence in one patient case, medical providers "thought she was trying to kill the patient with very low blood pressure untreated." He reported a private meeting with Dr. Lubarsky where Dr. Lubarsky "believed that he should offer her a full training program" and he did not agree, though he acknowledged that Dr. Lubarsky was the boss and it was his decision to make. Dr. Birnbach testified that Dr. Wirth was offended by the offer of doing a full residency program or leaving. He reported Dr. Wirth became very nasty towards Dr. Lubarsky and stated "I never liked it here, I never liked any of you people … I quit. I should have quit before. I quit now. I'm not putting up with this. You people have no business judging me. I'm out of here." He reported his impression was clear that Dr. Wirth had resigned. He testified Dr. Lubarsky "made it clear" by saying "I accept your resignation, you quit. You quit, that's fine. … You have some vacation time coming, take your vacation time and we'll just call it, we won't say anything bad about you, we'll call this exercise that we all did – you didn't work out, you didn't want to train here, we're not keeping you. I'm sorry you want to quit. We gave you other options. I'm sorry it didn't work out." He stated that Dr. Lubarsky called him the week after the meeting to confirm his impression that Dr. Wirth had quit and that he replied to Dr. Lubarsky "of course she did. She said I quit; I should have quit before; I'm out of here; I hate you people, you were never nice to me; I'm leaving." Dr. Lubarsky had called to confirm that Dr. Wirth had quit because she had been showing up at work and denying that she had quit. Dr. Birnbach added to Dr. Lubarsky's inquiry, "thank God she quit."

Dr. Birnbach testified that after he moved to the Coral Gable campus to Vice Provost of the University he was getting e-mails that Dr. Wirth was still showing up for work even though she had been told she wasn't working there anymore. He reported that as Vice Provost he hosted a seminar for new faculty in the middle of August, around the 15th or 18th, which has a backyard barbeque at the President's house on Saturday for the new faculty to meet. He went to the event to meet the new faculty and saw Dr. Wirth in attendance. He testified that he approached Dr. Wirth and told her "this is for new faculty, you're not new faculty. You don't work here, you quit. … I don't know what you're doing here, but please leave."

Dr. Birnbach testified in his professional opinion Dr. Wirth absolutely lacked the minimum level of competency required to perform as a clinical educator at the University of Miami. He reported that had Dr. Wirth been allowed to work clinically at the University he would leave the University.

On cross-examination by the Solicitor's counsel, Dr. Birnbach testified that Dr. Lubarsky called him after the July 24, 2007, meeting with Dr. Wirth and said "I heard her quit, is that what you heard?" He reported that "of course" he heard her quit at the meeting. He reported that Dr. Wirth showed up for work several times after the meeting and was told that she did not work there anymore.

On cross-examination by Dr. Wirth, Dr. Birnbach testified that he did not send her an invitation to the weekend barbeque for new faculty, but that invitations were handled by Faculty Affairs. He stated that when she did work for him he did invite her to the outside "Simulator," which tests clinical abilities, knowledge and skills.

On examination by the Court, Dr. Birnbach explained that the "Simulator" is "predominantly used to teach teamwork, communications during stressful situations, how does a person become a leader, [and] what makes a follower. It is not there to teach basics." The "Simulator" is used by residents in their first two years as part of obstetric rotation for team building. He stated that Dr. Wirth was invited to the "Simulator" because he was trying to teach her how to teach communication to residents, which was an integral part of the teaching mission.

April 4, 2007, Letter to Dr. G. Wirth, M.D., from Dr. D.A. Lubarsky, M.D. (WX 19, 20; DX 11)

These exhibits indicate that Dr. Wirth acknowledged that she "will be appointed as Visiting Assistant Professor of Anesthesiology with added clinical responsibilities as of May 1, 2007. [Her] annualized expected salary will be $96,000 it will be re-evaluated at three months upon satisfactory completion of your clinical assignment as determined by your Division Chief, Dr. Donald Penning. Upon completion of those duties, [Dr. Lubarsky] will recommend [her] for promotion to an Assistant Professor of Anesthesiology, on the clinical educator tract. [Her] primary clinical assignment will be in Obstetrics (80%) and Sylvester (20%) … [Her] clinical duties will be performed under the direction of a senior faculty member."

June 1, 2007, E-mail of Dr. K. Candiotti, M.D. (WX 22)

This exhibit indicates that Dr. Wirth was to begin work at the Sylvester Comprehensive Cancer Center on Monday, June 4, 2007, in a position "as fellow/resident for the time being. SCC will keep the same number of residents. For now she will be extra help at your facility."

Initial Labor Condition Application (LDA) and H-1B Visa involving Dr. G. Wirth, M.D. (SX 2, 4; DX 1, 3; WX 6, 7, 9)

The initial LCA involving Dr. Wirth was filed with the U.S. Government on July 10, 2006. The application period was for September 1, 2006 through August 31, 2009, inclusive, at the full-time wage rate of $48,000.00 per year for the position of Visiting Assistant Professor of Anesthesiology at the University of Miami, Miller School of Medicine. The listed prevailing wage for the position at the educational institution was $29,830.00.

Dr. Wirth was notified of the initial LCA approval and steps to obtain her H-1B visa by an August 10, 2006 letter from the University of Miami legal advisors.

State of Florida Medical Faculty Certificate (SX 7; DX 4, 5, 6, WX 18, 23)

The Florida Board of Medicine issued Dr. G. Wirth, M.D., "Medical Faculty Certificate Number: 1617" on March 20, 2007. The certificate authorized Dr. Wirth "to practice medicine and surgery in the State of Florida only in conjunction with [the University of Miami's] full time

faculty appointment to teach in a program of medicine at the University of Miami or in its affiliated clinical facilities or teaching hospitals." The certificate provided that it "automatically expires when [Dr. Wirth's] relationship is terminated with the University of Miami or after a period of 24 months, whichever occurs sooner."

Amended Labor Condition Application (LDA) and H-1B visa involving Dr. G. Wirth, M.D. (SX 5, 6; DX 2, 4, WX 21, 24)

The amended LCA involving Dr. Wirth was filed with the U.S. Government on May 3, 2007. The application period was for May 3, 2007 through May 2, 2010, inclusive, at the full-time wage rate of $96,000.00 per year for the position of Visiting Assistant Professor/Assistant Professor at the University of Miami, Miller School of Medicine. The listed prevailing wage for the position at the educational institution was $29,830.00. The LCA was received by USCIS, Vermont Service Center, on May 17, 2007. The receipt Notice indicated "This notice does not grant any immigration or benefit. It is not even evidence that this case is still pending. It only shows that the application or petition was filed on the date shown."

Dr. Wirth was notified that the amended LCA had been filed by a May 25, 2007, letter from the University of Miami legal advisors.

By letter dated September 21, 2007, the University of Miami, legal advisors, were notified by USCIS, Vermont Service Center, that additional information was required by November 5, 2007 on the amended LCA for Dr. Wirth. The additional documentation related to submission of the Florida Board of Medicine Medical Faculty Certificate issued for Dr. G. Wirth. The University of Miami legal advisors submitted a copy of the requested Florida Board of Medicine Medical Faculty Certificate to USCIS, Vermont Service Center by letter dated October 4, 2007, and sent by Federal Express to the USCIS in St. Albans, Vermont, by FedEx Tracking # 7997-2885-4800, for delivery on the morning of October 5, 2007.

On November 9, 2007, the USCIS, Vermont Service Center, issued an "Approval Notice" indicating that the amended LCA and H-1B visa status had been approved for the period commencing November 8, 2007 through May 1, 2010.

Written Notice Relating to Termination of Dr. G. Wirth's H-1B Employment to U.S. Government Authorities (SX 9; DX 4, 17, 18, 19, 20, 21, 22; WX 40, 41, 52, 53, 54, 55, 58, 63, 64)

By letter from the University of Miami legal advisors, dated December 11, 2007, and sent by Federal Express to the USCIS in St. Albans, Vermont, by FedEx Tracking # 7904-0108-6649, for delivery on the morning of December 12, 2007, the University of Miami, Miller School of Medicine sent notice that the "H-1B employment relationship" between the University and Dr. G. Wirth had ceased on August 31, 2007. This particular letter was delivered to the USCIS in St. Albans, Vermont at 11:31 AM, December 12, 2007.

Ms. E. Coker, as Assistant Director for Faculty Affairs, issued a letter from the University of Miami, Miller School of Medicine on December 11, 2007, addressed to the INS, Texas Service Center, in Mesquite, Texas, stating that the University of Miami no longer employed Dr. G.

