

U.S. Department of Labor

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Issue Date: 27 July 2012

CASE NO. 2011-LCA-00001

In the Matter of:

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

v.

**SIRSAI, INC. and VIJAY GUNTURU,
*Respondents.***

Jeannie Gorman, Attorney
Jeremiah Miller, Attorney
For the Department of Labor

Brian Green, Attorney
For Respondent, Sirsai, Inc.

Diane M. Butler, Attorney
For Respondent, Vijay Gunturu

BEFORE:
Russell D. Pulver
Administrative Law Judge

FINAL DECISION & ORDER

BACKGROUND

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(n) (2005) (“the Act” or “INA”), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I, C.F.R. § 655.700 *et seq.* Respondent Sirsai, Inc. (“Sirsai”) is a Washington corporation which provides information technology (IT) consulting services to clients in the greater Seattle, Washington area and in other parts of the United States. Prosecuting Party’s Exhibit (“PX”) 5. It has operated in its current corporate form since May 21, 2001. *Id.* Respondent Vijay Gunturu (“Mr. Gunturu”) is Sirsai’s only corporate officer and President. *Id.* Sirsai’s business model was to fill entry level or level I programmer analyst positions. Gunturu Deposition Transcript (“DT”) 119, 699. In addition to U.S. citizens and permanent residents, Mr. Gunturu employed existing H1-B workers in the U.S., educated IT

workers in India and spouses of H-1B workers in the U.S. on H-4 nonimmigrant status. DT 20. Sirsai has employed around 400 employees and around five to ten were recruited from India since 2001. HT 696-697. Sirsai and/or its attorney prepared the necessary application and petition documents by filing the Labor Condition Applications (“LCAs”), and then the H1-B petitions for foreign nationals who needed H-1B status to work in the U.S. DT 21. Shiva Nimmagadda, Venkata (“Mr. Venkata”) complained to the U.S. Department of Labor, Wage and Hour Division regarding his employment at Sirsai. Hearing Transcript (“TR”) 64, 121. The Administrator of the WHD began investigating Sirsai on January 20, 2009.¹ Kent Decl. ¶ 4; Respondents’ Exhibit (“RX”) 1. Department of Labor (DOL) Agent Brooke Kent, along with agents Jeanie Lui and Tony Pham, and DOL RIC Ramon Huaracha, conducted the investigation. TR 121, 134. Agent Kent determined that Sirsai was a covered employer over whom the WHD had jurisdiction based on Sirsai’s filing of the Labor Condition Application (“LCA”). *Id.* at 127.

On September 23, 2010, the District Director, Employment Standards Division, Wage and Hour Administration, issued the Administrator’s Notice of Determination, seeking to hold Sirsai and Mr. Gunturu (collectively “Respondents”), individually and as President of Sirsai, Inc. personally liable, for the following violations under the Act and its regulations:

- 1) Failure to pay wages as required in violation of 20 C.F.R. § 655.731. *See* 20 C.F.R. § 655.805(a)(2). The District Director alleges that this violation includes the “willful failure to pay the required wage rate for productive work, nonproductive time and by taking illegal deductions.”
- 2) Misrepresentation of a material fact on the Labor Condition Applications (“LCA”) in violation of 20 C.F.R. § 655.730. *See* 20 C.F.R. § 655.805(a)(1).
- 3) Substantially failing to provide notice of the filing of the LCA(s) in violation of 20 C.F.R. § 655.734. *See* 20 C.F.R. § 655.805(a)(5).
- 4) Failing to make a required displacement inquiry of another employer at a worksite where an H-1B nonimmigrant was placed as required under 20 C.F.R. § 655.738. *See* 20 C.F.R. § 655.805(a)(8).

RX 1. The Administrator determined that Respondents owed back wages in the aggregate amount of \$983,039.12 to one hundred and twenty-two H-1B non-immigrants, of which \$30,595.20 had already been paid. *Id.* According to the Administrator, Respondents still owe back wages in the amount of \$952,443.92. *Id.* The Administrator also assessed civil money penalties in the aggregate amount of \$405,175. *Id.* Respondents requested a hearing on the Administrator’s determination pursuant to the regulations. Respondents’ Post-Hearing Brief, p. 13. A hearing was held on May 10-12, 2012 in Seattle Washington concerning the violations involving a total of 125 separate employees. The parties were afforded a full and fair opportunity to present evidence and arguments. The Administrator and both Respondents were represented

¹ The Secretary of Labor has delegated all such investigative and enforcement functions to the Administrator, Wage and Hour Division of the Employment Standards Administration (ESA). 20 C.F.R. § 655.710(a). Investigator Brooke Kent was assigned the investigation into Sirsai, Inc. on January 20, 2009. Kent Decl. ¶ 4. Kent concluded the investigation on August 16, 2010. *Id.* at 5.

by counsel. Administrative Law Judge Exhibits ("AX") 1-11, Prosecuting Party (Administrator's) Exhibits ("PX") 1-2094, Respondent Sirsai Exhibits ("RX") 1-8184 and Respondent Gunturu Exhibits ("GX") 1-183, 213-215 and 218-235 were admitted into the record.² The following witnesses testified at the hearing on behalf of the Administrator: Shiva Nimmagadda Venkata, Brooke Kent, Tony Pham, Jean Lui, and Ramon Huaracha. Respondent Vijay Gunturu testified on his own behalf. The parties were provided the opportunity to present post trial briefs.

STATUTORY FRAMEWORK

The H-1B visa program allows U.S. employers to temporarily hire non-immigrants to fill specialized jobs in the United States. Specialized occupations are those occupations that require “theoretical and practical application of a body of highly specialized knowledge, and ...attainment of a bachelor’s or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732. Employers who seek to hire an H-1B nonimmigrant in a specialty occupation must first submit to the Department of Labor (DOL), and obtain DOL certification of, a labor condition application (“LCA”).³ 20 C.F.R. § 655.700(b)(1); *In the Matter of Eva Kolbusz-Kline v. Technical Career Institute*, ALJ No. 93-LCA-4, 1994 WL 897284, at *3 (Sec’y July 18, 1994). The application must specify the number of workers sought, the occupational classification in which they will be employed, and the wage rate and conditions under which they will be employed. 8 U.S.C.A. § 1182(n)(1)(D). In addition, the employer must attest that it is offering and will offer during the period of employment the greater of: (1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the prevailing wage level for the occupational classification in the area of employment. 8 U.S.C.A. §1182(n)(1)(A)(i)-(ii); 20 C.F.R. § 655.730(d). The employer must retain the original signed and certified LCA in its files, and must make a copy of the application, as well as specified necessary supporting documentation, available for public examination. 20 C.F.R. § 655.705(c)(2). Once DOL certifies the LCA, the employer submits paperwork to the United States Citizenship and Immigration Services (“USCIS”) and requests an H1-B visa for the workers. The non-immigrant workers are then admitted to the United States.

The Act directs the DOL to review the LCA only for completeness or obvious inaccuracies. Unless the Department finds that the application is incomplete or obviously inaccurate, the Department shall provide the certification described by the Act within seven days of the date of the filing of the application. 8 U.S.C. § 1182 (n) (1) and 20 C.F.R. § 655.740. Upon certification of the LCA by DOL, the employer is required to pay the wage and implement the working conditions set forth in the LCA. 8 U.S.C. § 1182(n)(2). These include hours, shifts, vacation periods, and fringe benefits. *Id.* The Department has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation of the required wages. *See* 20 C.F.R. Part 655 Subpart H. The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid, debarment of

² *See* TR at 15-16, 18, 26, 39, 42, 94, 192, 709, 714 and 733.

³ Within the DOL, the Employment and Training Administration (ETA) is responsible for receiving and certifying labor condition applications in accordance with applicable regulations. ETA is also responsible for compiling a list of labor condition applications and making such lists available for public examination.

the employer from future employment of aliens, civil money penalties, and other relief that the Department deems appropriate. 20 C.F.R. §§ 655.810, 655.855. An employer also has a duty to notify INS “immediately” of any changes in the terms and conditions of an H-1B nonimmigrant’s employment. 8 C.F.R. § 214.2(h)(11).

The Employer’s obligation to pay H-1B workers the required wages begins on the date on which the worker “enters into employment with the employer.” 20 C.F.R. § 655.731(c)(6). The H-1B worker is considered to “enter into employment” when he first makes himself available to work or otherwise comes under the control of the employer. *Id.* at § 655.731(c)(6)(i). Alternatively, even if the worker has not yet “entered into employment,” where the worker is present in the U.S. on the date of the approval of the H-1B petition, the employer shall pay to the worker the required wage beginning 60 days after the date the worker becomes eligible to work for the employer. *Id.* § 655.731(c)(6)(ii). The H-1B worker becomes eligible to work for employer on the date set forth in the approved H-1B petition filed by the employer. *Id.*

Under the INA’s “no benching provision,” the employer is obligated to pay the required wage even if the H-1B nonimmigrant is in “nonproductive status due to a decision by the employer (e.g., because of lack of assigned work).” 20 C.F.R. § 655.731(c)(7)(i); *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-010 through 01-LCA-025, slip op. at 7 (ARB May 31, 2005); *Rajan v. International Bus.Solutions, Ltd.*, ARB No.03-104, ALJ No. 03-LCA-12, slip op. at 7 (ARB Aug. 31,2004). However, the employer does not need to pay compensation if the “H-1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant).” 20 C.F.R. § 655.731(c)(7)(ii).

The employer’s obligation to pay the required wage ends when there is a “bona fide termination” of the employment relationship. *Id.* at §655.731(c)(7)(ii). In order to effectuate the termination, the employer under the H-1B program, must notify the Department of Homeland Security (DHS) that the employment relationship has been terminated so that the petition is canceled. 8 C.F.R. § 214.2(h)(11). Where appropriate, the employer must provide the nonimmigrant employee with payment for transportation back home.

PARTIES’ ARGUMENTS

The Administrator alleges that Respondents willfully failed to pay affected employees the required wage rate in violation of 8 U.S.C. §1182(n)(1)(A) and 20 C.F.R. §655.731; misrepresented material facts on the LCA in violation of 8 U.S.C. §1182(n)(2)(A), (C) and 220 C.F.R. §655.73; failed to provide notice of the filing of the LCA in violation of 20 C.F.R. §§ 655.734; and failed to make the required displacement inquiry in violation of 20 C.F.R. §655.738. Administrator’s Post-Hearing Brief – Part 1, p. 10-32. The administrator also argues that the civil money penalties assessed in the determination letter are appropriate and that penalties should be assessed against the employer which engaged in the violations. *Id.* at p. 33-42.

In response, Respondents raise a general defense that the Administrator asserted a claim covering, at most, a one-week period of time, from Monday, March 30, 2009 – Friday, April 3, 2009 for the week ending April 4, 2009. Respondents’ Post-hearing Brief, p. 5. Respondents also raise specific defenses regarding wage levels, benching, holiday pay and back wages. *Id.* Respondents also provide specific defenses regarding the Administrator’s claim that Respondents violated LCA paperwork requirements based on alleged material misrepresentation of wage level and place of employment. *Id.* at p. 6. Similarly, Respondents raise specific defenses with regards to the LCA notice violations based on failure to post LCAs at end-user work sites, secondary displacement inquiry and debarment allegations. *Id.* at p. 7.

Findings of Fact

I. Background

Mr. Gunturu co-founded Sirsai in 2001 with his wife Saritha Gunturu, but after she left the company in 2004 Mr. Gunturu became its president and only corporate officer. DT 7-9. Mr. Gunturu admits to being the owner of Sirsai and the sole person responsible for the company. TR 696. Since its inception in 2001, Sirsai has employed around 400 people. *Id.*

Sirsai is an IT consulting company that would fill open software tester and software programmer positions. DT 698. Sirsai would contact IT vendors in an attempt to place workers at user end-sites such as Microsoft, AT&T, and T-Mobile. TR 54, 57, PX 2046-2050. In addition to U.S. workers and green card holders, Sirsai recruited existing H-1B workers in the U.S., educated IT workers in India, and spouses of H-1B workers in the U.S. on H-4 nonimmigrant status. DT 20.

Sirsai sought employees by posting jobs on Dice.com and Monster.com. DT 14-15; PX 1353-56. Mr. Gunturu originally reviewed résumés himself, but Sirsai also engaged recruiters, from a company named SaiCores, to look for qualified applicants and had them forward their résumés to the company. DT 52-54. Sirsai would then interview the applicants to determine their education level and technical skills. DT 52. If Sirsai believed the applicant to be a good fit for a position after the interview, it would contact mid-level vendors or end-site users (such as Microsoft, AT&T, T Mobile, etc) to determine if positions were available. DT 18. After interviewing the job applicants, Sirsai and its attorney prepared the necessary application and petition documents for H-1B petition by filing LCAs, then the H-1B petitions. DT 21. The H-1B program allowed Sirsai to file petitions six months in advance, and Sirsai would apply in April or March for a start date for the employee around October. DT 22. At the time in which the petitions were filed, specific end-sites and the employees’ job duties were unknown. DT 125-126. In order to fill out the H-1B petitions and LCA forms, Sirsai would apply general information based upon its business location in the Bellevue area of Seattle, Washington. TR 707, DT 76, PX 200.

Although the end-sites and employees’ job duties were unknown at the time of filing, Sirsai listed its employees’ job titles as “programmer analysts” for all but two of the affected workers.⁴

⁴ The LCA for Kavitha Krishnaswamy lists her job title as Software Engineer. PX 266. The LCA for Vijaya Ragavan Sundararaj lists her job title as SAP FICO Business Analyst. PX 511.

PX 150-519. To determine the prevailing wage for the this position, Sirsai would take the skill sets provided to it by the vendors and end-sites and find the closest match to the DOL's Online Wage Library and the FLC data center. DT 123-124. Although Sirsai listed the job as programmer analyst for nearly all affected employees, the term is a broad, commonly used description in the IT industry to refer to a variety of positions and duties: Java programs, .Net developers, C Sharp programmers, internet coders, etc. DT 108. Mr. Gunturu chose the title programmer analyst himself. DT 109.

Before commencing work, Sirsai would require some of its employees to pay expenses related to the filing of H1-B petitions. DT 212. Sirsai would attempt to reimburse its employees for those fees at the end of the year. DT 213. Sirsai would increase the wages paid from the prevailing wage of some of its employees in order to reimburse them. DT 219. Sirsai engaged in this practice for two to three years before ending the practice in 2009. DT 213-214

After finishing the H1-B process, Sirsai would market its employees' résumés by sending them to vendors and end-site users they believed would have a job. DT 67. Following this, the vendors and end-site users would set up interviews with Sirsai employees for positions. DT 68. Sirsai would attempt to market their employees' résumés so that interviews would take place in September with the actual work beginning in October to coincide with the start dates listed on the LCAs. *Id.* If the employees were not able to get a position with an end-site user Sirsai would require them to either change their status to H-4 or take a vacation or training class until a position could be found. DT 68-69. Once an employee began working for an end-site user, Sirsai would then add the employee to the payroll. DT 65. Some Sirsai employees' positions at end-site users would finish before the end date on the LCA, and the employee would be required to take unpaid leave until a new position could be secured. DT 208.

Sirsai would be compensated by the vendors or the end-site user for each H-1B employee they helped secure a position. DT 168-169. Sirsai's payment for each H-1B employee varied depending upon the agreement with the vendor or end-site user. DT 170. Sirsai's profits entirely depended upon payment from the vendor or end-site user. DT 181; TR 744-745; RX 327; PX 634. Sirsai was required to pay the employees' salaries listed on the LCA regardless of whether they were receiving adequate payment from the vendor or end-site user. DT 183.

