

Issue Date: 11 January 2011

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

Case No.: 2010-LCA-00033

In the matter of:

RUSSELL J. CHILDS, *Complainant/Prosecuting Party*,

v.

MICROSOFT CORPORATION, *Respondent*.

Before: Colleen A. Geraghty, Administrative Law Judge

Appearances:

D. Jeffrey Burnham, Esq., Johnson, Graffe, Keay, Moniz & Wick, LLP, Seattle, WA for
Complainant/Prosecuting Party

Angelo Paparelli, Esq. and Stacy Shartin, Esq., Seyfarth Shaw, LLP, Irvine, CA for Respondent

DECISION AND ORDER

I. Statement of the Case

This matter arises under the Immigration and Nationality Act (“INA”), 8 U.S.C. §1101, as amended by the American Competitiveness and Workforce Improvement Act of 1998, 8 U.S.C. §§1101(a)(15)(H)(i)(b), 1182(n), and the implementing regulations found at 20 C.F.R. 655, subparts H and I (“H-1B program”). The INA and the regulations establish an H-1B Labor Condition Application (“LCA”) program for aliens who come to the United States temporarily to perform services in a “specialty occupation,” as defined in section 214(I)(1) of the INA. *See* 8 U.S.C. §1101(a)(15)(H)(i)(b).

On January 24, 2010, Dr. Childs, the Complainant/Prosecuting Party (“Complainant”) filed a complaint with the Administrator of the United States Department of Labor’s Wage and Hour Division (“Administrator”) alleging Microsoft Corporation violated the INA and several of the implementing regulations with regard to his wages and benefits. On July 1, 2010, the Administrator determined Microsoft violated 20 C.F.R. § 655.731(c)(3), by failing to offer medical benefits to an H-1B visa employee, Dr. Childs, equal to what it offered its American

employees. The Administrator made no findings regarding other violations of the INA and its implementing regulations related to wages as alleged by Dr. Childs. The Administrator did not assess a civil money penalty for the one violation he found.

Dr. Childs filed a timely request for a hearing on July 8, 2010, contending additional violations of the INA and its regulations occurred. The initial hearing date was continued at the parties' request. A formal hearing in this matter was held on November 22, 2010, in Seattle, Washington.

The Complainant and the Respondent appeared represented by counsel.¹ Prior to the hearing date, the parties submitted amended stipulations ("A. Stip.") and joint exhibits ("JX") A-U which were admitted at the hearing. TR 5-7.² In addition, Respondent's Exhibits ("RX") 1-3 were also admitted.³ TR 85-86, 211. The official documents were admitted as Administrative Law Judge Exhibits ALJX 1-15. TR 7-11.

II. Findings of Fact

1. Parties' Stipulations

The parties have stipulated to the following facts:

1. In order for Microsoft Corporation ("Microsoft") to employ the Complainant lawfully in an H-1B Specialty Occupation at its headquarters in Redmond, Washington at an annual salary of U.S. \$80,000, on March 24, 2008, Microsoft filed an H-1B Petition on U.S. Citizenship and Immigration Services (USCIS) Form I-129 (with a supporting letter from Microsoft) requesting classification of Complainant as an H-1B nonimmigrant worker (Receipt # WAC-08-139-50336) (the petition and letter are attached, respectively, as Exhibits A-1 and A-2). JX A-1 and A-2.⁴
2. The underlying Labor Condition Application (LCA) for the H-1B Petition (ETA Case No. I-08077-3998197, attached as Exhibit B) also reflected an offered wage rate of U.S. \$80,000 per year. JX B.

¹The Administrator was not a party to the proceedings before the undersigned.

²The amended joint stipulations and joint exhibits were also admitted as Administrative Law Judge Exhibits (ALJX 8 and 9).

³At hearing, the Complainant offered a legible copy of Exhibit J which had been included as an attachment to the parties' amended stipulations. The parties agreed that this document would simply be substituted for the illegible copy of the same document (Exhibit J) attached to the stipulations, rather than marking the document as Complainant's exhibit at hearing. TR 6-7.

⁴The stipulations did not designate the attached corresponding exhibits as a Joint Exhibit. However, for ease of reference I will cite the exhibits the parties included with the amended stipulations as JX in referring to the specific exhibit.

3. On April 24, 2008, USCIS approved Microsoft's H-1B Petition for Nonimmigrant Worker, with a period of petition validity granted from October 1, 2008 to September 12, 2011, as confirmed on Form I-797 Notice of Action (attached as Exhibit C). JX C.
4. On March 28, 2008, Complainant signed an employment agreement with Microsoft Canada CO. ("MCC") for employment as a Software Design Engineer ("SDE"), Level 61, at MCC's facility, the Microsoft Canada Development Centre, ("MCDC") in Richmond, British Columbia, Canada at an annual salary of Canadian ("CDN") \$98,000 per year, exclusive of standard benefits (attached as Exhibit D). JX D.
5. On May 12, 2008, Complainant commenced employment at MCDC.
6. On July 25, 2008, Microsoft provided Complainant with the original Form I-797 Notice of Action (approval notice) for his H-1B Petition for a Nonimmigrant Worker. On the same day, Complainant signed attestations, attached as Exhibit E, acknowledging his receipt of the original Form I-797 approval notice, a copy of the Form I-729, and a copy of the underlying labor condition application. JX E
7. On October 8, 2008, Complainant electronically signed Microsoft's offer letter, (attached as Exhibit F), accepting employment in the position of Software Design Engineer (SDE") II, Level 61, at a salary of \$97,000 annually. JX F.⁵
8. On November 1, 2008, Complainant lawfully entered The State of Washington from Canada pursuant to the previously approved and unexpired H-1B visa petition sponsored by Microsoft, and was admitted to the U.S. in H-1B status by U.S. Customs and Border Protection.
9. On November 3, 2008, Microsoft hired Complainant in Redmond, Washington as an SDE II, Level 61, at an annual salary of U.S. \$97,000 per year, exclusive of standard benefits. Microsoft did not pay Complainant in US dollars for the period November 3, 2008 (Complainant's first day at NEO [New Employee Orientation] in Redmond, Washington) to February 15, 2009 (date of first pay cycle after Complainant signed his employment agreement).