Wirth as of August 31, 2007. Upon written inquiry by USCIS, St. Albans, Vermont, dated February 23, 2009, the University of Miami legal advisors resent a copy of the December 11, 2007 letter to INS, Texas Service Center to USCIS in St. Albans, Vermont, by FedEx Tracking # 1Z-7F2-A84-01-9161-4466. This was delivered by FedEx at 10:20AM, March 20, 2009. A copy was resent by FedEx Tracking # 1Z-7F2-A84-01-9146-5807 and delivered to USCIS, St. Albans, Vermont, at 10:27 AM, March 23, 2009.

By letters dated February 23, 2009, USCIS notified the University of Miami that it intended to use the revocation process to terminate the initial LCA and the amended LCA issued to Dr. Wirth because her Florida Medical Faculty Certificate "has been null and void since April 10, 2008" and she is not licensed to practice anesthesiology in Florida since April 10, 2008.

By letter dated March 18, 2009, from the University of Miami legal advisors in response to the USCIS letters of February 23, 2009, the University advised USCIS that "Dr. Wirth's employment with the University of Miami terminated as of August 31, 2007." A copy of the December 11, 2007 letter to USCIS was included.

On April 16, 2009, the USCIS, St. Albans, Vermont acknowledged in writing to the University of Miami legal advisors that the validity periods under the initial LCA and the amended LCA were "automatically revoked in accordance with 8 CFR 214.2(h)(11)(ii).

University of Employment Payroll Records for Dr. G. Wirth, M.D. (SX 8; DX 7, 14, 56; WX 14, 29)

This exhibit indicates that Dr. Wirth commenced work as a Visiting Assistant Professor in the Anesthesiology Department, Medical Affairs Division of the School of Medicine on October 16, 2006, at a monthly rate of $4,000.00 through April 30, 2007. Her monthly rate of pay from May 1, 2007 through August 31, 2007, was $8,000.00. A $5,000.00 bonus was recorded as being paid during the September 2007 time period. The $5,000.00 bonus, less taxes, paid in the final September 2007 paycheck and was for relocation expenses, not including airfare for Dr. Wirth or her dependent children.

The records indicate 89.32 hours worked in October 2006 and 163.75 hours worked each of the months from September 2006 through August 31, 2007, inclusive. Her last day worked was reported as August 31, 2007 with termination being the same date. The "hours worked" included vacation time period. Termination of employment was recorded as "mutually satisfactory release." No vacation, sick or floater time was remaining as of September 28, 2007.

March 10, 2008, Letter from Dr. G. Wirth to Payroll Office, University of Miami (WX 83, 85)

This letter indicates that Dr. Wirth received Check # 604182 in the amount of $4,355.12 and dated October 3, 2007, on March 8, 2008. She stated "I am returning the above mentioned $5,000 bonus check because as I previously informed the University of Miami … I refuse to resign my position as delineated in the … 'Letter of Appointment' which I signed on May 1, 2007." Dr. Wirth requested a response to her Miami, Florida address.

Exhibits Related to the Employment Termination of Dr. G. Wirth, M.D. (DX 15, 16, 42, 43, 46, 49, 50, 56; WX 26, 27, 28, 30, 31, 74, 75)

By e-mail of 2:31 PM, July 24, 2007, to B.S.B., Dr. Wirth indicated "Hi, I am fired today."

By e-mail of 2:33 PM, July 24, 2007, to the Center for Education Advocacy, Inc., Dr. Wirth stated "I am fired anyway today, thanks for your efforts" related to the education of one of her daughters.

By e-mail of 1:39 PM, July 26, 2007, to W.K., Dr. Wirth indicated "I am fired! Because I am doing things differently. I have known for two days."

By e-mail of 10:35 AM, August 6, 2007, to V. Sciamarelli, Dr. Wirth requested assistance in composing a request to stay in Dr. Lubarsky's department through the month of September.

By e-mail of 5:38 PM, August 16, 2007, to Dr. Wirth, C. Saldarriaga, as Manager for Anesthesia Clinical Administration, notified Dr. Wirth, "As per your conversation with Dr. Lubarsky, you will be leaving the department at the end of August 2007. Your vacation total, at the end of August 2007, will be 18 days. Furthermore the department will reimburse you for a return coach airfare to your country (one way). Moreover the department will provide you $5000 towards relocation expenses, which will be paid as a bonus included in your final paycheck in August and will be subject to taxes. Also the department will pay for your children's return coach airfare one way which will be included in your August final check and also will be subject to taxes. Please submit your children's airfares by August 24, 2007 to Mary's office. The fiscal office will be processing your final paycheck." (Dr. Wirth acknowledged receipt of this e-mail in WX 27.)

By letter dated August 20, 2007, Dr. Wirth informed Dr. P. Goldschmidt, M.D., that "On July 24, 2007, I was called into a meeting by Dr. David Birnbach and Dr. David Lubarsky. Without presenting any evidence of performance reports or other documentation … they relied on threatening and intimidating language and coercion to suggest that I should resign by August 31, 2007. … I strongly object to being subjected to ill-treatment by some persons at the University of Miami. I expect to be treated in a professional manner. … Since I enjoy a 20-year blemish-free profession in the medical field, like my job and have done nothing deserving of ill-treatment, I have no intention of resigning from my position … I am not willing to capitulate to tactics of threats, intimidation and/or coercion."

By e-mail of 7:02 PM, Monday, August 20, 2007, the Manager for Anesthesia Clinical Administration informed Dr. Wirth "you should no longer be working in the OR and you should take the remainder of your days as vacation until the end of August."

By e-mail of 7:05 PM, Monday, August 20, 2007, the Manger for Anesthesia Clinical Administration indicated to Dr. Lubarsky that Dr. Wirth "was still working at SCC as of last Thursday," August 16, 2007 and that she had sent Dr. Wirth an e-mail to clarify her status in the department.

By letter of August 22, 2007, Dr. P.J. Goldschmidt replied to Dr. Wirth that he has "discussed your employment and separation from the Department of Anesthesiology" with Dr. Birnbach, Dr. Lubarsky and the Senior Associate Dean for Faculty Affairs "and feel that you have been treated fairly. … it would be best for you to start over in another position." (Dr. Wirth acknowledged receipt of this letter in WX 32.)

By letter dated September 6, 2007, Dr. Lubarsky indicated that Dr. Wirth had continued to show up at work, despite the results of the July 24, 2007, meeting; acknowledged the airfare and relocation expenses reported in the August 16, 2007 e-mail to Dr. Wirth; notified Dr. Wirth that the University would "immediately enforce the terms of your resignation"; and requested that she "leave the premises and turn in all of your University granted keys, access cards, and any other University property." (Dr. Wirth acknowledged receipt of this letter in WX 31.)

Vacation Request form from Dr. G. Wirth, M.D. (WX 71, 72, 73)

This exhibit, signed by Dr. Wirth on date June 5, 2007, requested vacation for the period August 1, 2007 through August 22, 2007. A 5:17 PM, July 3, 2007 e-mail response from the Manger for Anesthesia Clinical Administration indicated that the leave request could not be approved for the requested dates; but could be approved for the period August 20, 2007 through September 2, 2007.

Household Goods Transportation Expense Statement (WX 78)

This exhibit indicates Dr. Wirth was billed 9,156.78 Euros for transportation of household goods from Munich on August 31, 2006.

Copies of Lufthansa Airfare Receipts dated August 25, 2006 (WX 12)

This exhibit indicates that the cost to fly from Munich, Germany to Miami, Florida on August 27, 2006, was 134.97 Euros each for Dr. Wirth and her two minor daughters. It is specifically noted that Dr. Wirth testified that the price charged by the airlines was reduced from the normal price because she applied a large number of accrued "frequent flyer points."

DISCUSSION

I. Dr. G. Wirth is not entitled to payment of wages for the period August 27, 2006 to September 4, 2006, inclusive and September 7, 2006 through October 11, 2006, inclusive.

Dr. Wirth entered the United States with her two minor daughters at Miami International Airport on Sunday, August 27, 2006. The week after arriving in the United States on her H-1B visa, Tuesday, September 5, 2006 at the earliest[8], Dr. Wirth had initial contact with the University of Miami through Ms. M. Quesada and was told she needed to obtain a social security card and open a bank account for payroll purposes. Dr. Wirth applied for a social security card number on Wednesday, September 6, 2006, opened a bank account and obtained a driver's license on

[8] Monday, September 4, 2006, was Labor Day, a recognized Federal holiday.