II. Testimony

1. Shiva Nimmagadda Venkata

Shiva Nimmagadda Venkata was an employee of Sirsai who arrived in the U.S. to work in February of 2008 and began performing work in March of 2008. TR 66. Mr. Venkata was hired as a programmer analyst with an intended start date of September 10, 2007. RX 1809. Mr. Venkata's LCA listed him to be employed in Bellevue with a salary of \$56,000 per year. *Id.*

Mr. Venkata filed a complaint against Sirsai because he was benched and not paid for the work he had performed. TR 64-65. Mr. Venkata spoke to agent Brooke Kent of the Department of Labor regarding his complaint. *Id.* at 73.

In his witness statement, Mr. Venkata told agent Kent that he had heard about Sirsai from family members who had worked for the company. PX 1543. Prior to working for Sirsai, Mr. Venkata had a four year Bachelors degree and roughly three years of work experience. TR 76-77. While living in India, Mr. Venkata's petition was approved, and he received an employment agreement from Sirsai stating his salary and employment start date. *Id.* Sirsai requested that Mr. Venkata pay \$2,840.00 for the H-1B application and processing fees in April 2007, and his brother paid on his behalf. TR 76-77; PX 1543. Mr. Venkata mentioned to Agent Brooke Kent that friends of his that worked for Sirsai had to pay similar fees. *Id.* Although the start date was in the fall, Mr. Venkata informed Sirsai that he had obligations to his employer in India and would arrive in the US to work after they were completed. PX 1544.

Mr. Venkata arrived in the US on February 1, 2008, and informed Sirsai that he was ready to start working. *Id.* Mr. Venkata met with individuals from Sirsai on February 12, 2008, and they informed him he needed to prepare a résumé that they would place on the job market and they would contact him if he had an interview. *Id.* Mr. Venkata did not start receiving payments from Sirsai until he started work on a project with Microsoft on March 24, 2008. *Id.* While waiting to hear back from employers, Mr. Venkata took a training program at Sirsai for .Net programming. *Id.* Mr. Venkata told agent Kent the training lasted four to five weeks, and at least three other H-1B employees were at the training. *Id.*

Mr. Venkata worked as a Software Design Engineer in Test ("SDET") for Microsoft at the rate of \$30.00 an hour. TR 88, PX 1544. Mr. Venkata's duties included design, development, documentation, analysis, creation, testing and modification of computer systems or programs. Mr. Venkata worked eight hours a day, five days a week, and occasionally would work overtime. *Id.* While working for Microsoft, the company allowed Mr. Venkata to interview for another project that would start after his current one finished. Mr. Venkata's second project began on June 6, 2008, and lasted until October 10, 2008. PX 1545. Mr. Venkata's new position was as an SDET 2, but he told Agent Kent that his job duties were the same. Mr. Venkata also received the same salary and kept the same hours in his new position. *Id.*

After his second project ended on October 10, Mr. Venkata began seeking interviews for new work. Mr. Venkata interviewed with Microsoft, and was offered a full position with them outside of Sirsai. *Id.* Mr. Venkata provided Sirsai with his two weeks' notice around October 20, 2008, and began working as a full Microsoft employee on November 3, 2008. TR 101, PX 1545. Mr. Venkata told agent Kent that he was not paid for the work he performed as an SDET 2 employee at Microsoft from October 1, 2008 to October 10, 2008. PX 1545. Mr. Venkata also provided Agent Kent with a list of names of other H-1B employees that he knew were working for Sirsai. *Id.*

2. Agent Brooke Kent

Agent Brooke Kent has been an investigator with the Wage and Hour division of the Department of Labor for the past twenty-three years. TR 116. After receiving a complaint from Mr. Venkata, Agent Brooke set up an appointment with Mr. Gunturu to discuss her investigation. TR 122, RX 588. In this letter, Agent Kent requested a copy of all public access documentation

required by 20 CFR 655.760 including documents containing LCAs, documents explaining employees wage rates, and documents explaining how the prevailing wage rate was determined. RX 588. Agent Kent met with Mr. Gunturu and his attorney in February 2009. During this meeting she asked questions about Sirsai and requested the various documents listed in her initial letter. TR 125.

After the initial meeting, Agent Kent started an investigation to determine if Sirsai had complied with DOL regulations for the H-1B program. TR. 128. Agent Kent began her investigation by looking at Sirsai's payroll records. TR. 130-131. Agent Kent examined the LCAs of the Sirsai employees. TR 134. The investigation covered LCAs from the period of September 12, 2005 to September 10, 2011. TR 138-139, PX 192, 233. Not all Sirsai employees' LCA documents were provided to Agent Brooke, and she and another Wage and Hour Regional Coordinator, Ramon Huaracha, would cross reference the LCA numbers provided by looking them up online. *Id.* Agent Kent believed that looking at the LCA would help to determine if the prevailing wage rate was accurate. TR 137-138. After looking at the LCAs Agent Kent determined that Sirsai was only applying a prevailing wage of Level I to its H-1B employees and only listed its employees as working in Bellevue or Redmond. TR 141. Agent Kent explained that the prevailing wage rate is determined by the OES online website. The prevailing wage rate falls into a category from Level I to Level IV. TR 214-215. The four Levels reflect Employment and Training Administration ("ETA") guidance, which divides occupations into broad categories. TR 216-217, PX 1588. The duties involved for the H-1B performer would align with the duties established for specific jobs to determine the correct level pursuant to O*Net. PX 2004-2011. Agent Kent explained that Level I was entry level, and certain job requirements could increase the level: Masters degrees, special skills, supervising employees. TR 215.

Next, Agent Kent attempted to look at Sirsai's Public Access Files ("PAFs"). Agent Kent explained that the PAFs should contain all the documents requested in her original letter to Sirsai, and those documents would explain how Sirsai determined its H-1B workers were to be paid Level I wages. TR 143. The PAFs Agent Kent received were incomplete and she needed to find the missing information from other sources. TR 144-145. To determine if the prevailing wages were correctly determined to be Level I, Agent Kent compared the LCAs and the documents from the PAFs to the OES wage survey. TR 175. The OES wage survey presents the prevailing wage across various occupation titles at various times and in various work sites and cities. *Id.* Because the LCAs listed either Bellevue or Redmond as the place of work, Agent Kent used the Seattle-Bellevue-Everett area. TR 176. For the time frame, Agent Kent applied the time frame listed on the LCAs. *Id.* The job title programmer analyst did not have a corresponding OES or O*NET set of criteria. PX 1620-1631, 2004. Because the majority of the employees were listed as programmer analyst, Agent Kent used the job type of "computer programmer." TR 177. This information provided Agent Kent with dollar amounts for the prevailing wage for Levels I – IV. PX 1620-1621. Although the PAFs did have some position descriptions, the position descriptions did not seem to match up to any individual employee. TR 151, PX 1065. The PAFs only had a few instances of qualifications or job description for specific jobs that employees performed. TR 396. Agent Kent believed the position descriptions that were contained in the PAFs would not apply to a Level I wage due to the work experience and special skills needed. TR 155, PX 1065, 1432. Because the PAFs lacked information

regarding employees' job duties and required work and academic experience 1, Agent Kent began interviewing the H-1B employees. TR 148-149.

Agent Kent explained her methodology for taking witness statements from the H-1B employees she interviewed at the hearing. TR 151. Agent Kent would ask basic questions about the employees' employment with Sirsai and their end-site placement. *Id.* Most interviews were done by phone, but at least one was done via email. TR 409; PX 1456-1457. Following the interview, Agent Kent would type up all the information she had collected within a week's time. TR 151-152. Agent Kent conducted roughly a third of the interviews, and her fellow Wage and Hour agents performed the other interviews. TR 164. Agent Kent never contacted any of the employees' end-site placements because those organizations were not being investigated. TR 151. At times employee testimony would conflict with information Sirsai provided regarding job duties and work/academic experience. TR 174. For example, despite the discrepancy between the information provided by Sirsai and its H-1B employee Krishnaja Lakkakula, Agent Kent determined that the employee's prevailing wage was Level I. TR 170-174, PX 67, 2053-2055, 2083. Agent Kent looked at all the information available to her when determining the credibility of statements given by witnesses. TR. 175. Some witnesses may have given Agent Kent conflicting or incorrect testimony. TR 400. Agent Kent would not disregard the testimony, but rather looked at it in light of the other information she had. *Id.* During the course of her investigation, Agent Kent compiled the interviews she and her fellow agents had collected reflecting job requirements, employee education and experience, and other factors considered in determining the prevailing wage. TR 193, PX 2080-2086.

In addition to the interview statements, Agent Kent also used the USCIS petition letters submitted by Sirsai for each employee. TR 198. Agent Kent received the majority of the petition letters from Sirsai during the investigation, and a few were provided after the DOL had issued its determination letter. TR 200. The USCIS petition letters were important to the investigation because they described the jobs, the qualifications for the jobs, and the individual employees' skills, academic achievements, and experience. *Id.* Agent Kent focused her investigation on what the job required rather than the experience the employee had when determining prevailing wage. TR 201. Agent Kent believed that when the USCIS petition letter said the employees were qualified for a position due to their education or experience, she took this to mean it was a position requirement. TR 356-357. Agent Kent did not believe that Sirsai described all of the employees' employment history in the letters. TR 404. RX 1523. Agent Kent was aware that some individuals could be overqualified for an entry level position. TR 356.

After compiling all the payroll records, interview statements, LCA forms, and H-1B petition letters Agent Kent and her supervisor Mr. Huaracha created a document listing the violations committed by Sirsai. TR 205-207, PX 2070. Agent Kent and Mr. Huaracha found that Sirsai had engaged in 106 violations relating to failure to pay employees the proper required wage, known as Leveling. PX 2070. In these instances the employee was paid a rate less than the required wage rate. TR 212. The required wage rate for most of the employees was the prevailing wage rate. *Id.* The employees listed were not paid the proper prevailing wage rate because they were paid at Level I or some rate below the proper wage rate due to them. *Id.* Agent Kent did not seek a determination from the ETA to determine prevailing wage rate. TR

470. In some instances Sirsai's attorneys did provide ETA determinations for a few of its employees. TR 485; RX 241, 269, 272. Agent Kent would take the ETA determinations provided as final determinations of an individual employee's prevailing wage. TR 481; RX 238. Agent Kent would alter her prevailing wage determinations to reflect the correct wages due, if any, when the ETA determination would conflict with hers. TR 496; PX 148; RX 281, 283-286.

Agent Kent determined that the employees were paid at the incorrect prevailing wage rate by taking all the information she had gathered and comparing it to O*NET guidance. TR 220. Agent Kent determined wage rate by looking at all the facts pertaining to each employee on an individual basis. TR 380. At the hearing, Agent Kent used the LCA, payroll record and statement of Swapna Thatikonda as an example of a typical leveling violation. TR 221-222; PX 498-500, 628, 1567. Swapna Thatikonda was listed as a Level I employee and paid \$28 per hour when he should have been listed as Level II and paid \$32.09 per hour. TR 227. Agent Kent specifically referenced Swapna Thatikonda's USCIS petition letter that stated the employee's job required a Masters degree and the employee had a Masters degree. 248-250 RX 2242. Swapna Thatikonda's job duties were highly complex and therefore required a Level II determination. TR 251. Agent Kent took the difference between the wage rates, and applied it to the hours worked in the payroll register to determine back wages owed due to Leveling. *Id.*

Agent Kent also found that some employees were paid wages below even the Level I prevailing wage rate. PX 2046-2047. Agent Kent used A. Batlagandu Chandreskaran as an example of such employees paid wages below Level I. PX 2047. Sirsai issued an OES an actual wage rate memo for this employee at \$21.00. PX 873. The OES wage rate for Level I, the basis for which Sirsai was determining the required wage rate was \$29.43, a full eight dollars more than what was paid to this employee. PX 1623.

The investigation also revealed that Sirsai's employees were not paid proper wages due to benching. TR 209. Agent Kent began her calculations for periods when employees were benched for lack of work when they made themselves available to Sirsai to perform work. TR 232. The employees made themselves available by attending Sirsai trainings, interviewing for work, and requesting work placements from Sirsai. *Id.* Agent Kent only applied these employee actions if they fell within the time period of employment listed on the LCA. TR 232-233. After determining the employees' start dates, Agent Kent then compared the interview statements to the hours worked in the payroll register. TR 233. If there were gaps in the payroll that did not apply to vacation or sick time taken by the employee, Agent Kent would attribute it to benching. TR 234. Agent Kent also took into consideration a list from Sirsai containing vacation requests from its H-1B employees. TR 260. Benching did not apply to periods in which the employees requested vacation or sick time. TR 261.

There were four causes for failure to pay wages due to benching. TR 258. First, benching occurred due to a delay in starting work even though the worker was available either due to the need to interview or to attend trainings. *Id.* Second, benching occurred when end-site employers' place of business was closed due to a holiday and the employee was not paid. *Id.* Third, benching occurred when employees were not paid for a full-time work schedule of 40 hours per week despite being available for work. *Id.* Fourth, benching occurred when

employees had no work to perform when projects finished and employees were either waiting for new projects or new employers. *Id.*

Agent Kent looked at each individual employee in conjunction with all the other information she had to determine which benching violations occurred. TR 261. Agent Kent did offset the benching violations for instances on the payroll in which employees received overtime pay. TR 263.

Sirsai also owed back wages for failing to reimburse for business expenses. TR 238, 270. Employers are allowed to charge employees business expenses so long as it does not reduce their required wages below the minimum required wage. TR 238-239. Agent Kent's investigation revealed that the business expenses lowered some employees' wages below the required wage rate. TR 239. Agent Kent noted the instances in which Sirsai would repay its H-1B employees. TR 270, 277; PX 2087; RX 1-10, 27-28. Agent Kent was informed that Sirsai was no longer requesting its employees to pay for the processing fees for the H-1B process as of February 28, 2009. RX 27. Agent Kent offset these reimbursements against the back wages owed to its employees. TR 279; PX 1578-1581.

Agent Kent's investigation also inquired to see if there were material misrepresentations on Sirsai's employees' LCAs due to the wage rates and places of employment listed. TR 288. The LCA for Vijay Bachu listed that he was working in Bellevue. TR 290; PX 504 Agent Kent found that the payroll records for employee Vijay Bachu showed that statutory deductions based upon the state indicated that they were taken from New Jersey. TR 291-292; PX 551. Agent Kent concluded that the LCA had listed the incorrect employment location. TR 294; PX 2071. Agent Kent performed a similar analysis to determine if other employees LCA's place of employment was incorrect and summarized them in her findings. PX 294-295; PX 2071.

The INA requires H-1B dependent employers to post a notice that they are filing Labor Condition Applications. TR 295. Sirsai was an H-1B dependent employer. TR 297-298. The INA requires that the posted notice be conspicuous and close to the intended place of employment. *Id.* The INA requires that notice must be posted for all LCAs. TR 299. Agent Kent testified that LCAs could be posted electronically online. TR 296. Agent Kent did not see any LCA's posted at the Sirsai office, but she was informed that Sirsai had posted the LCA notice in its office. TR 341. Agent Kent's investigation revealed that Sirsai never posted LCA notices at any end-site user's work site. TR 344. Agent Kent discussed the notice requirement with Sirsai during her investigation, and Sirsai made attempts to get postings in various locations. *Id.* The INA required Sirsai to reach out to the end-site user for it to physically or electronically post the notice of the LCA to be in compliance. TR 347. Agent Kent concluded that Sirsai had failed to comply with the INA's LCA posting requirement. TR 299. Agent Kent informed Sirsai about its deficient LCA postings at the beginning of the investigation. TR 467-468. Agent Kent never specifically informed Sirsai that it had ten days to correct its deficient LCA postings, but maintained that Sirsai and Mr. Gunturu were aware that the posting was deficient. TR 467-468.