⁵The offer letter was an offer of employment with Microsoft in the United States at its Redmond, Washington location. JX F.

10. On November 3, 2008, Complainant participated in New Employee Orientation (“NEO”) and completed and signed Section 1 of the USCIS Form I-9 (Employment Eligibility Verification), confirming his identity, his foreign citizenship and his temporary authorization for employment in the United States.
11. Prior to attending the NEO, Complainant received information and access to an on-line tool available on the password-protected Microsoft intranet portal which would provide him with the ability to review and electronically sign the standard Microsoft employment agreement, (attached as Exhibit G), applicable to all Level 61 SDEs. JX G.
12. On November 18, 2008, Microsoft’s headcount Operations Analyst Christine Olson wrote and sent to a named group of Microsoft employees including the Complainant an email, attached as Exhibit H. JX H.
13. On November 18, 2008, Complainant responded to Ms. Olsen by email, attached as Exhibit I. JX I.
14. On December 22, 2008, Complainant wrote an email to David Jackson, a Microsoft Human Resources representative, attached as Exhibit J. JX J.
15. On January 29, 2009, David Jackson wrote an e-mail to Complainant, attached as Exhibit K. JX K.
16. On January 29, 2009,⁶ Complainant responded to Mr. Jackson by e-mail, attached as Exhibit L. JX L. On February 2, 2009, Complainant provided an additional response to Mr. Jackson by e-mail, attached as Exhibit M. JX M.
17. From November 1, 2008 to December 31, 2008, MCC paid the Complainant the gross amount of CDN \$16,333.32 and a net amount of CDN \$12,029.48 after subtracting authorized deductions of CDN \$4,303.84 equivalent to US \$13,312 (at an average exchange rate of 1:1.22698 for U.S. dollars to Canadian dollars, based on the currency conversion chart attached as Exhibit N). JX N. From November 1, 2008 to December 31, 2008, Complainant worked in the United States and not Canada.
18. The said sums paid to Complainant by MCC on behalf of Microsoft from November 1, 2008 to December 31, 2008, were distributed in four equal

⁶The stipulation incorrectly states the date for this email as January 29, 2010. The e-mail itself reflects that it was sent on January 29, 2009.

installments, according to the normal semi-monthly payroll scheduled for employees of MCC, as reflected in MCC payroll records from Complainant, attached as Exhibit O. JX O. These payments by MCC to Complainant on behalf of Microsoft represent an annualized gross salary of CDN \$98,000, exclusive of standard benefits – equivalent, at then-current exchange rates, to an annualized gross salary of approximately U.S. \$79,870.90 per year (at an average exchange rate of 1:1.22698 for U.S. dollars to Canadian dollars).

19. On February 2, 2009, Complainant signed and submitted an employment agreement with Microsoft, attached as Exhibit P. JX P.
20. On February 27, 2009, Microsoft paid Complainant a lump sum, in Redmond, Washington of \$31,261.25, as reflected in the attached Exhibit Q, for the period from November 3, 2008 (Complainant's first day at New Employee Orientation in Redmond, Washington) to February 15, 2009 (date of the first pay cycle after Complainant signed his employment agreement). JX Q.
21. On March 5, 2009, Microsoft paid Complainant gross amount of U.S. \$4,041.67 for his employment from February 16, 2009 to February 28, 2009. Dr. Childs subsequently continued to receive a gross payment of U.S. \$4,041.67 twice per month in accordance with Microsoft's standard payroll cycle for the duration of his employment with Microsoft.
22. Complainant's employment with Microsoft was terminated on August 7, 2009. On August 14, 2009, Microsoft paid Complainant a gross amount of U.S. \$6,046.52, comprised of \$1,616.67 in base salary and U.S. \$4,429.85 in accrued vacation time.
23. In calendar year 2008, Complainant was compensated a total of CDN \$63,204.04 in "Employment income" as reported in Box 14 of Complainant's Form T4 Statement of Remuneration Paid, issued by the Canada Revenue Agency, attached as Exhibit R. JX R.
24. In calendar year 2009, Microsoft compensated Complainant in the amounts reported in Complainant's Form W-2 Wage and tax Statement, reported to the Internal Revenue Service, attached as Exhibit S. JX S.
25. Attached as Exhibit T are copies of Complainant's paystubs for calendar year 2009 provided by Complainant. Copies of Complainant's paystubs for calendar year 2009 provided by Respondent are attached as Exhibit U. JX T and U.

Amended Pre-Trial Stipulations and JX A-U. TR 5-7, 9. As I find that substantial evidence in the record supports the stipulations, I accept the stipulations.

2. Hearing Testimony

In addition to the amended stipulations, Dr. Childs, Mr. Sommerfield and Mr. Jackson testified at the hearing.

a. Russell Childs, Ph.D

Dr. Childs holds a PH.D from the University of Birmingham, United Kingdom in particle physics. TR 41. Previously in his career, Dr. Childs worked for the United Kingdom's Ministry of Defense where he was required to sign the Official Secrets Act of the United Kingdom associated with his work. Dr. Childs testified that he initially began working for Microsoft Canada on March 28, 2008. TR 39, 44. When he began work with Microsoft Canada, Dr. Childs signed the employment agreement with Microsoft Canada and attached a list of items, he claimed an intellectual property interest in, to his employment agreement. TR 45. Microsoft Canada had permitted him to do so and that company countersigned the document. TR 44-45; A. Stip 4; JX P. The matters Dr. Childs' claims an intellectual property interest in included matters he worked on at the Ministry of Defense as well as other aspects of his own research over a period of years. TR 43-44; JX D.

In early October 2008, Microsoft asked Dr. Childs to come to the United States to work for Microsoft in Redmond, Washington and he agreed to do so. TR 46.⁷ Dr. Childs received a letter from Microsoft on October 6, 2008 offering him a position in Redmond, Washington. TR 46. The offer letter indicated the salary was \$97,000 annually and set out other terms of employment. JX F. The offer letter instructed that Dr. Childs was to indicate his acceptance of the employment offer by electronically signing the acceptance letter and the Microsoft Corporation Employee Agreement (included in the list of Offer Documents) prior to his start date. JX F and G. Further, the offer letter informed Dr. Childs he had been scheduled for New Employee Orientation on or about November 3, 2008. JX F. Dr. Childs electronically signed the acceptance letter on October 8, 2008, but he did not sign the employment agreement. JX F. Dr. Childs said he did not sign the employment agreement as he had some concerns regarding the terms of the employment agreement related to intellectual property. TR 45-48. He entered the United States and attended new employee orientation on or about November 3, 2008.