Wednesday, September 20, 2006. She initially stayed at a friend's apartment and secured her own rental apartment as of Sunday, October 1, 2006. She visited two car dealerships before entering a lease for a vehicle as transportation in September 2006. She interviewed at several schools for her daughters and elected to enroll them in the same local school. One daughter started school at the end of September, the other began in the beginning of October 2006. She also arranged babysitters for periods she would not be available to care for her daughters. She was in contact with University of Miami employees in the office of Faculty Affairs prior to October 16, 2006. Dr. Wirth maintained telephonic contact with the Department of Anesthesiology, Ms. Quesada, who assisted her in leasing a vehicle and answered questions about Miami, Florida, schools. On one occasion, she appeared in Ms. M. Quesada's office in the Department of Anesthesiology with her two daughters and reported she was still attending to personal affairs. Dr. Wirth called the Department of Anesthesiology on Thursday, October 12, 2006, and informed Ms. Quesada that she was "ready now" to start work but was told to wait until the supervising physicians returned from a conference they were attending. (Testimony; DX 57, 61)

Dr. Wirth first "entered into employment" for pay purposes under the H-1B program on September 5, 2006 when she reported her arrival and was directed to open a bank account and apply for a social security card number for payroll purposes. She completed those activities on September 6, 2006 and then began a period of voluntary "non-productive status" for her own benefit and request in order to address child care, child schooling, living accommodations, transportation issues, and related family matters while establishing a home in the Miami, Florida area. This "non-productive status" continued until October 12, 2006, when she notified the Department of Anesthesiology that she was available and ready to begin work at the University.

This Administrative Law Judge finds that Dr. Wirth's contract with the University during the period September 7, 2006 through October 11, 2006 was incidental to gaining assistance and information for addressing personal living conditions in Miami, including apartment leasing, vehicle leasing, babysitters and child schooling, one involving a special needs child, from individuals in the Department of Anesthesiology. The evidence fails to establish that there was any contact with the Department of Faculty Affairs during that period which would amount to the exercise of control over Dr. Wirth that would negate the finding that the period was a "non-productive status" period at Dr. Wirth's voluntary request and for her convenience.

The overwhelming credible evidence of record is that the University was unaware of Dr. Wirth's presence in the United States until September 5, 2006 and Dr. Wirth was extended personal accommodations at her request and for her convenience between September 7, 2006 and October 11, 2006, in order for her to address her personal living, schooling, transportation and child care issues. There was no exercise of authority over Dr. Wirth's personal actions prior to October 12, 2006, except the direction on September 5, 2006 to apply for a social security card and open a bank account, which was accomplished the following day, September 6, 2006.

Federal regulations provide that even if an H-1B non-immigrant worker has not yet "entered into employment" the sponsoring employer "shall pay the non-immigrant the required wage beginning 30 days after the date the non-immigrant first is admitted into the U.S. pursuant to the petition" [20 CFR §655.731(c)(6)]. Regulations at 20 CFR §655.731(c)(7)(i) excuse the

payment of required wages if the non-immigrant's nonproductive periods away from employment are at the employee's voluntary request and convenience. Since these regulations are part of the same Act and regulatory Subpart, payment of the LCA wage to Dr. Wirth from September 26, 2006 (thirty days after arrival in the United States on her H-1B visa) through October 11, 2006, is not required since her nonproductive status was voluntary on her part and for her convenience of addressing family issues involved with "settling in." The Employer has failed to establish that the period commencing October 12, 2006 through October 16, 2006 is also an excused voluntary nonproductive status.

After deliberations on the credible evidence of record, this Administrative Law Judge finds that the Respondent is not liable to pay the required wage to Dr. Wirth for the period August 27, 2006 through September 4, 2006 because she failed to establish by credible evidence of record that she had notified the University of Miami of her presence in the country and had "entered into employment" as required by federal regulations to commence payment of required wages during the first thirty days in the United States pursuant to an H-1B visa; and that the Respondent has established that it is excused from paying the required wage for the period September 7, 2006 through October 11, 2006, because that specific period involved a voluntary nonproductive status by Dr. Wirth for her convenience of dealing with personal family matters. Accordingly, Dr. Wirth is not entitled to the payment of a wage during the periods August 27, 2006 through September 4, 2006 and September 7, 2006 through October 11, 2006, inclusive.

II. Dr. G. Wirth is entitled to payment of 6/7 weeks of accrued wages at the rate of $923.08 per week for the periods September 5 and 6, 2006 and the period October 12, 2006 through October 15, 2006, inclusive.

As noted above, the credible evidence of record establishes that Dr. Wirth notified Ms. Quesada, Manager of Anesthesia Clinical Administration on Tuesday, September 5, 2006 that she was in the United States and was directed to obtain a social security card and open a bank account as a condition of employment. Dr. Wirth took the appropriate action the next day on September 6, 2006. Thereafter, Dr. Wirth was in an excused voluntary non-productive status through October 11, 2006, for her convenience. The credible evidence of record is that Dr. Wirth notified the Department of Anesthesiology she was available to work on October 12, 2006, but was told to wait until supervisors returned from an out-of-town conference. The Respondent acknowledges that Dr. Wirth was placed in a pay status on October 16, 2006. (Testimony, DX 57, 61)

This Administrative Law Judge finds that the Respondent has failed to establish that the two-day period September 5 and 6, 2006 as well as any period of time commencing on October 12, 2006 through her being placed in a pay status, are excused periods of voluntary non-productive status under the Act and Federal regulations. Accordingly, the Respondent is required to pay Dr. Wirth the appropriate wage under the initial LCA for September 5 and 6, 2006 as well as October 12, 13, 14 and 15, 2006. Since the annual wage set forth under the initial LCA is $48,000.00 per year, the weekly wage required to be paid under the initial LCA is $923.08 per week. In this case, the 6 days of unpaid wages equals a gross amount of $791.21, before taxes.

III. A *bona fide* termination of the employment relationship between Dr. Wirth and Respondent was complete on December 12, 2007.

As noted in the "Statutory and Regulatory Framework" section above, four events must exist in order for a bona fide termination of the H-1B employment relationship to have occurred, though the requirement to pay reasonable return transportation expense is excused if the employment relationship ended voluntarily on the part of the non-immigrant employee.

a. On July 24, 2007, Dr. G. Wirth was relieved of all work-related responsibilities and duties and informed that her employment with Respondent would end in August 2007.

The credible evidence of record set forth above establishes that Dr. Wirth, her immediate supervisors, Department of Anesthesiology administrative staff, Sylvester Comprehensive Cancer Center staff and three of Dr. Wirth's confidants all understood that Dr. Wirth had been relieved of all work-related duties on July 24, 2007 and was to end her employment relationship with the University of Miami Miller School of Medicine on August 31, 2007. Even though she continued to appear on the premises of the University of Miami, Dr. Wirth has failed to establish that she performed any work-related activities after July 24, 2007, other than that associated with her vacation status, or was in an employment relationship with the University of Miami after August 31, 2007. (Testimony; DX 15, 16, 43, 46, 49, 50, 56; WX 26, 27, 28, 30, 31, 74, 75)

Dr. Wirth's reliance on faculty manual provisions set forth in WX 25 and assertions that she did not receive a written termination letter is of no consequence under the Act and federal regulations related to the H-1B program. She was personally advised that the employment relationship would end August 31, 2007, both orally on July 24, 2007 and at a barbeque in mid-August 2007 as well as by e-mails on August 16 and 20, 2007 and letters of August 22, 2007 and September 6, 2007. An H-1B non-immigrant employee must be notified of employment-relationship termination as was done in this case. There is no additional requirement under the H-1B program for an employer to end the employee-employer relationship with an H-1B non-immigrant worker sponsored by the employer.

After deliberation on the credible evidence of record, this Administrative Law Judge finds that Dr. Wirth had actual notice on July 24, 2007, and additional direct oral and written notice in August 2007, that her employment relationship with her sponsor, the University of Miami Miller School of Medicine, would end on August 31, 2007.

b. The Respondent offered payment to Dr. G. Wirth for her transportation expenses back to her last place of foreign residence, Munich, Germany.

The credible evidence of record establishes that Dr. Lubarsky offered to pay Dr. Wirth the airfare transportation costs for herself and two minor daughters from Miami back to Germany, as well as $5,000.00 for the cost of relocating back to Germany on July 24, 2007 when she was notified that her employment relationship would end in August 2007. The offer to pay transportation airfare was again communicated to Dr. Wirth by e-mail of August 16, 2007 when she was requested to submit the cost of airfare to Ms. Saldarriaga as Manager for Anesthesia Clinical Administration. Dr. Wirth failed to provide information related to the cost of reasonable

transportation back to Germany from Miami, Florida. (Testimony; DX 14; WX 26; Stipulation 19)

The University of Miami actually delivered to Dr. Wirth a check in the amount of $4,355.12, dated October 3, 2007, representing the proffered $5,000.00 relocation expense allowance for non-airfare costs related to her return to Germany, less applicable withheld taxes. Dr. Wirth returned the check to the University of Miami by letter dated March 8, 2008. (SX 8; DX 7; WX 83, 85)

This Administrative Law Judge finds that the Respondent has established the usually required element of payment for reasonable return transportation expenses.

c. On December 12, 2007, the USCIS received written notice from Respondent that Dr. G. Wirth's H-1B employment status had been terminated.