The INA requires employers to conduct secondary displacement inquiries for some of its H-1B employees. TR 300. The secondary displacement inquiry consisted of Sirsai going to an

end-site and making sure that no US citizen was displaced by the H-1B worker. TR 302. The inquiry needed to occur at the end-site because that was where services were being performed. TR 303. Once the inquiry had been completed, it needed to be documented including date and place of posting. TR 304. Sirsai's PAFs had no documents suggesting a secondary displacement inquiry had taken place. TR 304. An employer did not have to conduct secondary displacement inquiries for exempt employees. TR 300. Exempt employees were employees that either grossed \$60,000 or more or had a Masters degree or higher. TR 301. Agent Kent did not include exempt employees in her investigation of whether Sirsai complied with the INA's secondary displacement inquiry. TR 301-302. Agent Kent notified Sirsai of the secondary displacement inquiry when she requested to see the PAFs for its employees. TR 304. Sirsai admitted it failed to conduct the secondary displacement inquiry for five of its employees. TR 304; PX 1964, 1981.

Upon completion of the investigation five categories of fines were assessed against Sirsai, known as Civil Money Penalties ("CMPs"). TR 305-306; PX 1578. First, Sirsai was assessed a CMP for misrepresentation of a material fact pertaining to the prevailing wage rate. *Id.* Second, Sirsai was assessed a CMP for misrepresentation of a material fact pertaining to the place of intended employment. *Id.* Third, Sirsai was assessed a CMP willful failure to pay wages as required by the INA. *Id.* Fourth, Sirsai was assessed a CMP for failure to provide notice of the filing of the LCA. *Id.* Fifth, Sirsai was assessed a CMP for failure to perform required displacement inquiries. *Id.*

The Administrator seeks back wages for leveling, benching and unreimbursed expenses for the following employees:

H-1B Nonimmigrant Employee	Leveling	Pre-Employment Benching	Benching	Unreimbursed Business Expenses	Total
Agrawal, Monica	\$1,407.45		\$196.32	\$2,900.00	\$4,503.77
Anapalli, Sumanth Kumar	\$2,295.00		\$3,504.00		\$5,799.00
Annarajan, Anjana	\$7,255.31		\$700.25		\$7,955.56
Arunchalam, Sivagami	\$394.56		\$277.12		\$671.68
Bachu Vijaya	\$4,413.84	\$9,051.30	\$15,821.50		\$29,286.64
Bandi, Pradeep Reddy	\$7,820.27		\$445.53		\$8,265.80
Basu, Nandini	\$7,804.95				\$7,804.95
Batlagandu C, Asiwarya	\$12,099.24		\$433.80		\$12,533.04
Benjamin, Sunil	\$1,710.00			\$3,000.00	\$4,710.00
Binwade, Rajiv			\$3,234.00	\$1,500.00	\$4,734.00
Biswas, Sanchita	\$2,257.68		\$180.28		\$2,437.96
Bonala, Muktimala	\$2,381.28		\$839.28	\$1,500	\$4,720.56
Chadha, Sonal	\$1,361.97		\$385.08		\$1,747.05
Chakraborty, Nandita	\$9,265.37				\$9,265.37
Chakraverty, Bornali	\$9,399.33		\$1,891.12		\$11,290.45
Chigarapalle, Neelima	\$3,890.64		\$810.48		\$4,701.12
Chintalapati, Lakshmi Varhani	\$3,064.64		\$942.88		\$4,007.52

Chopade, Pankaj Shantaram	\$1,216.00	\$2,840.64	\$2,198.60		\$6,255.24
Counassegarena, Prasenna	\$1,182.00				\$1,182.00
Dhungel, Shigbir Upadhyaya			\$2,628.00		\$2,628.00
Elumalai, Anbalagan	\$384.56	\$5,562.25	\$1,576.72		\$7,523.53
Gadeela, Geetha	\$1,942.75	\$5,647.84			\$7,590.59
Ganapule, Bhakti Prasanna	\$11,415.35		\$13,309.87		\$24,725.22
Garg, Ashita	\$6,609.44	\$18,740.51	\$26,185.39	\$3,500.00	\$55,034.34
Ghattamarah, Pratima	\$9,975.51		\$612.39		\$10,587.90
Gona, Kavya			\$2,040.00		\$2,040.00
Gopal, Nimmy	\$9,970.56		\$2,161.28		\$12,131.84
Hari, Meera	\$4,987.71		\$1,590.80		\$6,578.51
Higuchi, Haruka	\$6,884.56		\$1,778.88		\$8,663.44
Inguava, Sarita	\$754.00		\$2,625.36		\$3,379.36
Jagadeesan, Sonum	\$7,454.50		\$377.60		\$7,832.10
Jagadish, Savitha	\$9,889.62		\$3,080.64		\$12,970.26
Jain, Nilesh			\$4,200.00		\$4,200.00
Jaju, Rekha			\$960.00		\$960.00
Jinka, Srinivasulu	\$437.50		\$1,818.10	\$1,500	\$3,755.60
Kailasa, Rakesh	\$2,971.98				\$2,971.98
Kalburgie, Sandeep		\$7,882.26	\$320.00	\$2,500.00	\$10,350.26
Kapoor, Rohan			\$1,008.00		\$1,008.00
Kasinadhuni, Omkar			\$894.80		\$894.80
Kasinadhuni, Smitha			\$1,312.00		\$1,312.00
Katha, Sangeeta	\$3,861.84		\$513.44		\$4,375.28
Katyal, Sapna Gupta	\$5,761.90				\$5,761.90
Kavitha, Napa			\$256.00		\$256.00
Kessarla, Bhargavi	\$6,607.40		\$1,589.09		\$8,196.49
Khambhatawala, Kruti	\$6,364.04		\$419.69		\$6,783.73
Khandekar, Aarati	\$1,449.48			\$2,000.00	\$3,449.48
Khetavath, Swetha	\$4,294.50	\$9,659.09	\$1,283.60	\$2,500.00	\$17,737.19
Khurmi, Navpreet			\$1,100.80		\$1,100.80
Kodimela, Sowmya	\$2,560.97		\$1,156.21		\$3,717.18
Konidela, Snigdha	\$952.32		\$516.48		\$1,468.80
Koppak, Vijay	\$4.92		\$6,936.96		\$6,941.88
Koppoal, Srinivas			\$2,200.00		\$2,200.00
Koshe, Amol	\$7,411.08		\$1,573.04		\$8,984.12
Krishna, Nippy	\$1,272.24				\$1,272.24
Krishnaswamy, Kavitha	\$7,383.58		\$1,043.84		\$8,427.42
Kulkarni, Suniti	\$8,010.67	\$770.16	\$9,148.08		\$17,928.91
Kuwawala, Rashida	\$2,323.12	\$10,782.24	\$513.44	\$2,500.00	\$16,118.80
Lakkakula, Krishnaja		\$2,820.48		\$500.00	\$3,320.48
Lizet, Puthenpurayil	\$8,569.50		\$13,042.03	\$2,500.00	\$24,111.53
Malakapalli, Visali	\$6,343.59		\$3,914.98	\$3,000.00	\$13,258.57
Malhotra, Alpa	\$11,078.40		\$2,227.12		\$13,305.52
Malladi, Rajyalakshmi			\$2,310.00	\$750.00	\$3,060.00
Manavi, Mukta	\$13,653.77		\$1,080.64		\$14,734.41
Mirje, Sapna Ranjit	\$5,536.88	\$2,823.92	\$2,310.48		\$10,671.28
Modi, Sneha	\$8,825.57		\$488.02		\$9,313.59
Mohanty, Kamal	\$1,670.11		\$2,120.29		\$3,790.40
Miuniswamy, Nandhakumar	\$8,911.60	\$296.48	\$587.22		\$9,795.30
Murthy, Chitra	\$820.50	\$16,686.75	\$11,124.50	\$2,500.00	\$31,131.75
Mysore, jaideep	\$9,273.00				\$9,273.00

Nagaraju, Guru Prasad			\$2,555.00		\$2,555.00
Nallore, Sundarajan	\$4,068.40		\$1,097.52		\$5,165.92
Namita, Chandra	\$1,553.24				\$1,553.24
Nelabottla, Hari Krishna	\$864.00				\$864.00
Nidhin, Benjamin		\$16,009.92	\$1,461.00	\$3,000.00	\$20,470.92
Nimmigadda, Venkata Shiva	\$2,301.48	\$8,985.20	\$5,628.56	\$2,840.00	\$19,755.24
Nupur, Aggrawal	\$7,639.03			\$2,000.00	\$9,639.03
Palvai, Sreenivas Reddy			\$480.00		\$480.00
Patel Rameshbhai, Aparna	\$3,620.64	\$1,084.80	\$867.84	\$2,500.00	\$8,073.28
Patil, Abhijeet			\$242.40		\$242.40
Patil, Ashwini	\$5,494.00		\$1,512.00		\$7,006.00
Pentapalli, Rama	\$6,822.12	\$29,522.80	\$289.44	\$3,000.00	\$39,634.36
Pinnaka, Gopi Krishna	\$8,359.96		\$1,026.88		\$9,386.84
Potturu, Aruna	\$22,162.57		\$3,951.09		\$26,113.66
Prabhukumar, Shasikala			\$510.00		\$510.00
Prem, Yadav	\$174.72	\$9,098.88			\$9,273.60
Rahatadkar, Smita	\$8,229.08		\$2,567.20		\$10,796.28
Rai, Richa	\$10,319.07		\$3,594.08		\$13,913.15
Ramachandran, Gomathi	\$7,982.24		\$2,053.76		\$10,036.00
Ramamoorthy, Shantala	\$3.30		\$270.16		\$273.46
Ramesh Rao, Ramya	\$2,985.84		\$540.32	\$2,000.00	\$5,526.16
Ramesh, Jayapradha			\$3,767.00		\$3,767.00
Rammamurthi, Prakash	\$2,534.09	\$1,964.16	\$10,482.31		\$14,980.56
Rana, Manju	\$7,192.27		\$2,310.48	\$2,000.00	\$11,502.75
Ronanki, Madhuri	\$3,096.17		\$7,551.18		\$10,647.35
Sachandani, Reema	\$5,306.82		\$5,201.14		\$10,507.96
Sakamuri, Ramakrishna			\$1,136.32		\$1,136.32
Sampat, Sumit			\$4,740.00		\$4,740.00
Saravanan, Amsalakshmi	\$4,727.29				\$4,727.29
Sebastian Suja	\$3,125.58		\$513.44		\$3,639.02
Seelam, Pavan Kumar	\$704.00				\$704.00
Shaikh, Neeloufhar			\$1,071.60		\$1,071.60
Sharma, Anil Kumar	\$2,567.37				\$2,567.37
Sheety, Sonia	\$4,138.30		\$1,581.72		\$5,720.02
Singh, Megha	\$1,512.96		\$516.48		\$2,029.44
Sivasankaran, Suneetha			\$672.00		\$672.00
Subbaraj, Anadbalaji			\$168.00		\$168.00
Sundararaj, Vijaya	\$2,242.50				\$2,242.50
Thatikonda, Swapna	\$9,766.92	\$3,850.80	\$6,931.44		\$20,549.16
Thenneru, Susmita	\$3,658.32	\$9,286.75	\$5,401.21	\$3,000.00	\$21,346.28
Thirupathiaiah, Gunturu	\$4,022.08		\$770.16		\$4,792.24
Urasl, Santosh Gajanan	\$1,090.98		\$557.60		\$1,648.58
Valluru, Krutayi	\$3,259.73	\$14,376.32		\$1,500.00	\$19,136.05
Vazhappily, Roopa	\$3,547.26		\$1,177.70		\$4,724.96

Vedagiri, Sasikumar	\$2,160.00				\$2,160.00
Veerappan, Saravanashankar	\$1,050.56		\$1,477.35		\$2,527.91
Venkatachalam, Mythily	\$8,210.92	\$2,695.56	\$2,471.56		\$13,378.04
Venkataramana Rao, Suganya	\$6,539.40				\$6,539.40
Vijeyanandh, Jayanthi	\$3,837.02	\$301.20			\$4,138.22
Vinnakota, Harshita	\$3,164.80		\$774.72	\$1,500.00	\$5,439.52
Vuyyuru, Kiran Kumar			\$499.60		\$499.60
Vydhyam, Kiranmai Devi	\$1,734.80		\$1,520.00		\$3,254.80
Yadav, Jyoti	\$6,782.45		\$1,797.04		\$8,579.49
	\$467,790.38	\$158,724.56	\$257,686.28	\$56,990.00	\$941,191.22

PX 25-149; RX 447- 577; Summarized in The Administrator’s Post-Hearing Brief – Part 2, “Summary of Willful Failure to Pay Wages.” Agent Kent did find that Sirsai had reimbursed some of its employees for expenses in the amount of \$35,580.00 and gave it those fees as a credit resulting in total back wages owed of \$950,943.82. RX 444-446

3. Agent Tony Pham

Tony Pham was an investigator for the Wage and Hour Division of the Department of Labor. TR 532. Agent Pham has worked as an investigator for the Wage and Hour Division since 2003. *Id.* As an investigator Agent Pham has gone through various trainings in order to be able to perform his job duties. TR 533-534. Agent Pham was an investigator on the Sirsai case. TR 536. Agent Pham’s involvement in the case was limited to taking witness statements. *Id.* Agent Pham explained the process of how investigators take witness statements. TR 535. Various topics were inquired about during a witness interview: name, employer, dates of employment, job duties, and wages. *Id.* For the Sirsai case, Agent Pham’s supervisor, Brooke Kent, provided him with a script for the interviews. TR 537. Agent Kent’s script explained the allegations to Agent Pham, and informed Agent Pham which areas to focus on during the interview. TR 538-539; PX 03.

Agent Pham took a list of employees and contacted them to conduct interviews. TR 540. Some employees told Agent Pham they thought their wages and duties matched those listed on their LCAs. TR 554-556; PX 1564-1565. Agent Pham would take notes during the interviews. *Id.* Following the interview, Agent Pham would compile his notes into a document reflecting what the witness told him. *Id.* Following the interview, the investigator’s notes regarding witness statements were shredded per office policy. 540-541. After completing his interviews, Agent Pham provided Agent Kent with his findings. TR 541. Agent Pham did not provide any other documents or information to Agent Kent. TR 549.

4. Agent Jean Lui

Jean Lui was an investigator for 17 years for the Wage and Hour Division of the Department of Labor. TR 558. As an investigator Agent Lui has gone through various trainings in order to perform her job duties. TR 559. Agent Lui had been involved in 1,500 cases during

the course of her employment. *Id.* Agent Lui has only been involved in two H-1B cases as an investigator. TR 560. Agent Lui volunteered to participate in the Sirsai investigation. TR 561. Agent Lui became aware of the facts surrounding the Sirsai case during the Administrator briefings. TR 562-563. Agent Lui conducted witness interviews on the case. TR 562. Agent Kent provided Agent Lui with a script for performing interviews. TR 563; AR 03.