Soon after arriving in the U.S. and beginning work, Dr. Childs did not receive his wages in the normal payroll cycle at Microsoft and Microsoft realized Dr. Childs had not signed the employment agreement. TR 48. It became apparent that Dr. Childs and Microsoft disagreed over his efforts to modify the terms of the employment agreement pertaining to intellectual

⁷As noted above, on March 24, 2008, Microsoft submitted an H-1B application to the United States Citizenship and Immigration Services (USCIS) including Form I-129 and a Labor Condition Application seeking to hire Dr. Childs at a wage of \$80,000 annually. A. Stip. 1-2. The H-1B petition was approved on April 24, 2008. A. Stip. 3.

property and to include a list of items to which he asserted an intellectual property interest. TR 45-48, 51-54; JX H, I, J and K. In the period between November 3, 2008 when Dr. Childs entered the United States to work for Microsoft in Redmond, Washington and the third week of December 2008, he and Microsoft were attempting to resolve the dispute over intellectual property. Dr. Childs consulted an independent intellectual property attorney regarding his concerns with the Microsoft employment agreement as it related to intellectual property and he sought modifications to the terms of the employment agreement. TR 68, 70-71, 73, 76; JX H. In this period, Dr. Childs was working for Microsoft in the United States but he did not receive wages from Microsoft. TR 48-49; 55 JX H. Dr. Childs raised the wage issue with several Microsoft officials and employees. TR 48-49, 55; JX H. Sometime near the end of December 2008, Dr. Childs was instructed to check his Canadian Bank account and he then learned that Microsoft Canada had paid him under the Canadian employment agreement for the period November 3 through December 31, 2008. *Id.*⁸

The controversy over Dr. Childs' signing the employment agreement and, attaching the list of items he claimed as his intellectual property, went on for several weeks. TR 48, 50-53. In addition to the list of inventions, Dr. Childs wished to include language to the effect that Microsoft agreed it would not assert an interest in any work itemized on Dr. Childs' list. TR 48, 75-76.⁹ Microsoft was willing to accept the list, but was unwilling to accept the additional language Dr. Childs sought, or to countersign his list of inventions. TR 58-59, 62, 70-84; R -2. After several weeks of back and forth telephone meetings and e-mails in which the parties were unable to reach an amicable agreement regarding the claimed intellectual property issue, Microsoft informed Dr. Childs that if he was unwilling to sign the employment agreement and attach the list of claimed intellectual property items as Microsoft agreed to accept it, Microsoft would consider his non-execution of the employment agreement as a rejection of its offer of employment and would begin the repatriation process back to Dr. Childs' country of origin. TR 50-52; JX L. Dr. Childs said he signed the employment agreement on February 2, 2009 and attached the list of inventions under pressure and without the additional language he sought. TR 62-63, 67-69; JX P.

Although Dr. Childs was in the United States working for Microsoft in Redmond, Washington as of November 3, 2008, he was not paid by Microsoft U.S. for the period November 3, 2008 through February 15, 2009 until February 27, 2009. However, Dr. Childs maintains the check was further delayed reaching him as it was directed to an old address. TR 61, 93; JX Q. This meant that during the months of January and February he did not receive any wages from Microsoft. TR 60-61. JX Q. Thereafter, Dr. Childs received wages from Microsoft at regular intervals in the normal payroll cycle. JX T.

⁸During this period Dr. Childs said he was concerned that being in the United States working, without being paid, might place him in violation of the H-1B regulations. TR 59-60; JX L.

⁹Although Dr. Childs initially stated that he was simply attempting to have Microsoft allow him to attach the same list of claimed intellectual property items that Microsoft Canada had permitted him to attach to the Microsoft Canada employment agreement, he acknowledged on cross-examination that he made the list presented to Microsoft more comprehensive. TR 45-46, 48, 68, 75-76. A careful review of the intellectual property list and the language Dr. Childs added to the list and presented to Microsoft, demonstrates that the two lists were not the same and that the added language Dr. Childs sought to have Microsoft accept was more expansive than the document attached to the Microsoft Canada employment agreement. TR 75-76; 79-83; RX 1.

On cross-examination, Dr. Childs acknowledged that within two weeks of employment with Microsoft US and, during the period of the dispute over the employment contract and list of inventions, he was told by Microsoft officials that he could not be put on the Microsoft payroll until he signed the employment agreement. TR 86-89; JX H. Dr. Childs also acknowledged that he was paid his salary under the Microsoft Canada employment agreement for the period November 1, 2008 through December 31, 2008. TR 96-97. Dr. Childs agreed that he was later paid his salary under the Microsoft U.S. employment agreement for this same November 1, 2008 through December 31, 2008 period. *Id.*¹⁰ He conceded that for the period November 1, 2008 through December 31, 2008 he was paid salary by both Microsoft Canada and Microsoft in the United States. TR 97.

b. Testimony of Daniel Sommerfield

Daniel Sommerfield is employed as a development manager at Microsoft in Redmond, Washington. TR 109. Mr. Sommerfield was employed in that position during the period November 2008 through February 2009. TR 109-110. Dr. Childs' supervisor, Navin Joy, reported to Mr. Sommerfield. TR 109-110. Mr. Sommerfield testified that he was involved in efforts to have Dr. Childs sign the Microsoft employment agreement. Mr. Sommerfield described his role as passing Dr. Childs' inquiries to the proper officials within Microsoft, that is, to the human resources and legal departments and, at times, conveying responses from those departments back to Dr. Childs. TR 111-116. Mr. Sommerfield recalled that there were multiple e-mail exchanges with Dr. Childs regarding Microsoft's policy of not changing the terms or language in the standard employment agreement. TR 115-117. He referred Dr. Childs to Microsoft's in-house intellectual property attorney, Mr. Zeiger. TR 114-116. Mr. Sommerfield participated in a telephone call with Dr. Childs and David Jackson from the human resources department, and possibly others, on or about December 18, 2008, in which Dr. Childs raised concerns about the items of intellectual property and Mr. Jackson told Dr. Childs that Microsoft does not alter the employment agreement. TR 118. Mr. Sommerfield stated that during that telephone conference Mr. Jackson indicated the options or consequences of Dr. Childs either signing or not signing the employment agreement. TR 119. Mr. Sommerfield sent an e-mail to Dr. Childs the next day reiterating Mr. Jackson's message regarding the implications of Dr. Childs' decisions with regard to signing or not signing the employment agreement. TR 120-121. Mr. Sommerfield stated there was another meeting on these issues in mid-January 2009. TR 123-125.