The evidence of record establishes that the University of Miami legal advisors sent written notice of the termination of Dr. Wirth's employment-relationship with the University of Miami effective August 31, 2007, by federal express delivery to USCIS Vermont Service Center on December 11, 2007. The written notice was received at the USCIS Vermont Service Center at 11:31 AM, December 12, 2007. Subsequently, the notice of the termination in Dr. Wirth's employment-relationship was re-sent to USCIS Vermont Service Center on March 18, 2009. By separate correspondence sent by first class mail on December 11, 2007, the INS, Texas Service Center was notified in writing of the termination of Dr. Wirth's employment-relationship with the University of Miami effective August 31, 2007. Since this was sent by first class mail, delivery is presumed to have occurred on Monday, December 17, 2007. (Testimony; SX 9; DX 17, 18, 19, 20; WX 40, 41, 54, 55, 63, 64)

This Administrative Law Judge finds that the Respondent has established that proper notice of the termination of Dr. Wirth's employment-relationship with the University of Miami was filed with the USCIS on December 12, 2007.

d. On December 12, 2007, the visa validity period during which Dr. Wirth could remain in the United States and work for Respondent was automatically revoked.

Under the H-1B program, the validity period of the LCA temporary employment relationship terminates at the end of the validity period, on the event of the sponsoring employer going bankrupt, on the event of the sponsoring employer properly withdrawing the LCA, and upon exercise of the revocation process by the U.S. Government. An H-1B non-immigrant is prohibited to work outside the validity period of the relevant LCA. (20 CFR Chapter V, Part 655, Subpart H)

This Administrative Law Judge finds that the December letter delivered to the USCIS Vermont Service Center at 11:31 AM, December 12, 2007, is the written withdrawal by the sponsoring employer, University of Miami Miller School of Medicine, of the then effective LCA such that the validity period for Dr. Wirth to work under the H-1B program requirements ended on

December 12, 2007. Under existing Federal regulations, Dr. Wirth and her daughters were then authorized to remain in the United States under the H-1B visa for an additional ten days.

After deliberation on the credible evidence of record, this Administrative Law Judge finds that a *bona fide* termination of Dr. G. Wirth's employment by the Respondent under the H-1B visa program occurred on December 12, 2007, and not prior thereto.

IV. Dr. G. Wirth is entitled to 9-5/7 weeks of accrued wages from September 1, 2007 through November 7, 2007, inclusive, at the rate of $923.08 per week and to 5-1/7 weeks of accrued wages from November 8, 2007 through December 12, 2007, inclusive, at the rate of $1,846.15 per week.

Under the terms of the H-1B program, and existing case law, the sponsoring employer must pay at least the required wages set forth in the LCA during its period of validity, unless the responsible employer has established that there are non-productive periods which are the result of the H-1B non-immigrant employee's voluntary request and for the employee's convenience. (see 8 CFR §214.2(h)(4)(iii)(B)(2))

Here the Respondent has established that the period from July 24, 2007 through December 12, 2007 was a non-productive period as related to Dr. Wirth; but the Respondent has failed to establish that the non-productive period was the result of Dr. Wirth's voluntary request and her convenience. The Respondent has established that Dr. Wirth was relieved of all duties and responsibilities and placed in a leave status on July 24, 2007 by her supervisors, as a result of her endangering patients and inability to display the skills and knowledge required by the educational positions to which she was being trained and evaluated. Accordingly, though Dr. Wirth exhausted all leave balances during the non-productive period after July 24, 2007, the Respondent must still pay to Dr. Wirth at least the wage required under the LCA in effect during the non-productive period between July 24, 2007 and the *bona fide* termination on December 12, 2007.

In this case, Dr. Wirth began work under an approved initial-LCA which set forth a validity period of September 1, 2006 through August 31, 2009. The required wage under the initial LCA was $48,000.00 per year, which is the equivalent of $923.08 per week. An amended-LCA was submitted and subsequently approved on November 9, 2007, with a validity period of November 8, 2007 through May 1, 2010, and a required wage of $96,000.00 per year, which is the equivalent of $1,846.15 per week. Accordingly, since a non-immigrant can only work under one approved LCA at a time, effective November 7, 2007, the terms of the initial-LCA last applied and effective November 8, 2007, the terms of the amended-LCA applied to the Parties. Finally, as noted above, the only then applicable LCA, was revoked as a matter of law on December 12, 2007. The payroll records in evidence and Stipulation 18 establish that Dr. Wirth was paid at a rate greater than the required wage of $923.08 for the period July 24, 2007 through August 31, 2007. (Testimony; SX 2, 3, 4, 5, 6, 8; DX 1, 2, 3, 4, 7; WX 6, 9, 21; Stipulation 2, 4, 6, 14, 17, 18)

In view of all the foregoing, the Respondent is required to pay wages to Dr. Wirth in an amount of at least $923.08 per week for the period from July 24, 2007 through November 7, 2007,

inclusive, and in an amount of at least $1,846.15 per week for the period November 8, 2007 through December 12, 2007, inclusive. No credit may be claimed or given for monthly amounts paid Dr. Wirth in excess of the required wage set forth in the effective LCA for periods prior to September 1, 2007.

After deliberation on the credible evidence of record, this Administrative Law Judge finds that Dr. Wirth was paid in excess of the required wage for the period July 24, 2007 through August 31, 2007, inclusive; and is entitled to unpaid required wages for the period from September 1, 2007 through December 12, 2007, inclusive, in the total amount of $18,461.55 (9-5/7 weeks x $923.08 per week = $8,967.06; 5-1/7 weeks x $1,846.15 per week = $9,494.49).

V. Dr. G. Wirth is not entitled to reasonable transportation costs for her return to her last place of foreign residence, Munich, Germany.

Federal regulations at 8 CFR §214.2(h)(4)(iii)(E) provides that:

> "The employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. If the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity period of the petition, the alien has not been dismissed."

For reason set forth above, Dr. Wirth was relieved of all work duties and responsibilities on July 24, 2007 and her employment relationship with the University of Miami ended on August 31, 2007, even though there was no "bona fide termination" under the Act until December 12, 2007. Since the validity period of the LCA[9] had not terminated when Dr. Wirth's employment relationship with the University of Miami ended on August 31, 2007, whether the Respondent is responsible for return transportation of Dr. Wirth to her last place of foreign residence, Munich, Germany, depends entirely on whether Dr. Wirth was dismissed or had voluntarily resigned prior to the end of the LCA validity period. It is specifically noted that the H-1B program permits dependent children admission into the United States on an H-visa for the validity period of the parent's H-1B visa; but, the Act and program regulations do not require sponsoring employers to pay return transportation expenses of dependent children who may accompany the H-1B non-immigrant employee.

The Respondent has the burden to establish a voluntary resignation in order to escape liability for reasonable return transportation expenses for Dr. Wirth. To this end, Respondent submits that Dr. Wirth declined a position as resident in a re-training program and elected to resign her position with the University of Miami at a meeting on July 24, 2007, in lieu of being terminated for lack of professional knowledge, skills and abilities required of a Visiting Assistant Professor / Assistant Professor of Anesthesiology.

[9] As noted herein, the validity period for Dr. Wirth's LCA automatically terminated by operation of law on December 12, 2007.