Agent Lui described the interview process. TR 560. Agent Lui would introduce herself to a witness then ask them questions about various topics: name, length of employment, employer name, rate of pay, listed job duties, actual job duties. *Id.* If her witness was near a computer Agent Lui would instruct them to access the O*NET categories. TR 571. Agent Lui would ask the employees to find which job description under the O*NET categories met their respective positions. TR 572. Agent Lui did not remember each instance when an employee would reference their job duties to the O*NET categories. TR 575; PX 1509, 1518. Agent Lui would take hand-written notes during the interview and compile those notes into a document after the interview. TR 564. After the notes had been transcribed into a more legible format Agent Lui shredded her hand-written notes. TR 565. Agent Lui testified at the hearing that her witness statements accurately reflect the information provided to her by the Sirsai employees. TR 566. Agent Lui notified Agent Kent that the interview statements were available. *Id.* Agent Lui had no further involvement with the Sirsai case at that point. *Id.*

5. RIC Ramon Huaracha

Ramon Huaracha was the H-1B and H-2B Regional Immigration Coordinator for the Department of Labor. TR 578. RIC Huaracha has worked for the Wage and Hour Division since 2000 as an investigator and was promoted in 2008. TR 579. RIC Huaracha has gone through various trainings in order to perform his job duties, and has conducted trainings himself. TR 583. RIC Huaracha's duties as regional immigration coordinator are to provide investigative assistance to include violations that are to be cited, any back wages to be computed, CMP's to be assessed, and any debarments that are to be assessed. TR 582. As the Regional Immigration Coordinator, Mr. Huaracha had been involved in 140 H-1B visa cases. TR 581.

RIC Huaracha testified that he assisted the Seattle district office with the Sirsai investigation. TR 583. RIC Huaracha's primary duties were to apply regulatory requirements in regards to the violations, CMPs, back wages to be computed, and debarment associated with the violations. TR 584. RIC Huaracha had also assisted the investigation by interviewing three Sirsai employees. *Id.* RIC Huaracha received permission from his supervisor to recruit other investigators to the case given the amount of Sirsai's employees. TR 585. After recruiting investigators from other offices, Mr. Huaracha had a teleconference to brief the investigators about the nature of the Sirsai investigation. TR 586-587.

RIC Huaracha and Agent Kent worked together to provide the basic areas of focus for the interview script. TR 590-591. RIC Huaracha attempted to perform five interviews, but testified he was only able to interview three Sirsai employees. TR 591. RIC Huaracha would type the employees' statements as they were talking to him. TR 592. Following the interview RIC Huaracha would provide the H-1B employee with his typed statement and asked them to make corrections. TR 593. If all the information was accurate, RIC Huaracha requested they sign the

statement and return it to him. TR 594. Of the three interviews Mr. Huaracha testified he needed to make corrections to only one of them. TR 594-595.

RIC Huaracha determined that Sirsai had engaged in willful violations during the course of the investigation. TR 595. The Wage and Hour Division applied a reckless disregard definition to the classification of willful. TR 596. RIC Huaracha described several factors in the Administrator's determination that Sirsai's violations were willful. TR 595. These factors include the number of H-1B employees affected by the violation, the nature of the violation, other debarable violations, the number of LCAs that Sirsai had filed in the past, and lack of evidence indicating Sirsai's good faith compliance with the INA. TR 595-596. The Wage and Hour Division would take all the factors into account and how they would relate to each other, and then made its determination. TR 597. Sirsai's cooperation with the Wage and Hour Division's investigation was not a factor to determine willfulness. TR 615.

RIC Huaracha considered the number of workers affected. TR 596. Sirsai's violations affected 125 of its H-1B employees. *Id.*; PX 17-24. RIC Huaracha also looked at the nature of the violations with regards to the affected employees. TR 601. RIC Huaracha noticed that one of the violations, misclassification or leveling, occurred over 100 times. *Id.* The number and type of violations went hand in hand in the Wage and Hour Division's determination. *Id.*

RIC Huaracha also looked at the number of LCAs Sirsai had filed for its H-1B employees. TR 601-602. The number of LCAs indicated the extent to which an employer should be familiar with the H-1B process. TR 602. Sirsai had filed 400 LCA applications since 2006. TR 645. The more LCAs filed by an employer indicated that there should be some reasonable expectation by the employer to understand and follow H-1B procedure. *Id.* The fact that the nonimmigrant workers were not directly employed by Sirsai, but rather at an end-site did not affect the Wage and Hour Division's determination of reckless disregard. TR 602-603.

RIC Huaracha believed that Sirsai lacked a good faith effort to act in compliance with the law. TR 605-606. RIC Huaracha explained the types of evidence indicating good faith effort to act in compliance with the law. TR 606. One example provided by Mr. Huaracha was the employer's attempt to seek legal counsel or advice. TR 608. For example, if an employer had told an agent during the investigation that he contacted an attorney it could help show good faith compliance. TR 609-610. If an employer had engaged in good faith efforts at compliance, the Wage and Hour Division can find that violations may not be assessed for technical violations. TR 637.

The final factor to determine willfulness was violations relating to debarment. TR 613-614. An example of such a violation would be failure to provide notification of LCAs at the secondary employer or to perform displacement inquiries. TR 614. For these factors, the amount of violations listed was also taken into account. *Id.*

Mr. Huaracha explained how CMPs would be assessed against Sirsai for engaging in willful violations of the INA. TR 616-617. There are three types of CMPs that can be assessed against an employer. TR 617. The first type of CMP is a maximum of \$1,000 based upon the type of violation. *Id.* The second is a maximum of \$5,000 based upon the nature of the

violation. *Id.* The final type is a maximum of \$35,000 based upon the displacement of a US worker. TR 617-618. The third type of CMP did not apply in the Sirsai investigation. TR 618. The penalties assessed against an employer begin at half the maximum amount for each individual CMP. *Id.* This is called the base amount. TR 619.

RIC Huaracha recommended CMPs be assessed against Sirsai for its violations. TR 620-621; PX 2070. Because Sirsai had no previous history of violations, the Wage and Hour Division did not increase the CMP amount from the base amount. TR 622. The Wage and Hour Division did consider Sirsai’s cooperation with the investigation in recommending CMPs, but it did not decrease his determination in this instance. TR 624-628; PX 2070. The Wage and Hour Division did not decrease the CMPS for an employer’s demonstration it would take proactive steps to comply in the future, such as attending seminars or trainings. TR 626-627.

The Wage and Hour Division assessed the following CMPs against Sirsai. PX 2070.

Violation	Number of Violations	Base CMP	Decrease Factor	CMP per Violation	Total CMP	Total Debarment Years
Misrepresentation of a Material Fact-Prevailing Wage	106	\$500.00	5%	\$475.00	\$50.350	0
Misrepresentation of a Material Fact – Intended Place of Employment	7	\$500.00	5%	\$475.00	\$3,325.00	0
Willful Failure to Pay Wages as Required	122	\$2,500.00	5%	\$2,375.00	\$289,750.00	2
Substantial Failure to Provide Notice of the filing of the LCA	125	\$500.00	5%	\$475.00	\$59,375.00	1
Failure to Make Required Displacement Inquiry	5	\$500.00	5%	\$475.00	\$2,375.00	1
Total CMPS and Debarment Years					\$405,175.00	2

The Wage and Hour Division is not required to go to ETA to seek a determination of prevailing wage. TR 632. Even if an employer went to the ETA to get prevailing wage determinations, the Wage and Hour Division still checked the information provided to assure it corresponds to actual job duties and requirements. TR 654. If Wage and Hour Division disagrees with the information the employer provides to the ETA, then the Wage and Hour Division is required to go to the ETA to make a determination. TR 655. Guidance relating to

seeking ETA determinations comes from the immigration branch team. TR 659-660. The regulations did not require an ETA determination whereas DOL guidelines did require an ETA determination. TR 665; RX 4466. In all of the cases RIC Huaracha had been involved in, there was only one instance when the DOL requested an ETA determination. TR 667. RIC Huaracha's only instance when the DOL sought an ETA determination was because the employer originally sought an ETA determination, and the DOL challenged the information given to ETA because it was inaccurate. *Id.*

6. Vijay Gunturu

Vijay Gunturu has been working with Sirsai since 2001. TR 696. Since Mr. Gunturu has been working with Sirsai, the company has employed between 300 to 400 employees. *Id.* Sirsai has been employing the same business model since its inception. DT 21. Mr. Gunturu became involved in the H-1B process for Sirsai as an employer hiring employees beginning in 2004. DT 27. Mr. Gunturu had prior experience with the H-1B process when he first came to the US in 1998. DT 28. Mr. Gunturu spoke to multiple attorneys to become familiarized with the H-1B process from the employer's perspective. DT 29. The attorneys informed Mr. Gunturu of the process, requirements and fees for the H-1B process. DT 29-30. Mr. Gunturu informed his attorneys that he was applying in the spring and was unaware where the H-1B employees would eventually end up working. TR 703. Mr. Gunturu's attorneys told him to list Sirsai's main office for the place of employment. *Id.* Mr. Gunturu's attorneys also told him once the H-1B person had an end-site user, the employee needed to post the LCA at the end-site user's office. *Id.* Mr. Gunturu did not seek any other sources of help with the H-1B process. DT 30-31.

Initially Mr. Gunturu was involved with filling out H-1B employees' LCAs. DT 37. Mr. Gunturu eventually gave this responsibility to his employees and had them contact Sirsai's attorneys. *Id.* Mr. Gunturu would only occasionally supervise his employees when they were filling out LCA paperwork. DT 38. Mr. Gunturu trusted his employees' judgments when attempting to find positions, and they did not need to get his approval. DT 39-40. After his employees had completed the LCA paperwork, Mr. Gunturu would review and sign. DT 37. Once the LCA had been completed, it would be posted at the Sirsai office within ten days. DT 44. Mr. Gunturu was aware that he needed to retain the documentation of posting the LCA, but was unaware that he had an obligation to submit the record of the documentation to the DOL. DT 106.

After the DOL approves the LCA, Mr. Gunturu would receive a packet containing the LCA, I-129 and approval, I-797 approvals. DT 57. Mr. Gunturu would give a copy of the packet to the employee, and the employee was required to post the LCA at the end-site employer's place of business. *Id.* Sirsai would also keep a copy of the packet in its PAF. DT 60.

Mr. Gunturu would not place employees on the payroll until after the date listed on the LCA. DT 66. If the employees were not employed at an end-site they would still not be placed on the payroll despite the date listed on the LCA. DT 67-68. If the employees were not hired by an end-site employer by the date listed, Mr. Gunturu informed Sirsai employees that he would either have to terminate or change their H-1B status. DT 68. Mr. Gunturu would allow

employees to go on vacation to until a new end-site employer could be found or to allow them to go to school or trainings to develop skills necessary for the available positions. DT 68-70. Either Mr. Gunturu or his employee Indu Indumathi decided when the Sirsai employees would be added to the payroll. DT 87. Some employees that were going to have positions at end-sites would not begin working until after the LCA start date so there would be a gap in pay. DT 95. Mr. Gunturu would attempt to make up for this gap by adding a few dollars to an employee's hourly wage to make up for the gap in wages not paid from the LCA start date to the day they began working at the end-site. *Id.*

Mr. Gunturu attempted to place all of his employees in the Bellevue or Redmond area of Seattle. TR 707. Sometimes Sirsai would place employees outside of the Seattle area. *Id.* Mr. Gunturu did not remember the specific employees that were placed outside of the Seattle area but was aware certain employees were placed outside of Seattle. TR 714-715; DT 72-85, Exhibit 3-8. If an employee was placed outside of Seattle, Mr. Gunturu would send the employee a copy of the LCA and request they place it at her place of work. DT 81; TR 707.

Sirsai's standard procedure for posting LCAs was that he or his employees would post the LCA at Sirsai, and he would have his H-1B employees attempt to post their LCAs at the end-site. TR 709. Sirsai attempted to contact the end-site users regarding the posting of LCA's. TR 710. The end-site users would tell Sirsai that they were not the employer and therefore did not have a duty to post an LCA at their office. TR 710-711; RX 213-215. After the investigation began his procedure for posting LCAs at end-sites changed in 2009. TR 715. Sirsai would now send emails to end-sites requesting confirmation that the LCA was posted. *Id.* If the end-site refused to post the LCA, Sirsai would stop sending H-1B workers to those sites. TR 716.

Mr. Gunturu chose the position of programmer analyst listed on the majority of LCAs. DT 109. The majority of the LCAs for Sirsai employees listed programmer analyst because it is a broad term used in the IT industry to describe multiple types of positions. TR 698. Sirsai only specialized in hiring H-1B workers for programmer and testing positions. TR 699. The majority of end-site users would request different types of programmers such as Java or .Net. DT 108. Other than programmers Sirsai would also employ SDET type program testers. TR 699. Mr. Gunturu did not want Sirsai to employ workers with positions that required high-end abilities such as team leaders, project managers, or senior architects. DT 109-110. Mr. Gunturu only attempted to hire H-1B employees as programmer analysts because he thought they had minimum job requirements. DT 144. Mr. Gunturu did not believe H-1B workers would be able to perform higher skill level jobs. TR 699. Mr. Gunturu based this conclusion off his own experience as an H-1B worker. *Id.* Mr. Gunturu also used his own experience as a programmer analyst as a perfect fit for Sirsai's H-1B workers. *Id.* Sirsai's H-1B employees only needed a Bachelor's degree with a background in programming for the position of programmer analyst. DT 114, 119. Occasionally employees would have higher education and experience than the job of a programmer analyst. DT 118-199. Mr. Gunturu would explain to those employees that he did not have higher skilled positions available for them. DT 119. Mr. Gunturu would still hire these employees but he would attempt to place them in one of his lower level positions. DT 119-120.

The job duties of a programmer analyst consists of programming, testing, and writing scripts for testing. DT 120. Traditional sources of jobs and duties O*NET job zones, FLC Data Center and OES Wage surveys did not have an exact match for the programmer analyst position. DT 122; PX 1620-1631, 2004. Mr. Gunturu chose the job title of programmer analyst himself. TR 741; PX 2202-2203.

Mr. Gunturu would get emails containing the job descriptions that Sirsai's H-1B employees would be performing. DT 125-126. Mr. Gunturu would receive the position descriptions via email from vendors and end-site users. DT 127. The positions would be known, but because the H-1B applications were being applied for in the Spring it was not known which employee would be at which end-site position. DT 126. Sirsai did not keep the emails it received from vendors and end-site users containing position descriptions. DT 127. These emails only contained descriptions of the type of programmer needed, i.e. - C based programmer, Java Programmer, .Net programmer etc. DT 129; RX 245-246. These position descriptions did not contain specific education or employment experience requirements. DT 158. RX 282. Mr. Gunturu was unaware of specific job requirements for most H-1B employees. DT 131. Mr. Gunturu believed that other than the type of programming performed, there would be little difference between the job requirements between end-site employers. DT 133-134.

Mr. Gunturu did keep a few job descriptions provided to him by vendors or end-site employers. DT 184-185; PX 2044. Mr. Gunturu acknowledged that the requirements for the position of SDET 2 were one to three years of experience and various experience with different computer programs and formats. DT 187; PX 2044. Sirsai maintained that the SDET 2 position was with Microsoft and was a Level I wage level. PX 2043. Mr. Gunturu did not believe one to three years were necessary, and he believed the position would be satisfied by having a Bachelor's degree in an IT field. DT 193. Mr. Gunturu compared it to his hiring process at Sirsai. DT 189. Sirsai would often post higher experience requirements in order to weed out applicants he believed were lying on their résumés. DT 189-190. Mr. Gunturu believed that even if a person were claiming to have higher qualifications than the inflated requirements, the applicants would likely still be qualified for the position. DT 190.