Mr. Sommerfield acknowledged that he was aware that Dr. Childs was told that if he did not sign the employment agreement he could not continue to work at Microsoft. TR 130. He also conceded that he was aware of a number of complaints from Dr. Childs during the relevant period of time that he was having difficulty getting an apartment and seeing a physician. TR 131-132. He stated he attributed those difficulties to getting the employment agreement signed and he forwarded Dr. Childs' concerns to Mr. Jackson in the human resources department. TR 132. Mr. Sommerfield claimed that although he knew there was an issue with Dr. Childs' benefits because he had not signed the employment agreement, and he knew that there was an issue with his "status," he did not know Dr. Childs was not getting paid. TR 134.

¹⁰Dr. Childs was paid by Microsoft U.S. for the period November 1, 2008 through February 15, 2009 in one lump sum check issued on February 27, 2009. TR 97; JX T.

c. Testimony of Mr. Jackson

Mr. Jackson was a Senior Human Resources Business Partner at Microsoft during the relevant periods. TR 140. He was responsible for human resources issues for the Core Search Team headed by Mr. Joy and, for which Dr. Childs worked. Mr. Jackson first became involved in efforts to have Dr. Childs sign the Microsoft US employment agreement sometime in mid-November 2008. TR 141. Mr. Jackson recalled that Dr. Childs expressed concerns related to intellectual property he had developed and he wished to protect that property. TR 142, 144. Mr. Jackson stated that he told Dr. Childs that the employment agreement permits for a declaration to be attached to the employment agreement, and once those provisions were satisfied, Dr. Childs could be fully processed into Microsoft. TR 142-143. Mr. Jackson testified that initially he believed the issue was simply following up on a routine process to obtain the signed employment agreement. TR 142-143, 156-157. Mr. Jackson acknowledged that as he discussed Dr. Childs' concerns with him through November, he realized Dr. Childs was very concerned with protecting his intellectual property and Dr. Childs wanted to be sure Microsoft could not take anything he had developed. TR 142-143. Mr. Jackson indicated that in attempting to resolve Dr. Childs' concerns he got the legal department, both intellectual property and immigration areas, involved in an attempt to sort out any differences between the Microsoft Canada employment agreement and the Microsoft employment agreement. TR 144-145, 155-156. Mr. Jackson also stated that he told Dr. Childs that signing the employment agreement is a condition of employment with Microsoft. TR 145.

Mr. Jackson described a telephone meeting on December 18, 2008, with Dr. Childs. He recalled that other Microsoft officials participating in the telephone conference included, Lisa Hanna, a Microsoft attorney, Mr. Sommerfield, and perhaps Mr. Joy, and Leonard Smith, an intellectual property attorney for Microsoft. TR 147. Mr. Jackson said that there was further discussion of Dr. Childs' concerns regarding his intellectual property and that Microsoft officials told him that signing the employment agreement was required for him to work for Microsoft and that the company did not negotiate the terms of the employment agreement. TR 149-151. Mr. Jackson stated that Dr. Childs indicated he would sign the agreement, but that when the documents were presented to Microsoft, material changes had been made to the employment agreement or list of inventions. TR 173-176. He indicated there were further e-mail exchanges with Dr. Childs on this issue with both parties essentially sticking to their respective positions. TR 153-154.

On or about January 14, 2009, a further telephone conference was arranged with Dr. Childs in an effort to resolve the issues and have the employment agreement signed. TR 153. Following the conference, Mr. Jackson said that Microsoft's attorneys reviewed the Microsoft Canada and Microsoft employment agreements, as well as the addendum Dr. Childs attached to the Microsoft Canada agreement, and the changes he sought in the Microsoft employment agreement. TR 151. Specifically, in addition to attaching a list of intellectual property projects to the Microsoft employment agreement, Dr. Childs sought amendments to the agreement's language, he sought to have Microsoft agree not to assert a claim on items included on the list, and he requested Microsoft to countersign each page. TR 152-153.

Mr. Jackson recalled that following review, Mr. Smith, a Microsoft attorney, wrote a legal opinion concluding that the documents were not the same and advising that Microsoft would not accept Dr. Childs' changes to the employment agreement's language nor would it

accept the language Dr. Childs wished to add to the list of intellectual property projects. *Id.* Mr. Jackson was asked to share Microsoft's position with Dr. Childs. TR 152-153,179-180. On January 29, 2009, Mr. Jackson sent a lengthy e-mail to Dr. Childs laying out Microsoft's position explaining that the company would permit Dr. Childs to attach the list of intellectual property items to the employment agreement, but it would not agree to the language changes Dr. Childs' desired in the employment agreement or to the additional language he sought to attach to the list of claimed intellectual property items. TR 153, 159-160; JX K. The e-mail informed Dr. Childs that in order to move forward with his employment with Microsoft, the company needed to receive his signed employment agreement by February 2, 2009. TR 160-162; JX K. Once the signed agreement was received, Microsoft could complete his employee on-boarding. *Id.* Mr. Jackson's e-mail also stated that if Dr. Childs elected not to sign the employment agreement, Microsoft would consider that a rejection of the offer of employment and would begin the repatriation process back to Dr. Childs' country of origin. *Id.* Mr. Jackson testified that the repatriation process includes giving the employee an airline ticket home and at some point certifying that Dr. Childs was not an employee of Microsoft. TR 162, 201.