The evidence of record establishes that the senior faculty supervisors overseeing Dr. Wirth's evaluation of fitness for faculty status as a Visiting Assistant Professor of Anesthesiology provided Dr. Wirth a stimulating environment similar to that extended other H-1B physicians prior to appointment to the faculty as an Assistant Professor; but, that Dr. Wirth failed to demonstrate a level of knowledge, skills and competencies required for a faculty position in obstetric anesthesia in a teaching hospital. On June 25, 2007, the Clinical Leadership Committee voted to extend to Dr. Wirth, a period of clinical supervision and evaluation at the Sylvester Comprehensive Cancer Clinic in order to develop her skill, knowledge and competencies in a less demanding environment (DX 35). At a July 1, 2007, meeting of the Clinical Leadership Committee, the committee voted to deny a required endorsement for faculty appointment to Dr. Wirth at that time. (DX 37) On July 5, 2007, two supervising physicians at Sylvester Comprehensive Cancer Center expressed their views to Dr. Lubarsky and Dr. Birnbach that Dr. Wirth "is unable to work independently at this time." (DX 38) Dr. Penning testified that at the July 24, 2007, Clinical Leadership Committee, the committee decided to not pursue faculty appointment for Dr. Wirth and that Dr. Lubarsky would "subsequently" terminate her employment. The report from that committee states the same conclusion and directed subsequent action for Dr. Lubarsky; however, it is important to note that the July 24, 2007, report of the Clinical Leadership Committee indicates that the committee met at 4:00 PM through 5:00 PM on July 24, 2007. (DX 44) It is also relevant that Dr. Patin reported by letter to Dr. Lubarsky earlier on July 24, 2007, that Dr. Wirth lacked anesthesia knowledge, technical performance and communicative skills for independent practice at Sylvester Comprehensive Cancer Center.

Dr. Lubarsky and Dr. Birnbach submitted statements to investigators and testified to clearly hearing Dr. Wirth decline the offer of re-training and electing to resign at the July 24, 2007 meeting and that Dr. Lubarsky accepted the "resignation". Dr. Birnbach testified that the meeting was contentious and Dr. Wirth was "nasty" towards Dr. Lubarsky even though he had been the one supporter accommodating her throughout her time with the University of Miami. They did not indicate the time of day this meeting took place.

The evidence clearly established that Dr. Wirth was notified on July 24, 2007, that her duties and responsibilities ended on July 24, 2007 and that her employment relationship would end on August 31, 2007. The evidence clearly established that the University of Miami took administrative steps after July 24, 2007, to remove Dr. Wirth from the payroll by August 31, 2007, and to effect a bona fide termination under the Act on December 12, 2007. The issue still remaining is whether the Respondent has established that Dr. Wirth "voluntarily" ended her employer-employee relationship.

Dr. Lubarsky and Dr. Birnbach testified that Dr. Wirth was offered three choices: (1) accept and complete a retraining program at reduced salary and be reevaluated for the assistant professor of anesthesiology position; (2) resign and have the separation appear as she did not wish to train at the University of Miami; or, (3) have her employment terminated for cause. They testified that Dr. Wirth declined the resident retraining program and used the words equivalent to "I quit" or "I resign" which Dr. Lubarsky verbally responded essentially as "I accept your resignation". Dr. Lubarsky went on to inform Dr. Wirth that she would be provided airfare for herself and two children to Germany as well as $5,000.00 to assist in shipping her household goods. Dr. Birnbach testified that he was called a week later by Dr. Lubarsky who stated essentially, "I

heard her resign, is that what you heard?" Dr. Birnbach reconfirmed his understanding that Dr. Wirth had resigned and Dr. Lubarsky had accepted the verbal resignation.

Dr. Wirth alleges that she never resigned. Dr. Wirth issued several e-mails that undermine her credibility on the issue of never resigning. On June 29, 2007, she expressed her potential to resign when she stated to Dr. Brucker, "It would be very helpful if we could talk at your earliest convenience. I am at the point to quit." (DX 36) On July 24, 2007, Dr. Wirth sent two e-mails. At 2:31 PM, she informed Dr. Brucker, "Hi, I am fired today." (DX 43) At 2:33 PM, she informed a representative at the Center for Education Advocacy, Inc. "I am fired anyway today, thanks for your efforts." (DX 42) On July 26, 2007, to Mr. Kesser, Dr. Wirth indicated "I am fired! Because I am doing things differently. I have known for two days. … I have been contacting different surgeons, who are happy to put in a good word for me; all of them have proved stunned. … after August 31, you might need to use my personal e-mail address …" (DX 46)

Dr. Wirth also has made contradictory statements to others when she attempted to overturn the end of her employment. In an August 20, 2007, letter to Dr. P. Goldschmidt, she reported she was called into a meeting with Dr. Lubarsky and Dr. Birnbach and "without presenting any evidence of performance reports or other documentation … they relied on threatening and intimidating language and coercion to suggest that I should resign by August 31, 2007. … Since I enjoy a 20-year blemish-free profession in the medical field, like my job and have done nothing to deserving of ill-treatment, I have no intention of resigning from my position." (WX 27) This is opposite of her documented failure to participate in the evaluation program for visiting assistant professors with foreign medical training and license, her failure to respond to mentoring and counseling by Dr. Lubarsky and senior medical faculty, and her attempted clinical practice under close supervision which demonstrated a lack of knowledge and medical skills which placed patient safety at risk. In her November 16, 2007 letter to the President of the University of Miami (WX 32) Dr. Wirth claimed "a 15-year incident-free contract with the University of Munich" and reported "I am a faculty member of the Miller School of Medicine, Department of Anesthesiology. However, without any written cause of termination, I have been removed from the UM payroll … Pursuant to the Faculty Manual, I have not resigned and I have not been terminated." This November 2007 letter demonstrates that Dr. Wirth can color situations and not be forthright in her statements. She used the term "without written cause" when she was aware of a long history of counseling, mentoring, reassignment, and patient risk issues on her part as well as the fact her employment ended on August 31, 2007 and that she was turned down for a faculty appointment as an Assistant Professor and never progressed beyond a "visiting" status. On December 3, 2007, after being advised that the Faculty Manual did not apply to her since she did not progress beyond a "visiting" status (WX 33), Dr. Wirth reiterated her requests to the President of the University of Miami (WX 34) and on December 6, 2007, implored the Board of Trustees to become involved (WX 35), while still claiming unfair treatment by her supervisors at the University of Miami Miller School of Medicine.

Notwithstanding her never achieving assistant professor status and being aware that her employment was ending on August 31, 2007 due to her inability to demonstrate necessary medical knowledge, clinical abilities and teaching skills, Dr. Wirth indicated to a potential employer in an August 6, 2007 e-mail (DX 48), that "at the moment I am completing my visiting

professorship at Miami University, Florida" in a manner inferring that she had been functioning in the capacity of a visiting professor in a satisfactory manner when in fact she had been unable to function in a satisfactory manner as a visiting assistant professor (the LCA position description), fellow or medical resident. A similar lack of candor was demonstrated in the May 29, 2007, e-mail to F. Crist at the University of Munich (DX 33) stating "… because of university and hospital bureaucracy I am not authorized to work clinically for the time being. Credentialing appears to be a never-ending story here. It's absolutely wearing me down; the director is annoyed for no reason because I am costing him so much money without being able to take part in patient care. This is what the daily routine looks like -- for me, it's absolutely a disappointment." A similar lack of candor exists in her July 27, 2007, e-mail to the Chairman of the Department of Anesthesiology at the Medical University of Vienna seeking employment (DX 51), when she stated "Since October 2006, I have had the honor of invaluably expanding my knowledge as a visiting assistant professor at the University Hospital of Miami in the Department of Obstetric Anesthesia. I would like to complete this professionally valuable year here."

Finally, Dr. Wirth's curriculum vitae and representations submitted to the University of Miami to obtain her initial appointment, when evaluated in light of her established inability to teach or supervise residents and medical students, inability to safely interact independently with patients in the operating room, and demonstrated lack of knowledge in the field of anesthesiology during her time at the University of Miami, demonstrate additional lack of candor and truthfulness.

As to the statements by Dr. Lubarsky and Dr. Birnbach related to the July 24, 2007, meeting with Dr. Wirth, their testimony was forthright without any indication of evasion. Dr. Lubarsky's offer of retraining at the University's expense demonstrates a lack of malice. Additionally, the continued offer to pay airfare for Dr. Wirth and her children as well as an additional $5,000.00 for relocation expenses was not required under the H-1B program and demonstrated a lack of malice, a concern for Dr. Wirth's well-being as well as concern for her children, and demonstrates a lack of motive to manipulate Dr. Wirth into a resignation vice termination of employment for cause well documented.

After deliberation on the record of evidence, this Administrative Law Judge finds that the testimony of Dr. Lubarsky and Dr. Birnbach is entitled to greater weight than the assertion of Dr. Wirth that she did not resign from her visiting assistant professor of anesthesiology position with the University of Miami on July 24, 2007. Accordingly, this Administrative Law Judge finds that words equivalent to declining the offer of a residency training period were uttered by Dr. Wirth at the July 24, 2007 meeting with Dr. Lubarsky and Dr. Birnbach; that Dr. Wirth uttered words to the effect that she resigned in lieu of a public termination of employment at the July 24, 2007 meeting with Dr. Lubarsky and Dr. Birnbach; and that the Respondent has established that the words of resignation uttered by Dr. Wirth were a knowing, intelligent and voluntary act on her part. In that the Respondent has established that Dr. Wirth's employment was terminated voluntarily on her part prior to December 12, 2007, Dr. Wirth was not "dismissed" as defined by the Act and the Respondent is not responsible for the reasonable transportation expense for her return to Munich, Germany.