All of Sirsai's H-1B employees performed work at the Level I prevailing wage rate of roughly \$56,000. DT 144. Mr. Gunturu discussed the different prevailing wage levels with his attorneys in 2004. DT 139. Sirsai reached the Level I prevailing wage by looking at the job requirements, job duties, and employee background. DT 140-141. Mr. Gunturu maintained that Sirsai did this for every H-1B employee. DT 141. Mr. Gunturu admitted that it was possible that an end-site would request an employee to perform a different task than originally planned. DT 145. If that happened an employee could be performing work at a level higher than Level I. *Id.* Mr. Gunturu maintained that if this happened it was the employee's responsibility to inform him that his job duty changed to receive a higher prevailing wage. DT 146.

Occasionally Sirsai's H-1B employees would request time-off from their positions. TR 716. Many Sirsai employees had family members living in the US and they would request vacation time to visit with them. *Id.* Mr. Gunturu would also offer vacation to employees whose projects at end-sites were ending. TR 717. The H-1B program would require these employees to either change their status or leave the US unless they took was placed on vacation. *Id.* Sirsai

would place these employees on vacation until a new position was found so that the H-1B employee would not be required to leave their family in the U.S. *Id.* Many of Sirsai's H-1B employees had situations similar to this experience. TR 718.

Sirsai's employees were paid based upon a yearly salary. DT 197. Sirsai's employees were to work 8 hours a day, 5 days a week totaling 40 hours of work. *Id.* Employees would sometimes work fewer hours than 40 a week. DT 197-198. Sirsai only paid its H-1B employees for the hours that they worked. DT 200. Mr. Gunturu would not pay employees for state and federal holidays. DT 200-201. The State Department of Labor informed him Mr. Gunturu that he did not have to pay H-1B workers for holidays. DT 201. Mr. Gunturu believed that even if the offices were closed on holidays, work was still available because IT people can work from home. DT 201-202. Mr. Gunturu thought that most people would take the day off to spend time with their family as it was a holiday. DT 202-203. Agent Kent informed Mr. Gunturu that he did not have to pay for holidays pursuant to state law, but under the INA he did have to pay H-1B employees if they were available to work on holidays. TR 724-725. Sirsai changed its payment policy to reflect an additional 8 hours of work to be paid for holidays. TR 726.

Another time in which employees would take vacation was to engage in employment training. TR 719. These employees were unable to be hired by the start date on their LCA, and Sirsai would place these employees on vacation status so they could seek training to be qualified for a position at an end-site. *Id.* Mr. Nimmagadda was an example of such an employee. *Id.* Sirsai would offer its H-1B training programs at its head office free of charge. TR 720. These trainings were offered to employees prior to the start date on their LCA, and whenever they needed additional training to satisfy the position requirements of an end-site employer. TR 721-722. The free trainings would cost Sirsai money, so beginning in 2005 he started charging his H-1B employees a deposit that he would reimburse later. TR 721.

Mr. Gunturu would attempt to pay employees for holiday and waiting times by increasing their wages. TR 723; DT 211. Mr. Gunturu would look at the employees' prevailing wage yearly salary and turn that into an hourly basis. TR 723. Sirsai would add money to the hourly wage rate based upon the prevailing wage creating an actual wage that would make up the difference caused by holidays. *Id.* Mr. Guntur used this same method for employees that were waiting for a new position to start after an end-site employer's project had finished. DT 211. Sirsai also added money to the hourly wage to reimburse employees for the fees they paid for the H-1B filing process. DT 214. Some of the H-1B employees were not aware that he was reimbursing them for holiday, waiting, or H-1B filing fees by increasing their hourly wages above the prevailing wage. DT 216.

Analysis

I. Willful Failure to Pay Wages

Respondents argue that the claims brought by the Administrator regarding its H-1B employees should be limited to a one week period listed in its initial WH-56. Respondents' Post-Hearing Brief p. 16. Respondents contend that because the Administrator's initial WH-56 listed only the week of April 4 2009 the Administrator's claims should be limited to this one

week time period. *Id.* RX 623-630. As such Respondents contend that 88 of the 125 nonimmigrant employees were not working for Sirsai during that time period, and thus their claims should be dismissed. Respondents argue that failure to dismiss would result in a precedent allowing numerous revisions of WH-56 forms up until the date of the hearing. This argument lacks merit.

“Where, for example, a complaint is timely filed, back wages may be assessed for a period prior to one year before the filing of a complaint.” 20 C.F.R. § 655.806(a)(5). Administrator’s revision of its WH-56 form had no negative effect against the Respondents. In the present situation the original complaint was filed in a timely manner. The only defect in the complaint was an incorrect date. I note that other than naming additional employees, there were no changes made to the employees that were listed regarding back wages sought by the Administrator. Respondents were provided sufficient notice of the claims brought by the Administrator, and there is no prejudicial effect of altering the time frame of the covered period on the WH-56.

1. Leveling

a. Background

An employer seeking to employ H-1B non-immigrants in a specialty occupation must attest in an LCA that they will pay the H-1B non-immigrants a required wage rate, which is the greater of the actual wage or the prevailing wage. 8 U.S.C. §1182(n)(1)(A)(I) and (II). The prevailing wage is determined for the occupational classification in the area of intended employment and must be determined as of the time of the filing of the LCA. 20 C.F.R. § 655.731(a)(2). The regulations require that the prevailing wage be based on the best information available. *Id.* An employer that fails to pay wages as required by the Act is liable for back wages equal to the difference between the amount that should have been paid and the amount that was actually paid. *Id.* § 655.810.

The regulations require the Administrator to determine whether an employer has the proper documentation to support its wage attestation. 20 C.F.R. § 655.731(d)(1). Where the documentation is nonexistent or insufficient to determine the prevailing wage, or where the employer has been unable to demonstrate that the prevailing wage determined by an alternate source is in accordance with the regulatory criteria, the Administrator may contact the ETA, which shall provide the Administrator with a prevailing wage determination. *Id.* The Administrator shall use this determination as the basis for determining violations and for computing back wages, if such wages are found to be owed. *Id.*

The Administrator acknowledges that employers are not required to keep and maintain position descriptions but argues that the regulations require an employer to keep and maintain “a copy of the documentation the employer used to establish the ‘prevailing wage’ for the occupation for which the H1-B nonimmigrant is sought...[and] the underlying individual wage data relied upon to determine the prevailing wage...shall be made available to the Department in an enforcement action.” *Id.* at p. 14 (citing 20 C.F.R. §655.760(a)(4)). Respondents

acknowledged that they did not keep each position description even though they acknowledge that nonimmigrant workers were placed in jobs based on the job description. The Administrator argues that Respondents intended overseeing government agencies to reference their individual letters to USCIS on behalf of each beneficiary nonimmigrant worker.

It is clear that the Respondents did not maintain the proper paper documentation to support their wage attestation. Respondents' PAFs lacked many documents necessary to determine the prevailing wage rate, including any job descriptions other than title. Both parties agree that the term used to describe the job of the majority of the H-1B employees, "programmer analyst," is a broad term that covers a wide spectrum of jobs. Respondents admit that even though it was given job descriptions by mid level vendors and end-site users, it did not keep these job descriptions in the PAFs. Job descriptions are crucial to determining a prevailing wage because they describe the actual requirements and duties of the position. Accordingly, I find that it would have been appropriate for the Administrator to request a prevailing wage determination.

I do not find Respondents' argument that the Administrator was required to seek a prevailing wage determination from the ETA persuasive. Although the Field Operations Handbook suggests this is necessary, such guidelines are not binding on the Administrator. The regulations state that "the Administrator *may* contact the ETA, which shall provide the Administrator with a prevailing wage determination." 20 C.F.R. §655.731(d). The regulation is permissive, and the ETA's determination is merely an option that Administrator can use in its investigation. This point is strengthened by Agent Kent and Mr. Huaracha's testimony that ETA determinations are rarely used by Administrator during its investigations.

Both parties agree that the correct time and location⁵ was applied to Respondents' determination of prevailing wage level. Given the inadequacy of the PAFs explanation for Respondents' determination of the prevailing wage level, I find Administrator's use of the Respondents' USCIS Petition Letters, I-129 forms, and interview statements persuasive to determine that some employees were incorrectly classified at Level I. The required work and education experience for a job affects the determination of the prevailing wage level. ETA provides guidance for determining the proper wage level for a position. "Level I wage rates are assigned to jobs offers for beginning level employees who have only a basic level of understanding of the occupation." PX 1588. The guidance also states "Level II wage rates are assigned to job offers for qualified employees who have attained, either through *education* or *experience*...the job request warrants a wage determination at a Level II would be a requirement for years of education and/or experience that are generally described in O*NET Job Zones." *Id.* Level III rates require "either through education or experience, special skills or knowledge." *Id.* Level IV analysis is not necessary in this case. Based upon the testimony at the hearing and ETA guidance, I believe that if an H-1B employee has two years or more of experience or a Masters degree or higher and the job position requires either two years or more or a Masters degree or higher the ETA guidelines indicate that employee should have a Level II or higher prevailing wage rate. In addition, if the job has additional requirements or duties beyond that of those required by an entry level employee, the H-1B employee was not in a Level I position.

⁵ With exception to the Respondents nine H-1B employees that worked in a location other than Seattle, Washington which I discuss in part II.

b. Data

The Administrator provided the following charts summarizing the information gathered during its investigation.⁶

Chart 1 – USCIS Letters and I-129 Forms

	USCIS Letter					I-129 Education Level	Major	Exhibits
H-1B Employee	Source	MA Required	Qualifications	Qualifications	Other			
Agrawal, Monica	N/A					BA	Engineering	RX 858-872
Anapalli, Sumanth Kumar	N/A					BA	Electrical Engineering	PX 2080
Annarajan, Anjana	PAF			EX 2		BA	Computer Science	RX 873-882
Arunchalam, Sivagami	ER					BA	Architecture	RX 883-897
Bachu Vijaya	ER					MA	Automation and Robotics	RX 898-909
Bandi, Pradeep Reddy	PAF			EX 2		BA	Computer Science	RX 910-924
Basu, Nandini	PAF		ED			MA	Chemistry	RX 925-938
Batlagandu C, Asiwaraya	ER	M				MA	Information Science	RX 939-948
Benjamin, Sunil	PAF		ED			MA	Computer Applications	RX 949-959
Binwade, Rajiv	PAF			EX 2		MA	Business Administration	RX 961-974
Biswas, Sanchita	PAF					BA	Computer Engineering	RX 975-986
Bonala, Muktimala	PAF		ED	EX 2		MA	Computer Science	RX 997-1010
Chadha, Sonal	PAF			EX 2		BA	Computer Science	RX 1011-1024
Chakraborty, Nandita	PAF					MA	Computer Information System	RX 1025-1035
Chakraverty, Bornali	PAF			EX 2		BA	Sciences	PX 2079
Chigarapalli, Hemanth Kumar	N/A			EX 2		BA	Commerce	RX 1036-1046
Chigarapalle, Neelima	PAF			EX 2		BA	Technology	RX 1052-1062
Chintalapati, Lakshmi Varhani	PAF					BA	Computer Science	RX 1064-1078
Chopade, Pankaj Shantaram	PAF			EX 2		BA	Engineering	RX 1079-1093
Counassegarena, Prasenna	PAF					BA	Electronics Engineering	RX 1094-1108
Dhungel, Shigbir Upadhyaya	PAF					MA	Electrical & Computer Engineering	RX 1109-1115

⁶ At this time I overrule Respondents objection to The Administrator’s use of these charts as summary. I have cross referenced the information provided in the charts and find they accurately represent the exhibits and documents the parties provided to each other during discovery. I have provided exhibit references in addition to the charts for verification.

Elumalai, Anbalagan	PAF	M				MA	Computer Science	PX 944-950, 998-1000
Gadeela, Geetha	PAF	M				MA	Information Systems	RX 1121-1135
Ganapule, Bhakti Prasanna	PAF		ED	EX 2		MA	Information Systems	PX 2075
Garg, Ashita	PAF		ED	EX 2		MA	Computer Science	RX 1137-1149
Ghattamarahu, Pratima	PAF					MA	Computer Science	PX 2075
Gona, Kavya	PAF				pe	BA	Computer Science	RX 1162-1180
Gopal, Nimmy	ER		ED		pe	MA	Computer Applications	RX 1181-1187
Hari, Meera	PAF					BA	Civil Engineering	RX 1188-1197
Higuchi, Haruka	PAF	M		EX 2		BA	Computer and Software Systems	RX 1198-1212
Inguava, Sarita	N/A					BA	Electronics & Comm. Eng	RX 1213-1223
Jagadeesan, Sonum	PAF		ED	EX 3		BA	Computer Information System	RX 1224-1238
Jagadish, Savitha	PAF		ED			MA	Computer Science	RX 1239-1253
Jain, Nilesh	PAF			EX 2		BA	Computer Science	RX 1254-1267
Jaju, Rekha	N/A							
Jinka, Srinivasulu	PAF		ED	EX 2		MA	Engineering	RX 1268-1287
Kailasa, Rakesh	PAF			EX 3		BA	Engineering	RX 1288-1302
Kalburgie, Sandeep	N/A							
Kapoor, Rohan	PAF					BA	Computer Info System	RX 1303-1317
Kasinadhuni, Omkar	PAF		ED			MA	Computer Science	RX 1318-1331
Kasinadhuni, Smitha	N/A							
Katha, Sangeeta	PAF			EX 2		BA	Engineering	RX 1332-1346
Katyal, Sapna Gupta	ER			EX 2		BA	Computer Applications	RX 1347-1363
Kavitha, Napa	N/A					BA	Electrical & Electronics Engineering	RX 1364-1374
Kessarla, Bhargavi	PAF		ED	EX 3		MA	Computer Applications	RX 1381-1399
Khambhatawala, Kruti	PAF		ED			MA	Business Administration	RX 1400-1414
Khandekar, Aarati	N/A							

Khetavath, Swetha	PAF	M		EX 2	a	MA	Computer Science	RX 1415-1429
Khurmi, Navpreet	PAF			EX 3		BA	Computer Science	RX 1430-1445
Kodimela, Sowmya	N/A					MA	Electrical Engineering	RX 1446-1452
Konidela, Snigdha	PAF		ED			MA	Electrical Engineering	RX 1458-1472
Koppak, Vijay	PAF					BA	Computer Science & Engineering	RX 1473-1485
Koppoal, Srinivas	PAF		ED			MA	Computer Science & Engineering	RX 1486-1508
Koshe, Amol	PAF		ED	EX 3		MA	Computer Information Systems	RX 1509-1523
Kothari, Yamini	PAF					BA	Chemical Engineering	RX 1526-1530
Krishna, Nippy	PAF			EX 2		MA	Computer Science	RX 1535-1549
Krishnaswamy, Kavitha	N/A							
Kulkarni, Suniti	ER			EX 3		BA	Computer Information Systems	RX 1550-1560
Kuwawala, Rashida	PAF			EX 3		BA	Computer Engineering	RX 1565-1579
Lakkakula, Krishnaja	PAF	M				MA	Computer Science	PX 1165-1171, 1202-1204
Lizet, Puthenpurayil	ER		ED			MA	Computer Applications	RX 1580-1590
Malakapalli, Visali	PAF		ED			MA	Computer Science	RX 1591-1605
Malhotra, Alpa	PAF					BA	Science	RX 1606-1620
Malladi, Rajyalakshmi	ER		ED			MA	Computer Science	RX 1621-1644
Manavi, Mukta	N/A					BA	Home Science	RX 1645-1660
Mirje, Sapna Ranjit	PAF			EX 3		BA	Computer Science	RX 1661-1675
Modi, Sneha	N/A							
Mohanty, Kamal	N/A					BA	Computer Science	RX 1676-1682
Muniswamy, Nandhakumar	PAF			EX 3		MA	Engineering	RX 1688-1702
Murthy, Chitra	PAF		ED			MA	Computer Science	RX 1703-1716
Mysore, Jaideep	PAF		ED		pe	MA	Electrical Engineering	RX 1717-