Mr. Jackson acknowledged that he knew that the failure to sign the employment agreement was precluding Dr. Childs from enrolling in benefits, but he claimed he did not know there were any issues with Dr. Childs receiving pay until sometime in January 2009. TR 155, 183-185, 187. Mr. Jackson also denied knowing that Dr. Childs was having difficulty obtaining accommodations due to the lack of a paycheck. TR 185-186.

Mr. Jackson said that all Microsoft employees are required to sign the employment agreement. TR 163-165. He explained that if a U.S. citizen were offered employment with Microsoft and refused to sign the employment agreement, the offer of employment would have been rescinded. TR 164.

III. Issues

By stipulation the parties have narrowed the disputed legal issues. The legal issues are (1) whether Microsoft violated the regulations at 20 C.F.R. 655.731(c)(2), 655.731(c)(4) and 655.731(c)(6) and (2) if the violations are established, were the violations willful pursuant to 20 C.F.R. 655.810(b)(2)(i). JX.¹¹

IV. Discussion

A. Statutory and Regulatory Framework

Under the INA, an employer may hire nonimmigrant alien workers in "specialty occupations" for prescribed periods of time. 8 U.S.C. §§ 1101 (a)(15)(H)(i)(B).¹² These workers are commonly referred to as H-1B nonimmigrants. *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-010-25 (May 31, 2005). To employ H-1B nonimmigrants, the employer must first complete a Labor Condition Application ("LCA"). 8 U.S.C § 1182(n). In the LCA, the

¹¹The claim initially included a claim for discrimination, pursuant to 20 C.F.R. § 655.801, which the parties have now elected to pursue in an alternate proceeding. *See* A. Stip. at 7.

¹²A "specialty occupation" is one that requires theoretical and practical application of highly specialized knowledge and attainment of a bachelor's degree or higher in the specialty. 8 U.S.C. § 1184(i); 20 C.F.R. § 655.715.

employer must represent the number of employees to be hired, their occupational classification, the actual or required wage rate, the prevailing wage rate, and the source of such wage data, the period of employment and the date of need. 20 C.F.R. §§ 655.730 -734; 8 U.S.C. § 1182(n). The employer then obtains certification from the Department of Labor that it has filed the LCA with Department of Labor. After it secures the certified LCA, the employer submits a copy to the United States Citizenship and Immigration Services (“USCIS”) and petitions for an H-1B classification for the nonimmigrants it wishes to hire. Upon USCIS approval, the United States Department of State issues H-1B visas to the nonimmigrants. 20 C.F.R. § 655.705(b). If the visa is approved, the employer may hire the H-1B worker.

The implementing regulations at 20 C.F.R. § 655.731 set forth the requirements employers must meet in employing nonimmigrant workers in specialty occupations. Section 20 C.F.R. § 655.731(c) titled “Satisfaction of required wage obligation” provides, in relevant part:

...the required wage must be paid to the employee, cash in hand, free and clear, except that deductions [permitted by law, union contract, etc.] may reduce the cash wage below the level of the required wage....”

Section 20 C.F.R. § 655.721(c)(2) defines “cash wages paid” as payments meeting the following criteria:

- (i) Payments shown in the employer’s payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due...

Section 20 C.F.R. § 655.731(c)(4) addresses wages for salaried employees and provides:

For salaried employees wages will be due in prorated installments (e.g. annual salary divided into 26 bi-weekly pay periods where employer pays bi-weekly) paid no less often than monthly....

Section 20 C.F.R. § 655.731(c)(6) directs that the H-1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant “enters into employment” with the employer.

- (i).....the H-1B nonimmigrant is considered to “enter into employment” when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as....reporting for orientation or training....
- (ii) the employer that has had an LCA certified and H-1B petition approved for the H-1B nonimmigrant shall pay the nonimmigrant the required wage beginning 30 days after the date the nonimmigrant first is admitted into the U.S....

B. Did Microsoft Violate the Regulations At 20 C.F.R. §§ 655.731(c)(2), 655.731(c)(4) and 655.731(c)(6)?¹³

The Administrator made no finding that Microsoft violated the regulatory provisions at issue herein.¹⁴ The evidence is undisputed that Dr. Childs entered the United States on or about November 1, 2008 under the Labor Certification Application Microsoft obtained for him and pursuant to the employment offer from Microsoft. Dr. Childs presented himself for New Employee Orientation on November 3, 2008 at Microsoft's Redmond, Washington facility even though he had not yet signed the employment agreement. Microsoft allowed him to work for the company out of the Redmond, Washington facility beginning on that date. Microsoft continued to have Dr. Childs work even after the company became aware that the employment agreement had not been signed.¹⁵ It is undisputed that Microsoft failed to pay the Complainant wages in U.S. funds for the period November 3, 2008 through December 31, 2008.¹⁶ Additionally, Microsoft did not pay the Complainant wages at all for the period January 1, 2009 through February 15, 2009. Microsoft issued a check in U.S. dollars to Dr. Childs on February 27, 2009 which included wages for the period November 3, 2008 through February 15, 2009, but this check did not reach Dr. Childs until sometime in March 2009. On these undisputed facts, it is clear that Microsoft violated 20 C.F.R. §§ 655.731(c)(2), (c)(4) and (c)(6). \

I find that Microsoft violated 20 C.F.R. § 655.731(c)(2) as it failed to pay Dr. Childs wages in U.S. funds when the wages were due for the period November 3, 2008 to February 15, 2009. These same facts establish Microsoft violated 20 C.F.R. § 655.731(c)(4) because it did not pay Dr. Childs the wages due at least monthly for the period November 3, 2008 through December 31, 2008, or for the period January 1, 2009 through February 15, 2009.

¹³I decline Microsoft's invitation to reconsider the Order denying Microsoft's motion to dismiss the proceedings for lack of standing. M. Br. at 9-11. As discussed in the Order itself, Dr. Childs is an aggrieved party as his interests were adversely affected by Microsoft's violations of the regulations pertaining to the payment of wages. The Complainant is certainly interested in a finding that Microsoft violated the regulatory provisions at issue. Moreover, the Complainant is entitled to interest on the delayed wage payments. As discussed herein, Microsoft Canada's wage payment to Complainant for the period November 3, through December 31, 2008, is not an interest payment by Microsoft.