After deliberation on the evidence of record, this Administrative Law Judge finds that the Respondent is not responsible under the Act for the reasonable cost of return transportation of Dr. Wirth to her last place of foreign residence.

VI. Dr. G. Wirth has failed to establish that she is entitled to a housing allowance as a benefit of her H-1B employment status with Respondent.

The Act requires sponsoring employers to extend to H-1B non-immigrant employees the same benefits extended similarly situated employees (20 CFR §655.731(a); 20 CFR §655.731(c)(3)(i)-(iii)). Dr. Wirth asserts she is entitled to a housing allowance of $10,000.00 under the Act. To support this position, she refers to University of Miami Faculty Manual provisions and an explanation of benefits presented to her by Ms. M. Quesada prior to her acceptance of employment in 2006.

Ms. M. Quesada testified that the $10,000.00 housing allowance she noted in WX 4 was the maximum payable for documented relocation expenses incurred by foreign graduate physicians in clinical positions. Dr. Lubarsky testified that visiting professors are not paid relocation expenses or given a housing allowance though such benefits are offered to assistant professors in accordance with University of Miami guidelines.

The evidence of record establishes that before an individual can move from visiting assistant professor to assistant professor, the individual must receive the endorsement from the Clinical Leadership Committee (senior medical faculty), the endorsement of the Chair of the medical department involved (Dr. Lubarsky), the endorsement of the academic Dean of the University of Miami Miller School of Medicine, and approval of the University of Miami Provost. The Respondent has established that Dr. Wirth was denied such endorsement by the Clinical Leadership Committee on July 1, 2007 and effectively denied such endorsement by the Chair of the Department of Anesthesiology on July 24, 2007, when Dr. Lubarsky relieved Dr. Wirth of all duties and responsibilities at the University of Miami due to lack of demonstrated medical knowledge, skills and abilities. The evidence of record establishes that Dr. Wirth never attained the position of assistant professor which would have entitled her to a housing/relocation expense up to $10,000.00.

VII. The issues raised by Dr. Wirth concerning the occupation code and prevailing rate of pay for anesthesiologists are not relevant or material to this case.

The LCAs involved in this case each set forth the occupation code for the work in the Department of Anesthesiology, University of Miami Miller School of Medicine as “090” with a “prevailing wage “$29,830.00” (SX 2, 5; DX 1, 2, 3, 4, 24, 59; WX 6, 21) Dr. Wirth asserts that the prevailing annual wage should have been in the $141,565.00 to $209,269.00 range (WX 66, 67, 68, 69).

Testimony established that the University of Miami Miller School of Medicine is a teaching hospital in Florida and that Dr. Wirth was granted a Medical Faculty Certificate by the State of Florida to work as a clinical anesthesiologist only in teaching hospitals associated with the University of Miami. The evidence established that Dr. Wirth never attained a teaching position

and clinical privileges as an anesthesiologist in Miami. Accordingly, the wages paid practicing anesthesiologists in non-teaching environments is neither relevant nor material to this particular case.

VIII. Dr. G. Wirth is entitled to the payment of interest in accordance with 28 U.S. Code §1961 on the unpaid accrued required wages and unpaid reasonable transportation expense.

Although not specifically provided for under the Act, the payment of interest on wages and transportation expenses required to be paid under the Act that are past due has been recognized as an authorized action in order to "make whole" the individual who was denied use of the amount of compensation concerned for the period that the employer had use of unpaid compensation.

The Administrative Review Board has endorsed the purpose of pre-judgment and post-judgment interest awards as a reasonable manner to achieve making H-1B non-immigrant workers "whole" when they have been denied the use of unpaid required wages. In *Innawalli v. American Information Technology Corp*., ARB No. 04-165 (Sep. 29, 2006), the Administrative Review Board endorsed the award of prejudgment compound interest on a back pay award and post-judgment interest on the award until paid, citing its decision of the same day in *Amtel Group, Inc. v Yongmahapakorn*, ARB No. 04-087 (Sept. 29, 2006), which in turn cited the decision in *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041,99-042, 00-012 (May 17, 2000), a whistleblower action under the Energy Reorganization Act of 1974.

In *Doyle*, at pages 17 through 20, the Administrative Review Board looked to the award of compound interest in discrimination cases in the U.S. Court of Appeals for the 6th and 2nd Circuits, and directed that, "absent any unusual circumstances" the interest rate for pre-judgment and post-judgment calculations is:

> "that [interest rate] charged on the underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 USC §6621(b)(3) plus three percentage points. … The Federal short-term interest rate to be used is the so-called 'applicable federal rate' (AFR) for a quarterly period of computing. … To determine the quarterly average interest rate, the parties shall calculate the arithmetic average of the AFR for each of the three months of the calendar quarter, rounded to the nearest whole percentage point." *Id* at 18, 19. The resulting average AFR is then increased by 3% and the resulting interest rate applied to the balance of the unpaid principal and accumulated unpaid interest to determine that respective quarter's accumulated interest which is then added to the unpaid accumulated interest until paid. The quarterly process is followed until the unpaid principal and accumulated interest are paid in full.

Unfortunately, since those 2006 and 2000 decisions by the Administrative Review Board, the national banking industry has suffered economic setbacks requiring financial bailout and regulatory oversight, the national investment markets have declined extensively, and there has been widespread national economic decline. The quarterly AFR on September 29, 2006 was

4.89%; on September 30, 2009 it was .14%; by February 26, 2010 it had leveled at .13%. These are the types of "unusual circumstances" which the Administrative Review Board provided for in their prior decisions on the application of pre-judgment and post-judgment interest in order to ensure an individual is "made whole". Applying the average quarterly AFR plus 3% and order compound interest on the required wage and transportation expense due Dr. Wirth since their respective payable due dates in 2007, results in an actual interest award in excess of that required to make Dr. Wirth whole for the inability to use those funds in the economic climate since 2007. Such a windfall to Dr. Wirth and penalty to Respondent is not an appropriate judicial result in this case.

This Administrative Law Judge finds that under the "unusual circumstances" surrounding the low rate of return on investment assets since 2007, that the best method to ensure Dr. Wirth is "made whole" for the lack of use of required wage and transportation expense since 2007 is to apply the provisions set forth in 28 USC §1961 in the manner used within the U.S. Department of Labor for compensation owed an individual under the Black Lung Act and the Longshore and Harbor Workers Compensation Act and its various extended Acts.[10] Under this line of decisions, interest is not compounded and the applicable per annum interest rate to be applied to establish the annual interest due each respective installment of unpaid compensation is that rate set for the Long Term <10 YR/ 52-week U.S. Treasury bill immediately preceding the respective installment's due date.[11] The annual interest due accrues on an annual pro rata rate without compounding, until the date payment is tendered, acceptance is refused by the employee, or tender of the required payments cannot be made to the employee through no fault of the employer.

Since Dr. Wirth was to be paid on a monthly basis at the end of each month, and there was a *bona fide* termination of her employment on December 12, 2007, the following base annual interest amounts are payable in the base amounts as follows:

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[10] Prior to 1984, the interest rate to be paid on unpaid compensation from the date such compensation payment was due to be paid was 6% per annum. See *Avallone v. Todd Shipyards Corp*., 10 BRBS 724 (1978); *Oho v. Castle and Cooke Terminals, Ltd*., 9 BRBS 989 (Feb. 28, 1979). Subsequent to 1984, the Benefits Review Board stated that the purpose of interest awards is to make the claimant whole for the period that the employer had use of the unpaid compensation and the claimant was denied use of the amount concerned. The Benefits Review Board noted that "As counsel have emphasized and as is common knowledge, our economy has been marked in years past by a sustained inflationary trend. A fixed six percent rate does not take into account such economic trends and is therefore no longer appropriate to further the purpose of making the claimant whole. … We accordingly hold that the interest rate to be applied to installments of past due compensation is the United States District Court rate [from] 28 USC §1961." *Grant v. Portland Stevedoring Co*., 16 BRBS 267, 270-271 (1984). See *Newport News Shipbuilding and Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir., Mar. 13, 1978); *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP [Watkins]*, 594 F.2d 986 (4th Cir., March 26, 1979); *Newport News Shipbuilding and Dry Dock Co. v. Brown*, 376 F.3d 245 (4th Cir., July 19, 2004); *Clinchfield Coal Co. v Cox*, 611 F.2d 47 (4th Cir., Dec. 6, 1979) where the Court cited *Graham* to extend interest on each disability compensation payment from the date payment was due in cases under the Black Lung Act; *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426 (5th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, (9th Cir. 1991); *Hunt v. Director, OWCP*, 999 F.2d 419 (9th Cir. 1993); *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998)

[11] This rate is available directly from the U.S. Treasury at http://www.treas.gov/offices/domestic-finance/debt-management/interest-rate/daily_treas_bill_rates_historical_main.shtml. However, the 52-week rate was not published until June 2008.