								1735
Nagaraju, Guru Prasad	PAF		ED	EX 2	b	MA	Electrical Engineering	RX 1736-1755
Nallore, Sundararajan	PAF		ED			MA	Electrical Engineering	RX 1756-1769
Namita, Chandra	N/A							
Nelabottla, Hari Krishna	PAF		ED			MA	Engineering	RX 1770-1784
Nidhin, Benjamin	PAF		ED	EX 2		MA	Computer Applications	RX 1785-1799
Nimmigadda, Venkata Shiva	PAF					BA	Computer Engineering	RX 1800-1814
Nupur, Aggrawal	PAF		ED		h	BA	Computer Info System	PX 2080
Palvai, Sreenivas Reddy	N/A					BA	Computer Engineering	PX 2080
Patel Rameshbhai, Aparna	PAF		ED			MA	Computer Science	RX 1815-1829
Patil, Abhijeet	N/A					MA	Computer Science	RX 1830-1853
Patil, Ashwini	PAF					BA	Master of Computer Management	RX 1854-1863
Pentapalli, Rama	PAF					BA	Computer Science	RX 1864-1878
Pinnaka, Gopi Krishna	PAF			EX 3		BA	Information Services	RX 1879-1898
Potturu, Aruna	PAF					BA	Commerce	RX 1899-1914
Prabhukumar, Shasikala	ER		ED		pe	MA	Computer Engineering	RX 1915-1940
Prem, Yadav	PAF		ED			MA	Computer Engineering	RX 1941-1955
Rahatadkar, Smita	PAF				c	BA	Information Technology	RX 1956-1970
Rai, Richa	PAF			EX 2		BA	Electrical Engineering	RX 1971-1985
Ramachandran, Gomathi	PAF		ED			MA	Computer Applications	PX 2079
Ramamoorthy, Shantala	None							
Ramesh Rao, Ramya	N/A							
Ramesh, Jayapradha	PAF				pe	BA	Computer Science	RX 2001-2024
Rammamurthi, Prakash	PAF			EX 2		BA	Computer Science and Engineering	RX 1986-1995
Rana, Manju	PAF					BA	Engineering and Computer Science	RX 2025-2039
Ronanki, Madhuri	PAF					BA	Computer Science Technology	RX 2040-2049

Sachandani, Reema	N/A							
Sakamuri, Ramakrishna	PAF					BA	Computer Engineering	RX 2050-2068
Sampat, Sumit	ER					MA	Electrical Engineering	RX 2069-2083
Saravanan, Amsalakshmi	PAF	M		EX 2		MA	Computer Applications	PX 936-938
Sebastian, Suja	PAF			EX 3		BA	Information Technology	RX 2084-2098
Seelam, Pavan Kumar	PAF		ED		d	MA	Computer Applications	RX 2099-2113
Shaikh, Neeloufhar	PAF	M		EX 2		MA	Computer Engineering	RX 2114-2128
Sharma, Anil Kumar	ER				pe	MA	Design Engineering	RX 2134-2159
Sheety, Sonia	PAF					BA	Computer Science	RX 2160-2174
Singh, Megha	PAF	M				BA	Computer Science	RX 2175-2188
Sivasankaran, Suneetha	PAF					BA	Computer Science	RX 2189-2202
Subbaraj, Anadbalaji	N/A					BA	Computer Science and Engineering	RX 2203-2212
Sundararaj, Vijaya	PAF		ED			MA	Management Info Sys/MBA	RX 2219-2228
Thatikonda, Swapna	PAF	M				MA	Computer Science	RX 2229-2243
Thenneru, Susmita	PAF					BA	Computer Science and Engineering	RX 2244-2253
Thirupathiaiah, Gunturu	PAF		ED			MA	Computer Science	RX 2254-2268
Urasl, Santosh Gajanan	PAF	M		EX 3		BA	Product Engineering	RX 2269-2282
Valluru, Krutayi	PAF					BA	Computer Science	PX 2079
Vazhappily, Roopa	PAF		ED	EX 2	e	MA	Mathematics	RX 2285-2298
Vedagiri, Sasikumar	PAF			EX 2				RX 2299-2311
Veerappan, Saravanashankar	PAF			EX 2		BA	Engineering	RX 2312-2326
Venkatachalam, Mythily	PAF					BA	Engineering	RX 2327-2341
Venkataramana Rao, Suganya	N/A					BA	Chemical Engineering	RX 2342-2356
Vijeyanandh, Jayanthi	PAF			EX 2	g	MA	Computer Information Systems	RX 2357-2371
Vinnakota, Harshita	N/A					MA	Computer	RX

							Systems	2372-2386
Vuyyuru, Kiran Kumar	PAF	M				MA	Information Technology	PX 1120-1125, 1154-1156
Vydhyam, Kiranmai Devi	PAF					BA	Computer Science	RX 2387-2401
Yadav, Jyoti	PAF			EX 2		MA	Botany	RX 2402-2415
Regati, Anil Kumar Reddy	PAF		ED	EX 2		MA	Sciences	PX 2079

PAF = Public Access File, **ER** = Employer provided outside of PAF, **M** = Masters Degree is specifically required for the job, **ED** = Has Masters; education and experience qualifies for job, **EX 2** = Has 2.1 to 2.9 years of experience; experience and education qualifies for job **EX 3** = Has at least three years of experience; education and experience qualifies for job, **pe** = Employee has progressive employment experience, **a** = MS Certified .NET and C#, **b** = USCIS states “we wish to continue to employ as “Senior Programmer Analyst,” **c** = Prior to Sirsai was a “Sr. QA Associate,” **d** = Prior to Sirsai was “Project Leader,” **e** = Prior to Sirsai was “Senior Programmer,” **f** = Prior to Sirsai was “Associate Consultant/Project Lead,” **g** = Prior to Sirsai was “Lead engineer,” **h** = “Certificates of coursework in Oracle”

Chart 2 – Interview Statements⁷

H-1B Employee	Job Requires or EE has Two Years or less Experience	Job Requires Two to Three Years Experience	Employee has Two to Three Years Experience	Job Requires Three years or more Experience	Employee has Three Years or More Experience	Job Requires Masters Degree	Employee has Masters Degree	Job is Entry Level	Additional Considerations	Exhibits
Agrawal, Monica					x					PX 1500
Anapalli, Sumanth Kumar				x			MA		Gave Guidance to Trainees	PX 1558-1559
Annarajan, Anjana										NA
Arunchalam, Sivagami		x			x					PX 1546
Bachu Vijaya					x					PX 1573
Bandi, Pradeep Reddy										NA
Basu, Nandini										NA
Batlagandu C, Asiwarya										NA
Benjamin, Sunil				x		x				PX 1563
Binwade, Rajiv				x						PX 1521
Biswas, Sanchita										NA
Bonala, Muktimala					x					PX 1503-1504

⁷ I overrule Respondent’s renewed objection to the Interview notes on the grounds of Hearsay. “Any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, subpart B) shall not apply.” 20 C.F.R. § 655.825. Furthermore, there is no issue as to authentication as each person that conducted the interviews testified at trial describing the process.

Chadha, Sonal									NA
Chakraborty, Nandita									NA
Chakraverty, Bornali				x					PX 1473
Chigarapalle, Neelima				x					PX 1507
Chintalapati, Lakshmi Varhani									NA
Chopade, Pankaj Shantaram									PX 1513
Counassegarena, Prasenna		x							NA
Dhungel, Shigbir Upadhyaya									PX 1476-1478
Elumalai, Anbalagan				x				x	PX 1462-1463
Gadeela, Geetha									NA
Ganapule, Bhakti Prasanna				x					PX 1472
Garg, Ashita				x					PX 1469-1470
Ghattamarahu, Pratima									NA
Gona, Kavya	x							x	PX1493
Gopal, Nimmy									NA
Hari, Meera									NA
Higuchi, Haruka									NA
Inguava, Sarita				x				MS Certified Programmer	PX 1538
Jagadeesan, Sonum				x					PX 1553
Jagadish, Savitha							x		PX 1541
Jain, Nilesh				x					PX 1509
Jaju, Rekha	x								PX 1529
Jinka, Srinivasulu							x		PX 1554-1556
Kailasa, Rakesh				x					PX 1523
Kalburgie, Sandeep				x				Elec.	PX 1534
Kapoor, Rohan				x					PX 1531-1532
Kasinadhuni, Omkar							x		PX 1511-1512
Kasinadhuni, Smitha		x						Computer Science	PX 1548-1549
Katha, Sangeeta									NA
Katyal, Sapna Gupta									NA
Kavitha, Napa									NA
Kessarla, Bhargavi									NA
Khambhatawala, Kruti									NA
Khandekar,				x					PX

Aarati										1452-1453
Khetavath, Swetha					x					PX 1569-1571
Khurmi, Navpreet										NA
Kodimela, Sowmya										NA
Konidela, Snigdha										PX 1551-1552
Koppak, Vijay				x		x				PX 1574
Koppoal, Srinivas										NA
Koshe, Amol										PX 1456-1459
Krishna, Nippy										NA
Krishnaswamy, Kavitha		x								PX 1491-1492
Kulkarni, Suniti						x		MA		PX 1564-1565
Kuwawala, Rashida					x					PX 1527
Lakkakula, Krishnaja					x					PX 1496
Lizet, Puthenpurayil					x					PX 1486-1487
Malakapalli, Visali					x					PX 1577
Malhotra, Alpa						x				PXPX 1455
Malladi, Rajyalakshmi					x					PX 1522
Manavi, Mukta		x								PX 1501-1502
Mirje, Sapna Ranjit					x					PX 1536-1537
Modi, Sneha					x					PX 1550
Mohanty, Kamal					x					PX 1488
Muniswamy, Nandhakumar					x		x			PX 1506
Murthy, Chitra									Detected Priority or Severity of Bug	PX 1475
Mysore, jaideep										NA
Nagaraju, Guru Prasad										NA
Nallore, Sundararajan			x				x			PX 1465
Namita, Chandra							x	Comp'r SW		PX 1474
Nelabottla, Hari Krishna					x					PX 1482
Nidhin, Benjamin					x		x			PX 1471
Nimmigadda, Venkata Shiva									SDET Level II	PX 1543-

										1545
Nupur, Aggrawal			x						Microsoft Certified Professional	PX 1510
Palvai, Sreenivas Reddy										NA
Patel Rameshbhai, Aparna								x		PX 1466-1467
Patil, Abhijeet				x						PX 1454
Patil, Ashwini										NA
Pentapalli, Rama										PX 1524
Pinnaka, Gopi Krishna										NA
Potturu, Aruna					x					PX 1468
Prabhukumar, Shasikala										NA
Prem, Yadav				x		x				PX 1518
Rahatadkar, Smita				x						PX 1547
Rai, Richa		x								PX 1530
Ramachandran, Gomathi				x		x	MA			PX 1479
Ramamoorthy, Shantala										NA
Ramesh Rao, Ramya	x								"Job Not Entry Level"	PX 1526
Ramesh, Jayapradha				x						PX 1485
Rammamurthi, Prakash						x				PX 1517
Rana, Manju										PX 1499
Regati, Anil Kumar Reddy				x						PX 1464
Ronanki, Madhuri										PX 1498
Sachandani, Reema					x				On Site Coordinator	PX 1528
Sakamuri, Ramakrishna									Project Lead	PX 1525
Sampat, Sumit										PX 1560-1561
Saravanan, Amsalakshmi				x						NA
Sebastian, Suja	x						x			PX 1557
Seelam, Pavan Kumar		x					x			PX 1515-1516
Shaikh, Neeloufhar										PX 1508
Sharma, Anil Kumar										NA
Sheety, Sonia										NA
Singh, Megha								x		NA
Sivasankaran, Suneetha										PX 1562
Subbaraj, Anadbalaji						x				NA
Sundararaj, Vijaya				x						PX 1575-

										1576
Thatikonda, Swapna			x							PX 1567
Thenneru, Susmita				x		x				PX 1566
Thirupathiaiah, Gunturu										PX 1480- 1481
Urasl, Santosh Gajanan		x								NA
Valluru, Krutayi		x								PX 1497
Vazhappily, Roopa				x						PX 1533
Vedagiri, Sasikumar										PX 1539- 1540
Veerappan, Saravanashankar				x						NA
Venkatachalam, Mythily										PX 1505
Venkataramana Rao, Suganya				x					Quality Analysis Lead	NA
Vijeyanandh, Jayanthi				x						PX 1484
Vinnakota, Harshita				x		x				PX 1483
Vuyyuru, Kiran Kumar		x								PX 1494
Vydhyam, Kiranmai Devi										PX 1495
Yadav, Jyoti										NA

Respondents argue that the interview statements by the nonimmigrant employees' should be provided little weight. Respondents allege that the interview statements are self-serving, and suggest that the nonimmigrant workers would exaggerate their job requirements and abilities to the investigatory agents. I believe that this argument lacks merit. The interview statements match up consistently with the USCIS petition letters in areas in which they overlap, such as work experience and education level. Furthermore, given that the Respondents' lacked any records of its H-1B employees' position descriptions or requirements at end-sites, the only other available and reliable source for the information was the H-1B employees themselves. Although there are some discrepancies between the interview statements and the petition letters, such discrepancies are taken into account in my determination.

Respondents' contention that the methodology of the DOL's interview process was flawed is not persuasive. Respondents' assert that the nature of the interviews (via phone or email), the questions asked to witnesses, the lack of follow up questions, and the timing of the interviews call into question the validity of the statements as evidence. I recognize that the interview process did not produce definitive answers in all circumstances to issues relating to prevailing wage level. I took this into consideration with the other available evidence in arriving at these conclusions regarding the proper prevailing wage level.

Respondents' argument that the ads for positions and end-site users' position descriptions were not the actual requirements for a position is not persuasive. Respondents attempt to argue that higher experience requirements were requested to weed out unskilled workers. It seems highly unfair for an employer to seek highly skilled workers and then later claim the work does not require that worker's skills in order to justify a lower prevailing wage.