¹⁴As noted, the Administrator's investigation found that Microsoft failed to offer either equal benefits or equal eligibility for benefits or both in violation of 20 C.F.R. § 655.731(c)(3). As a remedy, the Administrator directed the Microsoft to comply with 20 C.F.R. § 655.731 in the future and did not assess a civil monetary penalty.

¹⁵Microsoft officials stated repeatedly that Dr. Childs could not be on-boarded until the employment agreement was signed. Despite denials by both Mr. Sommerfield and Mr. Jackson, I find that Microsoft officials in the U.S. were aware that Dr. Childs was not receiving his Microsoft wages/salary during the relevant four-month period.

¹⁶Although Dr. Childs was in the United States working for Microsoft in Redmond, Washington during this period, Microsoft Canada (MCC) paid Complainant in Canadian dollars under his employment contract with MCC. Dr. Childs' testimony that he first learned of these payments to his Canadian account on or about December 20, 2008 was undisputed.

Finally, I find Microsoft violated 20 C.F.R. § 655.731(c)(6) as it did not pay Dr. Childs the required wages beginning on November 3, 2008, the date he entered into employment. Additionally, Microsoft failed to pay him the required wages beginning thirty days after the date he was first admitted into the United States.¹⁷

C. Willfulness and the Assessment of Civil Monetary Penalties?

Dr. Childs argues that Microsoft's violation of the H-1B regulations was intentional and willful. C. Br. at 5-7. In support of his assertion, Dr. Childs maintains that Microsoft does make exceptions to its standard employment agreement, but chose not to do so for his requested intellectual property concerns, in order to force him to give up his intellectual property rights. C. Br. at 6. Dr. Childs also contends that informing him that if he did not sign the employment agreement without changes, Microsoft would view the non-execution of the employment agreement as a rejection of the offer of employment, and would begin the repatriation process, was a threat and coercive. *Id.* In contrast, Microsoft contends that any violation was not willful and Microsoft argues the company worked in good faith to resolve the dispute. M. Br. at 16-20.

A civil monetary penalty not exceeding \$5000 per violation *may* be assessed for “a willful failure pertaining to wages/working conditions (Sec. 655.731)....” 20 C.F.R. § 655.810 (b)(2)(i). Pursuant to 20 C.F.R. § 655.805(c) a “willful failure” to comply with the H-1B regulations is defined as “a knowing failure or a reckless disregard with respect to whether the conduct was contrary to sections 212(n)(1)(A)(i) or (ii), or 212(t)(1)(a)(1) or (ii) of the INA, or §§ 655.731 or 655.732.” See *McLaughlin v. Richard Shoe Co.*, 486 U.S. 128 (1988); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). The term “‘willful’... is generally understood to refer to conduct that is not merely negligent.” *McLaughlin*, 486 U.S. at 133. The standard of willfulness adopted by the Supreme Court in *McLaughlin* is whether “the employer either knew or showed reckless disregard... [that] its conduct was prohibited by the statute.” *Id.*¹⁸ Under the facts of this case, I find that the Microsoft did not act with reckless disregard. Therefore, I do not assess a civil monetary penalty.

¹⁷Microsoft's contention that the undersigned is precluded from finding Microsoft violated the wage regulations if the company made a good-faith effort to comply, citing 8 U.S.C. 1182(n)(2)(H) of the INA, is unpersuasive. M. Br. at 14. Failing to pay any wages for four months, while requiring the nonimmigrant to work, cannot be deemed a mere technical violation of the wage regulations such that clear and unambiguous violations of the regulations are simply excused without a finding of violation.

¹⁸“In determining the amount of the civil money penalty to be assessed, the Administrator shall consider the type of violation committed and other relevant factors.” 20 C.F.R. § 655.810(c). The non-exclusive list of factors included within the regulation are: (1) The previous history of violations by the employer; (2) The number of workers affected by the violation; (3) The gravity of the violation; (4) The employer's good faith efforts to comply; (5) The employer's explanation; (6) The employer's commitment to future compliance; (7) The employer's financial gain due to the violation, or potential financial loss, injury or adverse effect to others. See *id.* Under the statutory scheme, I have the ability to determine the appropriateness of a civil penalty and I can “affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.” 20 C.F.R. § 655.840(b); see also *Administrator v. Itek Consulting, Inc.*, 2008-LCA-00046 (ALJ May 6, 2009); *Administrator, Wage and Hour Division v. Law Offices of AnilShaw*, 2003-LCA-00020 (ALJ May 19, 2004).

After careful consideration of the evidence, I find that both Dr. Childs and Microsoft contributed to the events that unfolded. Microsoft's offer letter to Dr. Childs explicitly stated that he was to indicate his acceptance of the offer of employment by signing the offer letter and the employment agreement **prior** to his start date. The offer letter further instructed that he was not authorized to alter the terms of the offer letter or the employment agreement in any manner and that employment was at-will. Dr. Childs was aware that acceptance of the employment offer required him to sign the employment agreement as presented. Nevertheless, Dr. Childs entered the US on the H-1B visa Microsoft had obtained, attended new employee orientation at Microsoft, and began working without signing the employment agreement. Knowing he disagreed with provisions of the employment agreement, knowing that the offer letter indicated he was to indicate his acceptance of the offer by signing the employment agreement prior to his start date and knowing that Microsoft's offer letter stated the terms of the employment agreement could not be altered, Dr. Childs' action in presenting himself for employment is puzzling.