Required Payment	Amount	Long Term <10 YR / 52-week U.S. T-bill Rate	Annual Simple Interest Payable
9/5/06 & 9/6/06 required wage payable on 9/30/06	$263.74	4.84%	$12.77
10/12-15/06 required wage payable on 10/31/06	$527.47	4.81%	$25.37
9/1-30/07 required wage payable on 9/30/07	$4,000.00	4.89%	$195.60
10/1-31/07 required wage payable on 10/31/07	$4,000.00	4.79%	$191.60
11/1-7/07 required wage payable on 11/30/07	$923.08	4.44%	$40.98
11/8-30/07 required wage payable on 11/30/07	$6,065.92	4.44%	$269.33
12/1-12/07 required wage payable on 12/12/07	$3,164.83	4.55%	$144.00

The Parties may compute the total interest amount accrued at the time of payment tenure by multiplying that applicable simple annual interest identified above by the number of years and fraction thereof that has passed between the date the respective required wage was payable.[12]

IX. Respondent is required to withhold from the accrued interest and accrued required wages, and submit to federal, state and local authorities, the appropriately related income, social security and Medicare taxes.

Federal regulation authorize the reduction in the amount payable to Dr. Wirth for valid deductions set forth in 20 CFR §655.731(c). These deductions included "appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 UCS §1 *et. seq.*) … payments of the tax reported and paid to the IRS as

[12] As an example: If the required wage due payable on November 30, 2007 ($923.08 and $6,065.92) is not tendered until April 30, 2010, a period of 2-5/12 years, the annual simple interest accrued and payable would be 2-5/12 years times the annual simple interest of $219.31($40.98 plus $269.33) which would equal an accrued interest on the November 30, 2007 required wage totaling $530.00.

required by the Federal Insurance Contributions Act, 26 USC §3101, *et. seq*. FICA) … and payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State and local governments in accordance with any other applicable law." 20 CFR §655.731(c)(2)(i)-(iv)

It is specifically noted that the evidence of record establishes that Dr. Wirth was a single parent serving as a head-of-household and had two dependent children. Dr. Wirth's payroll records indicate that she claimed single status with ten (10) exemptions in 2007. (SX 8; DX 7; WX 14, 29) The evidence of record fails to support such a large number of deductions when computing tax withholding. Even though Dr. Wirth has relocated to Italy, she is afforded the opportunity to receive a refund of over withheld amounts from the appropriate taxing officials when she files appropriate tax documents for the year in which the accrued interest and accrued required wage payments directed by this Order are tendered. Accordingly, Dr. Wirth is not prejudiced by applying tax withholding rates based in line with her single, head-of-household status with two minor dependents, in lieu of her claimed allowance of ten (10).

X. Dr. G. Wirth's Addendum Objection related to representation by non-attorney V. Sciamarelli is without merit.

In an addendum to her post-hearing brief Dr. Wirth noted her "objection to the court's refusal to permit Mr. Victor Sciamarelli to act as a representative with me at the formal hearing. … Mr. Sciamarelli's appearance was announced prior to the scheduled formal hearing. He is a U.S. citizen, a career airline pilot with a flawless record who has participated in airline termination issues and participated briefly as a volunteer with the ACLU. … I believe the court could have extended to me the same latitude by allowing Mr. Sciamarelli to more directly assist me during the hearing, especially in the questioning of witnesses and questioning me in rebuttal during my own testimony." She argues that Federal regulations at 29 CFR §18.34(g)(2) require Mr. Sciamarelli be accepted as her representative because he is a U.S. citizen.

In formal hearings under the Act, the procedural rules set forth in 29 CFR Part 18, Subpart A apply. In accordance with the Administrative Procedure Act, 5 USC §556, the Federal Rules of Evidence and rules of evidence set forth in 29 CFR Part 18, Subpart B, do not apply, though evidence that is immaterial, irrelevant or unduly repetitive may be excluded (20 CFR §655.825). Under 29 CFR §18.34 all Parties to the formal hearing "shall have the right to appear at a hearing in person, by counsel, <u>or</u> by other representative, to examine and cross-examine witnesses, and to introduce into the record documentary or other relevant evidence … [and] all other rights essential to a fair hearing." Each attorney and non-attorney representative must file a notice of appearance. Each participant at the hearing, may make a written or oral statement of position, and, at the discretion of the presiding Judge, may be permitted to file proposed findings of fact, conclusions of law and a post-hearing brief. Applications to represent a Party at the formal hearing submitted by non-attorney representatives are required to be submitted to the presiding Judge by the time the formal hearing is commenced and must set forth the applicant's qualifications to appear in the proceedings. The presiding Judge may inquire into the qualifications of the applicant but is not required to do so. 29 CFR §18.34(g)(2)

The Administrative Review Board has directly addressed the regulatory issue involving formal hearings under the Act and as set forth in 29 CFR §18.34(g)(2), referenced by Dr. Wirth, that "Any citizen of the United States who is not an attorney at law shall be admitted to appear in a representative capacity in an adjudicative proceeding." The Administrative Review Board has held that the presiding Administrative Law Judge "has latitude in terms of whom they will permit to represent a party … [and] the ALJ 'may' deny the privilege in certain circumstances." *Rajan v. International Business Solutions, Ltd.*, ARB No. 03-104 (Aug. 31, 2004) at page 6.

During prehearing conference calls, in prehearing motions, during the formal hearing and in post-hearing brief, Dr. Wirth presented herself and proved herself as a highly intelligent individual with a firm grasp of legal issues, procedures, and requirements. She demonstrated a strong ability in both written and oral English. She demonstrated no weakness in understanding the pre-hearing, hearing, or post-hearing proceedings. She demonstrated a strong grasp of the documentary evidence and the actual transaction of events relevant to her case. She conducted herself in a very professional manner throughout the pre-hearing and formal hearing periods.

Prior to the formal hearing Dr. Wirth indicated to the Court in writing that she wished to have her friend, Mr. V. Sciamarelli, present as her representative at the formal hearing. There was no indication of how Mr. Sciamarelli would assist her or what qualifications Mr. Sciamarelli possessed that would qualify him to render legal assistance to her during the H-1B proceeding. She had indicated that he was a friend and an airline pilot. Subsequent to the hearing, Dr. Wirth also indicated that Mr. Sciamarelli had been involved in airline termination cases and a brief period with the American Civil Liberties Union.

Dr. Wirth demonstrated no language barriers or educational deficiencies that would support a need for assistance of a more highly educated individual or an individual fluent in English. Dr. Wirth maintained a strong, determined presence in all pre-hearing and formal hearing sessions and did not demonstrate personality disorders or social shyness that would support a need for an independent spokes-person. Dr. Wirth listed Mr. Sciamarelli as a potential witness at the formal hearing and introduced documentary evidence related to Mr. Sciamarelli that had been identified in filed exhibits lists prior to the formal hearing.[13]

During the formal hearing Mr. Sciamarelli was permitted to sit next to Dr. Wirth and directly converse with Dr. Wirth during examination of other witnesses and presentations of the other Parties. He had full access to documentary evidence at Dr. Wirth's table and full access to Dr. Wirth and others involved with the hearing during recesses. He was not permitted to directly examine witnesses or address the Court, though he was permitted to pass questions and make suggestions to Dr. Wirth throughout the proceeding.

During the hearing Dr. Wirth was called as a witness by the Solicitor's counsel and cross-examined by the Respondent's counsel. She demonstrated no misunderstanding or confusion during her testimony or during objections and ruling on the admissibility of evidence. Dr. Wirth was given the opportunity to testify after examination by the other Party counsel and elected to

[13] Mr. Sciamarelli's misrepresentation of Dr. Wirth "as a doctor of anesthesia in Miami" on July 26, 2007 (DX 45), was not considered in restricting him to an advisor role to Dr. Wirth at the hearing. The wording is recognized as a misrepresentation only when all the evidence of record is considered.

delay her testimony until after the close of the Respondent's case. When offered the opportunity to retake the stand and testify, Dr. Wirth elected not to testify. A several hour recess was granted to the Parties to prepare closing argument. Oral argument was presented first by the Solicitor and then by Respondent. When given the opportunity to present an oral argument, Dr. Wirth declined. The Parties were given the opportunity to present a written brief regarding the period between September 1, 2007 and December 2007. Dr. Wirth submitted a written brief that was in keeping with the high quality of her other Court filings.