I reject Respondents' argument that the ARB's decision in *Amtel v. Yongmahapakorn* prevents me from taking into account its employees' descriptions of the work. The holding in that case stated that an employee was to be paid the prevailing wage based upon the job listed on the LCA. *Ametel v. Yongmahapakorn*, ARB Case No. 04-087, ALJ Case No. 2004 LCA-006, at 5-6. The Administrator does not assert that the H-1B employees were not programmer analysts, merely that programmer analyst is a broad job description that describes work that requires a higher prevailing wage than Level I. The employees I find to be misclassified performed work as a programmer analyst that required a higher prevailing wage.

c. Proper Employee Classifications

I find that the following 43 employees were not paid the proper wage due to misclassification of the prevailing wage level: Aarati Khandekar, Aiswarya Batlagandu Chandrasekaran, Anuradha Nallore Sundararajan, Benjamin Nidhin, Bornali Chakraverthy, Chandra Namita, Geetha Gadeela, Hari Krishna Nelabottla, Hashita Vinnakot, Jayanthi Vijeyanandh, Josiny Mary Lizet Puthenpurajil Jose, Kamal Mohanti, Kavita Krishnaswamy, Kiran Vuyyuru, Kiran Vdyhyam, Madhuri Ronanki, Mukta Manavi, Mythily Venkatachalam, Nandha Kumar Munisamy, Neelima Chigarapalle, Nilesh Jain, Pankaj Chopade, Patrima Sayyaparaju, Pavan Kumar Seelam, Prem Yadav, Rajiv Sudhakar Binwade, Rama c. Pentapalli, Ramakrishna Sakamuri, Rashida Kuwawala, Roopa Vazhappily, Santosh Gajanan Ursal, Savitha Jagadish, Senha R. Modi, Shiva Nimmagadda Venkata, Sivagami Arunchalam, Smitha Rahatadkar Krishnaji, Sneha Modi, Sonum Jagadeesan, Suja Sebastian, Sumanth Kumar Annapalli, Swapna Thatikonda, Vijay Koppaka, Visali Malakapalli. The education or experience requirements for their positions establish that their prevailing wages were categorized at a lower level than they should have been based upon ETA guidelines and O*NET standards. The interview statements indicate that many of these employees' positions required two or more years of experience, and these employees had two or more years of experience.⁸ Each of these employees' interview statements indicates that they had two or more years of experience prior to working at their respective end-site location. Even though they were with different employers and in different positions, these H-1B employees' jobs each required at least two years of work experience. The experience requirements and experience of these employees indicate that they should have been at a prevailing wage rate of Level II.

The USCIS petition letters and interview statements indicate that some employees were misclassified based solely upon the education requirements of the job.⁹ Each of these employees had a Masters Degree, and their job required a Masters degree. Respondents themselves state that some of these nonimmigrant workers jobs required a Masters Degree in their USCIS petition letters. (RX 947, 1134, 2281, 2242). I believe these H-1B employees were misclassified at a

⁸ Aarati Khandekar, Bornali Chakraverthy, Jayanthi Vijeyanandh, Josiny Mary Lizet Puthenpurajil Jose, Kamal Mohanti, Kavita Krishnaswamy, Kiran Vdyhyam, Madhuri Ronanki, Mukta Manavi, Mythily Venkatachalam, Nandha Kumar Munisamy, Neelima Chigarapalle, Nilesh Jain, Pankaj Chopade, Patrima Sayyaparaju, Rajiv Sudhakar Binwade, Rama C. Pentapalli, Ramakrishna Sakamuri, Rashida Kuwawala, Roopa Vazhappily, Senha R. Modi, Shiva Nimmagadda Venkata, Sivagami Arunchalam, Smith Rahatadkar, Krishnaji, Sneha Modi, Sonum Jagadeesan, Suja Sebastian, Sumanth Kumar Annapalli, Vijay Koppaka, Visali Malakapalli.

⁹ Aiswarya Batlagandu Chandrasekaran, Chandra Namita, Geetha Gadeela, Pavan Kumar Seelam, Santosh Gajanan Ursal, Swapna Thatikonda.

lower prevailing wage rate. Some employees had jobs that required years of experience and a Masters degree or higher.¹⁰ Either the education experience or work experience would classify these individuals at Level II or Level III for their prevailing wage determination. These individuals were improperly classified and should have been paid a higher prevailing wage.

I find that the following 18 employees were not paid the proper wages due to misclassification of the prevailing wage level based upon the nature of the job: Aggarwal Nupur, Alpa Malhotra, Amol Koshe, Anbalagan Elumalai, Aruna Potturu, Ashita Garg, Bhakti Ganapule, Chitra Murphy, Krutayi Valluru, Manju Rana, Monica Swapnil Agrawal, Mukthi Mala Bonala, Prakash Ramamurthi, Rakesh Kailasa, Ramya Ramesh Rao, Reema N. Sachanandani, Srinvasalu Jinka, Vijay Bachu. These employees were expected to perform various tasks without assistance suggesting a knowledge and experience requirement higher than that of O*NET guidance for Level I employees. O*NET guidance indicates that Level I (entry) “employees work under close supervision and receive specific instructions on required tasks and results expected... their work is closely monitored and reviewed for accuracy.” PX 1588. On the other hand O*NET guidance for Level II states the employees “perform moderately complex tasks that require limited judgment.” *Id.* These employees were unsure about the specific requirements of their jobs, but their description of their jobs indicates that it was not Level I work. The employees would describe their work as “intermediate” or “not entry level.” PX 1470, 1472, 1475, 1497, 1499, 1500, 1517, 1523, 1526, 1528. One described his work as being a “Team Lead.” PX 1463. Another described the job as needing to be a Microsoft Certified Professional to complete the tasks of the job. PX 1510. These workers described their job as having little to no supervision. PX 1455, 1468, 1475, 1497, 1499, 1517, 1523, 1526. The Employers required special skills, and did not provide these H-1B employees assistance or training with the systems they were required to use. PX 1455, 1457, 1463, 1468, 1470, 1472, 1499, 1503, 1555, 1573. Each of these employees had the qualifications necessary to work at a Level II position. Based upon their descriptions of their jobs, I believe that they were working at a Level II position. I find that these employees’ jobs were improperly labeled as Level I.

I find the Administrator failed to establish that improper leveling occurred for these 44 employees: Amsalakshmi Saravanan, Anil Kumar Sharma, Ashwini Patil, Kiranmai Devi Vydhyam, Lakshmi Vardhani Sobha Chintalapati, Meera Hari, Megha Singh, Nandita Chakraborty, Pratima Ghattamaru, Sanchita Biswas, Sonia Shetty, Suganaya Venkataramana Rao, Anjana Annarajan, Aparna Patel, Bhargavi Kesarla, Gopi Krishna Pinnaka, Haruka Higuchi, Hemanth Kumar Chigarapalli, Jaideep Mysore, Jain Nilesh, Jyoti Yadav, Kruti Jyotendra Khmabhatwala, Nandini Basu, Nimmy Gopal, Nippy Krishna, Pradeep Reddy Bandi, Prasenna Lakshmi Counassegarane, Pravan Kumar Seelam, Richa Rai, Sangeeta Katha, Sapna Katyal, Sapna Mirje, Saravanashankar Veerappan, Sarita Inguava, Shantala Ramamoorthy, Snigdha Konidela, Sonal Chadha, Sundararajan Nallore, Suniti Shrikanthan kulkarnii, Swetha Khetavath, Thirupathiaiah Gunturu, Vijaya Ragavan Sundaraj. The Administrator bears the burden of establishing if the employees’ work qualified them for a higher wage. The USCIS Petition letters and the interview statements do suggest that the work for these individuals was higher than a Level I prevailing wage. Although these employees could have been performing work that required a Level II or higher wage, the evidence provided fails to establish that a

¹⁰ Anuradha Nallore Sundararajan, Benjamin Nidhin, Hashita Vinnakot, Jayanthi Vijeyanandh, Kiran Vuyyuru, Prem Yadav, Savitha Jagadish.

higher wage needed to be paid to these employees. The interview statements and USCIS petition letters did indicate that some of these employees had education and/or work experience that qualified them for work at a higher prevailing wage level. The letters also stated that the work was “highly complex.” Respondents correctly argue that these individuals' higher experience and education levels do not necessarily mean that their jobs required those levels of education or experience. The record indicates that some individuals could have been overqualified for their positions in which they would not be paid a higher wage. Information was needed for these H-1B nonimmigrants' positions describing the job duties and requirements to determine a higher prevailing wage, and such info is lacking. Requiring Respondents to pay a higher prevailing wage for these employees is improper. I find that these employees are properly classified.

Pradeep Reddy Bandi, Nandita Chakraborty, Prasenna Lakshmi Counassegarena, Sonia Shetty, Aparna Patel, Jaideep Mysore, Pavan Kumar Seelam, and Suganya Venkatarama Rao were paid wages lower than the Level I prevailing wage rate. I find that these employees are owed the difference between the wages they were paid and the Level I prevailing wage rate.

2. Benching

An H-1B nonimmigrant shall receive the required pay beginning on the date when the nonimmigrant enters into employment with the employer. 20 C.F.R. § 655.731(c)(6). The H-1B nonimmigrant is considered to enter into employment when he or she first becomes available for work or otherwise comes under the control of the employer, such as reporting for orientation or training *Id.* For salaried employees, wages are due in prorated installments (*e.g.*, weekly or bi-weekly) paid no less often than monthly. 20 C.F.R. § 655.731(c)(4). H-1B employees must be paid the required wage even if they are not performing work and are in a nonproductive status due to a decision by the employer such as a lack of assigned work or lack of a permit or license. 20 C.F.R. § 655.731(c)(7)(i). On the other hand, wages need not be paid if an H-1B employee is nonproductive due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience or renders the nonimmigrant unable to work 20 C.F.R. §655.731(c)(7)(ii).

I find that the evidence establishes Respondents failed to pay the required wages to employees during times when they were benched without assigned projects. The record establishes that benching occurred when nonimmigrant workers participated in Sirsai-sponsored training without pay; when there were delays in starting work despite the workers' availability; not yet being offered a job after interviewing for it; when the locations of work were closed for a holiday; when the workers were available to work 40 hours in a work week but not being paid those 40 hours; and when there were delays following a workers' completion of a specific project and a new project was not available yet. TR 232, 258-259. Offering an employee a vacation instead of being terminated does not relieve an employer of its burden to pay the required wage if an employee is able, available and desirous of work.

The Administrator argues that benching occurred based upon a list of employees who sought Sirsai-provided training during the period of employment listed on their LCA provided by Respondents, the interviews with employees, and cross-references with payroll data and

documents provided by Respondents to determine whether the nonimmigrant was paid. TR 232-234; RX 23; PX 2032-2038. The Administrator gave deference to Respondents' payroll records, and calculated a credit for the employer when an employee worked overtime hours that it was not required to pay. TR 132-133; *See* § 655.731(c)(7)(i). Respondents do not challenge the data the Administrator relied upon, however, they contend that the back wages the Administrator calculated for benching should be recalculated and reduced. I disagree with the Respondents contention for the following reasons.

Respondents' argument that it should not have to pay pre-employment benching under the 30/60 rule misinterprets the regulation. Respondents argue that under 20 C.F.R. § 655.731(c)(6)(ii) they are not liable for the first 30 days for employees that enter into the U.S. and not liable for the first 60 days for employees already present in the U.S.. Respondents ask to find the effective start date for each affected H-1B worker at an end-site user location and apply their understanding of the 30/60 rule to credit them for the grace period. Respondents' understanding of the 30/60 rule fails to account for the "entered into employment" provision of 20 C.F.R. § 655.731(c)(6)(i) and (ii). The 30/60 rule only applies to H-1B nonimmigrants that have not yet "entered into employment." The rule does not apply to a worker "when he/she first makes him/herself available for work or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter." *Id.*

Under the INA and its regulations, the employer for whom the H-1B enters into employment with was Respondents, and not the end-site users. The record clearly establishes that these employees were ready to work, and be provided work by Respondents, on the start date listed in their LCAs. However, work was not available for them and thus they were required to seek trainings, additional interviews, etc. The fact that these workers did not begin work at an end-site user's location does not mean that they had not entered into employment with Respondents. It was Respondents' duty under the INA to make sure these individuals had work available for them on the start date of their LCAs or else pay their wages themselves.

I find the Respondents' arguments regarding paying only the prevailing wage for nonproductive bench time and the use of "Pro Rata" variable wage method to pay for nonproductive bench time lack merit. Respondents argue that DOL guidance allows an employer to pay variable wages for productive and non-productive time. Respondents argue that actual wage listed on an LCA may change depending upon whether an employee is in productive or nonproductive status. Respondents contend that this so called "variable wage rate" and "pro rata" method allowed them to pay a higher wage rate to compensate in advance for benching time in which they received no wages. This interpretation of the employer's duty to pay the required wage rate is incorrect. The Act requires an employer to pay its H-1B employees either the higher of the actual wage or prevailing wage listed on an LCA. 8 U.S.C. §1182(n)(1)(A). Respondents' LCAs list both the actual wages paid to employees and the prevailing wage and its source. The rate of pay listed in Section C of Respondents' LCAs was always the same or slightly higher than the prevailing wage listed in the LCA. The Act mandates the higher rate listed as the required wage to be paid to the H-1B employee. In instances when the prevailing

wage rate would actually be higher than the actual wage rate due to misclassification, the prevailing wage rate should have been paid during the periods of benching.

I find that Respondents improperly Benched employees in violation of 20 C.F.R. § 655.731(c). I further find that The Administrator's benching calculation should take into account the prevailing wage rate of Level I for those employees properly classified, and the higher Level of II or III for those improperly classified at Level I.

3. Unreimbursed Business Expenses

An employer violates the Act's regulations when it makes a nonimmigrant worker pay for a specifically prohibited business expense. 20 C.F.R. §655.731(c)(9)(iii)(C). An Employer is not authorized to make any deduction which causes the employee's wages to fall below the required wage rate even if the matter is not shown in the employer's payrolls as a deduction. *Id.* at (12).

Both parties agree that Sirsai required some of its employees to pay business expenses for filing the LCAs and attending trainings. Both parties also agree that Sirsai reimbursed some of those employees for the business expenses they paid. RX 581-621. The parties disagree over whether or not there are any more employees that are owed wages. Respondents admit that the Administrator provided them a complete calculation of what had been reimbursed but did not list who needed to be paid. PX 2087. They conclude that this means there is no documentary evidence to support that some employees have not been reimbursed. I find this argument to lack merit. The Administrator determined its calculations by looking at payroll documents (PX 520-868, 2057-2069) and other documents provided by Respondents' counsel (PX 2032-2040). The record clearly establishes that Respondents still owe some of its H-1B employees back wages for unreimbursed business expenses.

Respondents argue specifically that Mr. Nimmagadda is time barred from recovering H-1B fees as he did not seek them within 12 months of paying the fees. 8 U.S.C. § 1182(n)(2)(A); *DOL v. Avenue Dental Care*, 2006-LCA-00029 (Jan. 7, 2010). I agree with Respondents. Mr. Nimmagadda's filing paid for his filing fees in April of 2007, and his complaint was not filed with the DOL until February 2009, well after the 12 month period. I find that no reimbursement fees for filing the LCA are owed to Mr. Nimmagadda or any employee that paid filing fees before February 2008.

4. Willful Failure to Pay Wages

The Act's regulations require an employer commencing the H-1B process to establish the wage requirement, and satisfy the wage obligation. 20 C.F.R. §655.731(a),(b), and (c). The employer is the ultimate attester of the truth of the information reported on the LCA. Certification of the LCA by the ETA does not warrant that reported information is correct. *Id.* § 507.740(c). It is for this reason that the LCA requires the applicant to sign a Declaration under penalty of perjury that the information on the LCA is correct and true. The representations on the LCA regarding wages are meant to provide a clear understanding to all employees of the terms of employment permitted by the grant of an H-1B specialty visa for a particular non-

immigrant employee to work in a stated occupation for a specific time for compensation similar to that paid to qualified employees in the employer's workforce.