For its part, Microsoft could have avoided this entire matter by ensuring that Dr. Childs, or any employee for that matter, sign the employment agreement **before** he was permitted to attend New Employee Orientation and begin working.¹⁹ However, once it was clear that there was a significant disagreement over the terms of the employment agreement related to intellectual property, Microsoft attempted to work with Dr. Childs to resolve his concerns. There were several e-mail exchanges and telephone meetings in an effort to address the concerns, Microsoft encouraged Dr. Childs to consult outside intellectual property counsel. Additionally, Microsoft attorneys reviewed and considered the changes Dr. Childs wished to make to the terms of the employment agreement, and the language he wanted to add to the list of claimed intellectual property items, which Microsoft agreed could be attached to the agreement. Microsoft determined it would not accept the changes the language changes Dr. Childs sought. When Microsoft informed Dr. Childs that it would not accept his changes to the employment agreement and the additional language he sought to add on the list of intellectual property items, Dr. Childs had a choice, either, sign the employment agreement as presented and attach a list of intellectual property items, or decline the offer of employment. He elected to sign the employment agreement.²⁰

¹⁹One certainly expects that Microsoft has modified its human resources/personnel practices to avoid any future similar violations of the H-1B compensation regulations.

²⁰The H-1B visa program, by design, deprives employers of economic incentives to prefer nonimmigrant professional employees, because their wages and benefits must equal those that would be paid to American workers. 20 C.F.R. § 655.731(b). The regulations implementing the H-1B visa program set forth the requirements for complying with the terms of the LCA underlying the approved H-1B visa. Relevant to this case, the regulation at 20 C.F.R. § 655.731(c) addresses requirements regarding wages under the LCA for the H-1B visa holder. The Department of Labor's regulations identifying the requirements for an LCA and an employer's obligations to the nonimmigrant employee there under, do not address or consider issues related to potential intellectual property claims of a nonimmigrant worker. The dispute over the terms of the Microsoft employment contract as it relates to claimed intellectual property items and issues is beyond the scope of issues relevant to a determination of whether Microsoft violated the requirements of the LCA and H-1B regulations related to payment of wages for nonimmigrant workers.

Nor is Microsoft's informing Dr. Childs that if he elected not to sign the employment agreement, the company would view that as a rejection of the employment offer, and begin the repatriation process, evidence of willfulness. Rather, that is the consequence of declining the offer of employment with Microsoft as the H-1B application indicated Dr. Childs would be employed by Microsoft in Redmond, Washington and provided that should Dr. Childs be dismissed from employment before the period of authorized employment, Microsoft would assume liability for reasonable transportation costs back to his home country. JX A.²¹

D. Damages

1. Back Wages

Microsoft paid Dr. Childs back wages owed for the period November 3, 2008 through February 15, 2009 in one check issued on February 27, 2009. Thereafter, Microsoft paid Dr. Childs wages pursuant to the normal payroll cycle. The parties agree and I find Dr. Childs has received all wages due under the LCA.

2. Interest

The Administrative Review Board has held that, notwithstanding that the Immigration and Nationality Act does not specifically authorize an award of interest on back pay, interest shall be paid on awards of back pay, with compound interest to be paid prejudgment. *Innawalli v. Am. Info. Tech. Corp.*, ARB No. 05-165, ALJ No. 2004-LCA-13 PDF at 8-9 (ARB Sept. 29, 2006); *Amtel Group of Florida, Inc., v. Yongmahapakorn*, ARB No. 04-087, 2004-LCA-6 PDF at 12-13 (ARB Sept. 29, 2006) (citing *Doyle v. Hydro Nuclear Serv.*, ARB Nos. 99-041, 99-042,00-012; ALJ No. 89-ERA-22, slip op. at 18-21 (May 17, 2000)). The ARB went on to order the employer to pay prejudgment and post-judgment interest on the owed back pay. *Yongmahapakorn*, PDF at 12-13. The interest rate used is the Federal Short Term rate plus 3%, as specified in 26 U.S.C. § 6621. *Mao v. Nasser*, ARB No. 06-121, ALJ No. 2005-LCA-36 PDF at 11-12 (ARB Nov. 26, 2008).

Dr. Childs received all wages due from Microsoft for the period November 3, 2008 through February 15, 2009 in a check issued on February 27, 2009. Dr. Childs maintains he is nonetheless entitled to interest lost during the four month period he was not paid by Microsoft, at a rate of at 10%, for a total of \$280 interest due. C. Br. at 8. Microsoft argues that Dr. Childs has been overpaid for the period of November 3, 2008 through December 31, 2008 because he was paid by Microsoft Canada during this period.

²¹At the time Microsoft asked Dr. Childs to come to work in the United States it did not tell him that his position in Canada was being eliminated. Therefore, Mr. Jackson's testimony that Dr. Childs' position in Canada no longer existed once he came to the U.S. is not credible. In light of the fact that Dr. Childs left his position with Microsoft Canada, moved to the United States, and that Microsoft permitted Dr. Childs to begin work in Redmond without a signed agreement, and allowed him to work while the dispute continued unresolved for several months, one might have expected Microsoft to permit Dr. Childs the option of returning to the position he held with Microsoft Canada. However, Microsoft's failure to do so does not elevate its violations of the wage regulations under the H-1B visa program to willful violations.

Once he signed the employment agreement with Microsoft, that company paid him for this same period. Microsoft states the overpayment is \$13,021.59 in U.S. dollars (the amount paid by Microsoft Canada converted to US currency) and asserts that Microsoft did not claim a credit and has never required Dr. Childs to repay the amount to Microsoft Canada. Microsoft maintains that such overpayment adequately compensates Dr. Childs for any interest due for the delayed salary payments by Microsoft. M. Br. at 8 n.2.

As Dr. Childs was not paid wages owed under the LCA, when such wages were due, as required by the regulations at issue, he is entitled to prejudgment interest on the delayed payments, based upon Federal Short Interest Term rate plus 3%, as specified in 26 U.S.C. § 6621, from the date the wage payments were due until February 27, 2009 when the wages were paid.²²

3. 401(k) Contributions

Dr. Childs also contends that he suffered a loss of matching 401(k) contributions over the four month period and is owed anywhere from \$16,164 to \$8,082 as a result. C. Br. at 8. Dr. Childs' figures are based upon the assertion made in his post-hearing brief that he would have contributed between one half and his total salary during for these four months, to a 401(k) and received the employer match. Dr. Childs' argument is unpersuasive. Other than the argument in his brief there is little evidence that he would have contributed between one-half and all of his salary during this four month period to a 401(k).²³ I simply cannot credit such an assertion especially in the face of Dr. Childs' complaints to Microsoft, and his testimony at hearing, as to the significant difficulties he said he was experiencing getting an apartment, obtaining medical treatment and meeting responsibilities without his salary.²⁴

4. Attorney Fees

The Complainant seeks an award of attorney fees asserting that such fees are allowed in the discretion of the judge, are not specifically prohibited under 20 C.F.R. 655, et seq., and/or are permissible under the Equal Access to Justice Act. C. Br. at 10 and Pet. For Attorney Fees ¶ 2. Microsoft did not address attorney fees.