In view of all the foregoing, this Administrative Law Judge finds that it was not error to deny Mr. V. Sciamarelli status as a non-attorney representative at the formal hearing in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation on all the evidence of record and argument of the Parties, this Administrative Law Judge finds:

1 On July 10, 2006, University of Miami Miller School of Medicine filed an original LCA with the U.S. Government to hire Dr. Wirth as an H-1B worker in the capacity of a visiting assistant professor of anesthesiology, ETA Case Number I-06191-2683429.
2 The rate of pay listed in the original LCA was $48,000.00 per year for a full-time position.
3 The listed prevailing wage listed on the original LCA was $29,830.00 per year based on Other Wage Source – OES for 2006.
4 The original LCA listed the employment period as September 1, 2006 to August 31, 2009; the occupational code as 090; and the job title as visiting professor of anesthesiology.
5 By letter dated July 19, 2006, the University of Miami Miller School of Medicine filed a Form I-129 petition for non-immigrant worker in support of the original LCA.
6 On August 3, 2006, the original LCA / I-129 was approved by the U.S. Immigration and Naturalization Service, Vermont Service Center, for the period September 1, 2006 through August 31, 2009 for Dr. Gabriele Wirth, in the occupancy code 090 and under ECA Number 06-224-52613.
7 On August 25, 2006, Dr. Wirth was issued a U.S. Visa in Munich, Germany, that was classified as R-H-1B for the period ending August 31, 2009, related to employment with the University of Miami Miller School of Medicine, under EAC Number 06-224-52613.
8 On August 27, 2006, Dr. Wirth arrived in Miami, Florida, with her minor daughter A. Wirth (Passport Number E1700752) and her minor daughter E. Wirth (Passport Number E1700753).
9 On September 6, 2006, Dr. Wirth applied for a Social Security card.
10 On or about September 6, 2006, Dr. Wirth opened a bank account.
11 For the period August 27, 2006 through October 15, 2006, Dr. Wirth received no employment compensation from the University of Miami Miller School of Medicine.
12 For the period October 16, 2006 through April 30, 2007, the University of Miami Miller School of Medicine paid Dr. Wirth compensation for her work at the rate equivalent to $48,000.00 per year.

13 On March 20, 2007, Dr. Wirth received a restricted medical faculty certificate, number 1617, from the State of Florida for the effective period March 20, 2007 to March 19, 2009 or until employment with the University of Miami Miller School of Medicine is terminated, whichever end date is earlier.

14 On May 3, 2007, the University of Miami Miller School of Medicine filed an amended LCA with the U.S. Government to hire Dr. Wirth as an H-1B worker in the capacity of visiting assistant professor/assistant professor in ETA Case Number I-07123-3435641.

22. The rate of pay listed on the amended LCA was $96,000.00 per year for a full-time position.
23. The listed prevailing wage on the amended LCA was $29,830.00 per year based on Other Wage Source, OES Wage Survey for 2007.
24. The amended LCA listed the employment period as May 3, 2007 to May 2, 2010; the occupational code as 090; and the job title as visiting assistant professor/assistant professor.
25. On November 9, 2007, the amended LCA / I-129 was approved by the U.S. Immigration and Naturalization Service, Vermont Service Center, for the period November 8, 2007 through May 1, 2010, for Dr. Gabriele Wirth, the occupancy code was 090 under ECA Number 07-162-5500.
26. For the period May 1, 2007 to August 31, 2007, University of Miami Miller School of Medicine paid Dr. Wirth compensation at the rate equivalent to $96,000.00 per year.
27. By e-mail dated August 16, 2007, University of Miami offered Dr. Wirth $5,000.00 towards relocation expenses, plus payment of her and her children's return coach airfare one-way.
28. By letter dated April 16, 2009, the U.S. Immigration and Naturalization Service, notified University of Miami Miller School of Medicine that the petition for non-immigrant worker filed on August 1, 2006 and approved August 3, 2006, related to Dr. Gabriele Wirth, EAC Number 0622452613 is automatically revoked in accordance with 8 CFR 214.2(h)(11)(ii).
29. By letter dated April 16, 2009, U.S. Immigration and Naturalization Service, Vermont Service Center, notified University of Miami Miller School of Medicine that the petition for non-immigrant worker filed on May 3, 2007, and approved November 6, 2007, related to Dr. Gabriele Wirth, EAC Number 07-162-5500 is automatically revoked in accordance with 8 RFC 214.2(h)(11)(ii).
30. July 24, 2007, was a Tuesday.
31. August 17, 2007, was a Friday
32. Dr. G. Wirth is not entitled to payment of wages for the period August 27, 2006 through September 4, 2006, inclusive and September 7, 2006 through October 11, 2006, inclusive.
33. Dr. G. Wirth is entitled to payment of 6/7 weeks of accrued wages at the rate of $923.08 per week for the period September 4 and 5, 2006 and for October 12, 13, 14, and 15, 2006.
34. A *bona fide* termination of the employment relationship between Dr. Wirth and Respondent was complete on December 12, 2007.
35. Dr. G. Wirth is entitled to 9-5/7 weeks of accrued wages from September 1, 2007 through November 7, 2007, inclusive, at the rate of $923.08 per week and to 5-1/7 weeks of

accrued wages from November 8, 2007 through December 12, 2007, inclusive, at the rate of $1,846.15 per week.

36. The Respondent has established that Dr. G. Wirth's employment ended as a knowing, intelligent and voluntary action on her part.
37. Dr. G. Wirth has failed to establish that she is entitled to a housing allowance as a benefit of her H-1B employment status with Respondent.
38. Dr. Wirth is entitled to interest payments on past due and payable monetary wage amounts at the simple interest rate set forth in 28 U.S. Code §1961.
39. Dr. Wirth was a single, head-of-household, individual with two dependent minor children during all times relevant to the case.
40. Respondent is required to withhold from the accrued interest and accrued required wages, and submit to federal, state and local authorities, the appropriately related income, social security and Medicare taxes.
41. Dr. G. Wirth's Addendum Objection related to representation by non-attorney V. Sciamarelli is without merit.

ORDER

IT IS HEREBY ORDERED that:

1. In accordance with the Act, Respondent shall pay Dr. G. Wirth, that amount of required wages and transportation expense remaining after all federal, state and local taxes required to be withheld are deducted from:

    (a) $263.74 in accrued wages for the period September 5 and 6, 2006 which became due and payable on September 30, 2006;
    (b) $527.47 in accrued wages for the period October 12 to 15, 2006, inclusive, which became due and payable on October 31, 2006;
    (c) $4,000.00 in accrued wages for the period September 1, 2007 through September 30, 2007, inclusive, which became due and payable on September 30, 2007;
    (d) $4,000.00 in accrued wages for the period October 1, 2007 through October 31, 2007, inclusive, which became due and payable on October 31, 2007;
    (e) $923.08 in accrued wages for the period November 1, 2007 through November 7, 2007, inclusive, which became due and payable on November 30, 2007;
    (f) $6,065.92 in accrued wages for the period November 8, 2007 through November 30, 2007, inclusive, which became due and payable on November 30, 2007; and,
    (g) $3,164.83 in accrued wages for the period December 1, 2007 through December 12, 2007, inclusive, which became due and payable on December 12, 2007.

2. Respondent shall pay Dr. G. Wirth, that amount of accrued simple interest remaining after all federal, state and local taxes required to be withheld are deducted from the

accrued simple interest which shall be computed at the rate specified in 28 USC § 1961 in effect as of the date the respective required wages first became due and payable.

3. Payment of the required remaining amounts, after required tax withholding, shall be tendered by appropriate certified mail and/or courier, to Dr. G. Wirth at her address of record, Piazza di Porta Maggiore, 7, 40125 Bologna, Italy, or such other address or means mutually agreeable to the Dr. Wirth and Respondent.

4. Respondent shall file with the Administrator, with copy to Dr. Wirth, the appropriate documentation evidencing the computation of amounts payable to Dr. Wirth after authorized deductions, as well as, appropriate documentation evidencing the tender of said payment of required wages and interest as directed herein.

5. All monetary computations made pursuant to this Order are subject to verification by the Administrator.

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

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).