The Administrator may assess CMPs in an amount not to exceed \$5,000 per violation for "a willful failure pertaining to wages/working conditions. 20 C.F.R. §655.810(b)(2). The Act's regulations in 20 C.F.R. §655.805(c) state "*willful failure*" means 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)(i) or (ii) of the INA, or §§655.731 or 655.732. See *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); see also *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). Evidence establishing the employer's familiarity with the requirements of the H-1B regulations, processes, and wage requirements can establish willfulness within the meaning of 20 C.F.R. §655.805(c). *Administrator v. Pegasus Consulting Group*, ARB No. 05-086, ALJ No. 2004-LCA-21 (April 28, 2008).

Respondents' actions affected 122 of its employees by willfully failing to provide wages as required. The reasons for the failure to pay the proper wages were due to not reimbursing business expenses, benching, and leveling. Respondents respond that because Sirsai and Mr. Gunturu had a reasonable basis for believing it was complying with the law the violation cannot be willful. I find that the Respondents' belief that it was complying with the law did not have a reasonable basis and they acted with reckless disregard to the provisions of the Act. Respondents acted with reckless disregard when failing to pay its employees.

Respondents maintained that it did not place any H-1B employees in a position higher than a Level 1 classification, yet were aware that it was possible that a programmer analyst could be paid at a higher prevailing wage. Respondents believed it was the employees' duty to report when they were performing work higher than Level 1, whereas the Act makes it clear it is the employer's responsibility. Respondents actively ignored indicators that an employee could be classified at a higher prevailing wage, such as vendor and end-site user job descriptions with multiple years of experience requested, because they did not want to place anyone in a job that required a higher prevailing wage. Respondents actively tried to maintain ignorance about their H-1B employees' actual position requirements so they could classify their employees at the lowest prevailing wage level.

As to Respondents' failure to pay wages due to benching and unpaid reimbursements, Respondents were aware that pre-employment benching could and would occur if an employee was unable to find a job at an end-site user as indicated by the trainings it offered to help its H-1B employees acquire positions. Respondents were also aware that they needed to pay during non-productive time; however they required their H-1B employees to go on vacation as to relieve them of the requirement to pay wages. The Act clearly requires that when a worker is ready, able, and desirous of work but non-productive the employer is required to pay wages. Finally, the Act clearly prevents an employer requiring H-1B employees from paying for filing fees and other expenses; however, Respondents maintained this practice so that it could pay for its free trainings.

Respondents claim any mistakes to comply with the act were due to innocent ignorance. I find this argument lacks merit as the record establishes that Respondents were clearly familiar

with the provisions of the Act. Respondents' business model was based upon hiring H-1B nonimmigrant workers and placing them with end-site users. Respondents filed hundreds of LCAs for nonimmigrant workers during the course of its business. Mr. Gunturu spoke to lawyers about the necessary requirements of the law, yet took no other steps to familiarize himself with the law. Given the experience Respondents had with the H-1B process, they should have been able to follow the law. The violations committed by the Respondents were clearly contrary to the provisions of the Act, and indicate either a deliberate or reckless disregard to follow the law. Although Respondents did attempt to comply with the Administrator's investigation, they were unable to provide the investigators with the information needed because it was absent or non-existent.

I find the Administrator's determination of the failure to pay wages as willful appropriate.

II. Misrepresentations of Material Facts on LCA

When an H-1B employer signs an LCA it is required to attest that "the statements in the LCA are true." 20 C.F.R. §655.730(b)(2). The Administrator may assess a CMP of no more than \$1,000.00 for the misrepresentation of a material fact on the LCA. *Id.* at §655.810(a)(iii).

1. Prevailing Wage Rate

Respondents argue that the prevailing wage rates listed on its LCAs were not material misrepresentations. Respondent's rationale is that they used the best information available when filling out the LCAs. Respondent's argue that Programmer analyst was the best term to use as it encompasses multiple fields and multiple job possibilities, and that their determination of Level I prevailing wage was based upon the best information available to them, and thus was not a material misrepresentation. I Disagree.

The prevailing wage listed on the LCAs of multiple Sirsai H-1B employees was a material misrepresentation. Respondents admit to filing its LCAs without actually knowing the location, position, or job duties of the H-1B employee. This is because Respondent's business model requires it file its LCAs months before attempting to secure a position with an end-site user. Respondents attempted to place individuals only in positions that would be entry level, but as the record indicates this did not happen. Respondents were aware that the term programmer analyst is a broad term that applies to many positions. Although Mr. Gunturu believed that a programmer analyst was only an entry level position, the record establishes that was not necessarily true. Respondents' filing of the LCAs consisted of nothing more than making guesses at the level of work the nonimmigrant employees were going to perform, and in multiple instances those guesses were incorrect. The Act is not intended for Respondent's type of business model, and as such I find that there were material misrepresentations as to the prevailing wage on the LCA. However, I believe the misrepresentations are limited to those employees that were incorrectly classified at a Level I rate, and no misrepresentations occurred for any employee that was correctly classified.

The Administrator does not assert that the listing of the job as programmer analyst was of itself a material misrepresentation, and as such I will not address it.

2. Geographic Location

An H-1B employer is required to list on the LCA the geographic location where work is to be performed. 8 U.S.C. §1182(n)(1)(A)(II);(n)(4)(A). The Administrator asserts that Respondents listed the incorrect location for nine of their nonimmigrant workers.

H-1B Employee	LCA Indicating Seattle as Work Location	Actual Work Location
Agrawal, Monica	PX 303	PX 762, 806, 813
Bachu, Vijay	PX 504	PX 532, 571, 763, 861
Inguava, Sarita	PX 435	PX 598, 604, 650, 699
Patil, Abhijeet	PX 156	PX 548, 568, 2058
Patil, Ashwini	PX 200	PX 780
Rammamurthi, Prakash	PX 357	PX 645
Reddy, Anil Kumar	PX 179	PX 782
Sakamuri, Ramakrishna	PX 387	PX 542, 549, 608
Shaikh, Neeloupfhar	PX 327	PX 627, 695, 705, 723

Respondents admit that these employees worked outside of the Washington area. PX 1978-1979 (RFP 10). I find that Respondents made material misrepresentations regarding the work location for these 9 employees.

III. Respondents Failed to Provide Notice of the Filing of LCA

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

The requirements of providing notice of the filing of the LCA required Respondents to post notices at the places in which their employees worked. This means that Respondents were required to post notice at the site location of the end-site user in which each H-1B employee worked. Both parties agree that Respondents failed to post notice of filing. Respondents attempted to comply with the requirements by having its H-1B employees post the filing at the end-site user, and directly contacted end-site users requesting they post the notice of filing of the

LCA themselves. The record establishes that the end-site users refused to comply with Respondents' requests as they were not legally obligated to do so by the Act.

I find that Respondents substantially¹¹ and willfully violated the act. By Respondents' own admission, it was unable to post any of the notices of filing of the LCA's at any end-site user's location. While I do believe that Respondents tried to comply with the law, Respondent's business made compliance with the law impossible without the assistance of the end-site users. The end-site users had no obligation under the Act to post the notice. Respondents admit that the end-site users informed them that they would not post the notice. The Respondents were aware of the fact that they were unable to comply with the law, yet continued to send H-1B employees to end-site users. Although Respondents allege they changed their business practice and stopped sending employees to end-site users that refused to post notice, this did not come into effect for the 125 employees affected in this case. Thus, the failure to post was both substantial and willful.

I note that the end-site users' reliance upon Respondents' services relieves them of a duty it would have for employing an H-1B employee. It seems the end-site users such as Microsoft, AT&T, T Mobile, etc. reap the benefits of the program without having to fulfill any of the obligations. This was not how the Act was intended to be implemented. I sympathize with Respondents' attempts at compliance. However, it was their duty as the statute and regulations currently exist, not the duty of the end-site users or H-1B employees, to post the notice of filing of the LCA at secondary sites. Respondents failed to fulfill the requirement.

I disagree with Respondents' arguments against the assessment of CMPs for failure to post notice of filing of the LCA. Respondents argue that the Administrator should have provided them with an opportunity to correct the deficiencies with filing, but the record indicates that Agent Kent informed Respondents that their posting was insufficient. The record also indicates that Respondents were aware of the deficiency as it tried to reach out to end-site users. Although Respondents were never informed that they had 10 days to fix the deficiency, they were aware that the posting of the notice of filing the LCAs was deficient and needed to be corrected during the course of the investigation. The fact that it was impossible to fix as the end-site users had no obligation or intention to post the notice does not mean Respondents were not provided notice and time to fix the deficiency. Respondents also argue that the Administrator failed to establish that the notice of filing of the LCA was not done at any end-site user; however, it was Respondents' obligation under 20 C.F.R. §655.734(b) to keep records detailing posting of the notice. Respondents did not maintain this record as they were apparently unable to post at any end-site user location.

I find the Respondents have substantially failed to comply with the posting requirement at 20 C.F.R. 655.734(a).

IV. Respondents Failed to Make the Required Displacement Inquiry

¹¹ See *Guy Santiglia v. Sun Microsystems Inc.*, 2003-LCA-2 (Feb. 19, 2003) (where ALJ defined "substantial compliance" as "compliance with the essential requirements whether or contract or statute).

An H-1B-dependent employer is obligated to fulfill a displacement inquiry for all non-exempt employees. 20 C.F.R. §655.737(a). An exempt employee is an H-1B employee who receives \$60,000.00 annually or who holds a Master's degree or higher. *Id.* at (b). The regulation requires the H-1B employer "to maintain documentation to show the manner in which it satisfied its obligation to make inquiries as to the displacement of U.S. workers by the other/secondary employer with which the H-1B employer places any H-1B nonimmigrants." *Id.* at §655.738(e)(2). An H-1B-dependent employer's failure to make the displacement inquiry before the placement of an H-1B worker requires a one year debarment from the H-1B program. 8 U.S.C. 1182(n)(2)(C)(i)(I),(II).

Respondents were obligated to make a secondary displacement inquiry for all non-exempt employees, and to maintain such documentation. Respondents admit that they made no secondary displacement inquiries. Respondents argue that they were not provided the opportunity to correct any deficiencies. However, Respondents were provided notice of their failure to perform the displacement inquiry, yet failed to make required inquiries.

I find that Respondents failed to satisfy the displacement inquiry under 20 C.F.R. §655.737(a).

V. Penalties for Non Compliance

1. Civil Money Penalties

The Administrator may assess CMPs not to exceed \$5,000 per violation for a willful violation pertaining to wages. U.S.C. §1182(n)(2)(C)(ii); 20 C.F.R. §655.810(b)(2). The Administrator may assess a penalty not to exceed \$1,000 per violation for displacement of U.S. workers, a substantial violation pertaining to notification, labor condition application specificity, recruitment of U.S. workers, or a misrepresentation of a material fact on an LCA. U.S.C. §1182(n)(2)(C)(i); 20 C.F.R. §655.810(b). Willful failure 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)(i), or (ii) of the INA, or §§ 655.731 or 655.732." 20 C.F.R. § 655.805(c); *see also McLaughlin v. Richland Shoe Company*, 486 U.S. 128, 133-135(1988). The regulations require The Administrator to consider seven factors for the assessment of CMPs: (1) Previous history of violation, or violations, by the employer under the INA and this subpart I or subpart H of this part; (2) The number of workers affected by the violation or violations; (3) The gravity of the violation or violations; (4) Efforts made by the employer in good faith to comply with the provisions of 8 U.S.C. 1182(n) or (t) and this subparts H and I of this part; (5) The employer's explanation of the violation or violations; (6) The employer's commitment to future compliance; and (7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties. 20 C.F.R. §655.810(c).

I believe that The Administrator was within his discretion to assess the CMPs it did against Respondents. The Administrator started at half the amount it could assess, and then determined whether or not to assess increase or decrease factors. The Administrator assessed a 5% decrease to Respondents total based upon the seven factors listed in the regulations:

Respondents' previous violations (none); the number of workers affected (125); the nature of the offenses (three debarable violations including a willful failure violation); efforts to comply with the law; Respondents' explanation for its actions; Respondents' commitment to future compliance; and any financial gain Respondents enjoyed.

Respondents urge that no CMPs be assessed against it. While I realize the CMP's assessed against Respondents are quite large, this is due to their failure to comply with the requirements of the law. Respondents' failure to comply with the law was due to the fact that they tried to maintain a business model that the INA is apparently not designed to cover. Respondents urge that the order be limited to requiring future compliance; however, such an order would not reflect the gravity of the situation and, in the cases of failure to post notice, apparently impossible to enforce.

I find that the CMPs assessed against Respondents, to the extent they remain for the violations affirmed herein, are appropriate.

2. Debarment

An employer that willfully fails to pay wages shall be debarred for a period of at least 2 years. 20 C.F.R. § 655.810(d)(2). The H-1B statute provides that a substantial failure to provide notice may result in a one year debarment. 8 U.S.C. §1182(n)(2)(c)(i)(I); (II). An H-1B dependent employer's failure to make the displacement inquiry of a secondary or other employer before placement of a non-exempt H-1B worker requires a one-year debarment. *Id.* Further, an H-1B employer's ignorance of the INA's requirements or contention that noncompliance was due to an attorney or an employee will not excuse noncompliance. *See Administrator v. Home Mort. Co. of America, Inc.*, ALJ No. 2004-LCA-040, slip op. at 15 (ALJ Mar. 6, 2006).

The Administrator request that Respondents be debarred for a period of two years for the various violations they committed. I find that Respondents could be debarred for two years for its willful failure to pay wages, and a period of one year each for its substantial failure to provide notice of filing of LCAs and for failure to conduct a secondary displacement inquiry.

I find and affirm that Respondents are to be debarred from the H-1B program for a period of two years.

VI. Liability

The Administrator requests that Respondents, Sirsai Corporation and Vijay Gunturu be held jointly and severally liable for the violations alleged here. Although The Administrator established an argument for holding Respondents jointly and severally liable I find it unnecessary to address here. Mr. Gunturu, as the head of Sirsai, fully accepted liability for Sirsai's actions in this endeavor at the hearing. Mr. Gunturu specifically testified that he did not contest his own individual liability for all actions herein as he stated he "as president and the owner, I am the responsible person." TR at 695-696. *See Administrator v. Avenue Dental Care*, ARB 07-101 (January 7, 2010) slip op. at 5-7. Therefore it is unnecessary to address the legal arguments as to his liability.

I find that Respondents Vijay Gunturu and Sirsai, Inc. jointly and severally liable for all amounts assessed against them.

Conclusion

For the foregoing reasons, I affirm the Administrator's determination that Respondents willfully failed to pay required wages to H-1B non-immigrants in violation of 8 U.S.C. § 1182(n)(1)(A) and 20 C.F.R. § 655.731(c). However, I disagree with the amount assessed for back wages and order the Administrator to recalculate the determination with regards to this decision. In addition, I find that Respondents willfully made misrepresentations of material fact on LCAs in violation of 10 C.F.R. § 655.730. See, 20 C.F.R. § 655.805(a)(1). I find that Respondents substantially failed to post a notice of filing of LCAs in violation of 20 C.F.R. § 655.805(a)(5). I further find that Respondents failed to make a secondary displacement inquiry for its non exempt employees in violation of 20 C.F.R. §655.737(a). I find that civil money penalties are to be assessed against the Respondents taking into account my limitations regarding misrepresentation of a material fact for prevailing wage rate, and further find that Respondents are to be debarred for a period of two years.

The determination of the Administrator is **AFFIRMED** but **MODIFIED** with respect to back wages and civil money penalties assessed for affected workers.

SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

NOTICE OF APPEAL RIGHTS:

To appeal, you must file a Petition for Review (“Petition”) that is received by the Administrative Review Board (“Board”) within 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* 20 C.F.R. § 655.840(a).