²²Microsoft Canada's payment of Dr. Childs' salary under the Canadian employment agreement during November and December 2008 does not relieve Microsoft from liability for interest due for its delayed payment of wages for the period November 3, 2008 through February 15, 2009 when the complainant was working in the U.S.. I express no opinion as to whether Microsoft Canada has a claim against Dr. Childs for a refund of the significant amounts paid to him for November through December 2008, when he was working for Microsoft in Redmond, Washington.

²³Dr. Childs' appears to appreciate the difficulty with his damage claim in this regard as he acknowledges that Microsoft's late payment of February 27, 2009, and his designations for withholding, remedied the 401(k) match for the period January and February 2009. C. Br. at 9.

²⁴Dr. Child's claims loss of Employee Stock Options during the four month period he was not initially paid wages by Microsoft US. C. Br. at 9. However, there is little evidence to support this claim and Complainant acknowledges the value of the stock option is unknown. Accordingly, I find the Complainant has failed to establish this element of his damage claim.

In general, the “American Rule” requires each litigant bear his own attorney fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). Congress has altered this general rule by specifically providing, in many statutes, for the prevailing party to be awarded attorney’s fees as either a matter of right or discretion. *See Id.* at 254-55.²⁵ Even where Congress has not specifically authorized an award of attorney fees, in limited circumstances, such fees may still be available as an equitable remedy through a court’s inherent powers. There are three acknowledged categories of equitable exceptions to the “American Rule”: (1) the “common fund exception;” (2) as sanctions for willful disobedience of a court order; and (3) where a litigant has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Id.* at 258-259; *See also, Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (citations and quotations omitted).

Applying these principles to the instant matter, I note that the INA does not expressly authorize an award of attorney fees. Nor do the regulations implementing Section 1182(n) of the INA provide for an award of attorney fees. The regulation outlining remedies which may be ordered for violations of the H-1B wage regulations, provides that “civil monetary penalties, back wages, and/or *any other remedy* determined... to be appropriate are immediately due for payment... upon the decision of the administrative law judge...” 20 C.F.R. § 655.810(f) (emphasis supplied). The phrase “any other remedy” authorizes equitable relief. As the statute at issue herein does not specifically authorize fee shifting, the American Rule applies unless one of the exceptions to the rule is satisfied. However, here, there has been no willful disobedience of a court order, nor bad faith on behalf of either party. Furthermore, this is not a circumstance where the litigation is a benefit for a group of beneficiaries of a common fund (generally applicable in corporate litigation). Thus, none of the equitable exceptions to the American Rule are available to support the Complainant’s request for attorney fees from Microsoft.²⁶

The Complainant’s suggestion that fees may be awarded under the Equal Access to Justice Act (“EAJA”) is equally unavailing. The EAJA’s requirement that a government agency pay attorneys fees and expenses is triggered only when the party seeking to obtain them has been subjected by the agency to an “adversary adjudication” and has prevailed there against the agency. 5 U.S.C. § 504. The EAJA defines adversary adjudication as an “adjudication under Section 554 of the APA in which the position of the United States is represented by counsel or otherwise” 5 U.S.C. § 504(b)(1)(c). Section 1184(n)(2)(B) of the INA provides that hearings held under that provision are held in accordance with Section 556 of the Administrative

²⁵Under federal fee shifting statutes, attorney fees may be awarded to the prevailing or successful party. *Perdue v. Kenney A.*, -- U.S. --, 130 S.Ct. 1662, 1671 (2010); *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Richardson v. Cont'l Grain Co.*, 336 F.3d 1103, 1106 (9th Cir. 2003). While a party need not obtain monetary relief to prevail for purposes of such fee-shifting statutes, *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1118 (9th Cir.2000), he must obtain some actual relief that “materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). Succeeding on an issue alone is insufficient; even obtaining declaratory judgment will not result in the award of fees, unless it causes the defendant’s behavior to change for the benefit of the plaintiff. *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (per curiam).

²⁶Although not relevant here, under the Federal Rules of Civil Procedure attorney fees may be assessed as a sanction in appropriate circumstances. *See* F.R. C. P. 11; F.R. C. P. 37(b).

Procedures Act, (“APA”), 5 U.S.C. § 556. *See also* 20 C.F.R. 655.825(b). The instant hearing was not an adversary adjudication within the meaning of Section 504(b)(1)(C) of the EAJA. Rather, the hearing was held under Section 556 of the APA, which unlike Section 554 of the APA, is not incorporated by reference in the EAJA. In addition, the Administrator of the Department of Labor was not a party and did not participate in the hearing before the undersigned. Accordingly, fees may not be awarded against the Department of Labor in the present case.

V. ORDER

I modify the Administrator’s decision and find that Microsoft violated the H-1B regulations at 20 C.F.R. §§ 655.731 (c)(2), (c)(4) and (c)(6) related to wages for Dr. Childs. Therefore, I find:

1. Microsoft shall pay pre-judgment interest on the wages that were not timely paid from the date the wages were due until paid, at the applicable rate of interest which shall be calculated in accordance with 26 U.S.C. § 6621 and this Decision and Order;
2. The Administrator of the Wage and Hour Division, Employment Standards Division, DOL, shall forthwith make such calculations as may be necessary and appropriate with respect to all calculations of interest necessary to carry out this Decision and Order;
3. This Decision and Order shall supersede the Administrator’s finding which did not include a finding of violation with regard to the regulations at 20 C.F.R. §§ 655.731(c)(2), 655.731(c)(4) and 655.731(c)(6), and which shall be without further effect.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

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

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

If no Petition is timely filed, then the administrative law judge’s decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the

Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).