

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 May 2012

Case No.: 2011-LCA-00016

In the Matter of:

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

v.

**XCEL SOLUTIONS CORPORATION,
JIT GOEL, PRESIDENT, individually, and
RENU GOEL, Vice President, individually**
Respondents

Appearances: Molly K. Biklen, Esquire
Andrew K. Karonis, Esquire
For Complainant

Jit Goel
Respondent, *pro se*

Before: Theresa C. Timlin
Administrative Law Judge

DECISION AND ORDER

This case was brought under § 212(n) of the Immigration and Nationality Act, 8 U.S.C. § 1182(n), as amended (“INA”), and the implementing regulations set forth at 20 C.F.R. Part 655, subparts H and I. The INA permits employers to hire nonimmigrants in “specialty occupations” to work in the United States for prescribed periods of time. 20 C.F.R. § 655.700. Employers seeking to hire such workers, commonly referred to as H-1B nonimmigrants, must obtain certification from the Department of Labor by filing a Labor Condition Application (“LCA”). The LCA stipulates the wage levels and working conditions that the employer provides the H1-B nonimmigrant. After securing certification, and upon approval by the Department of Homeland Security, the nonimmigrant is issued a visa and may begin work. 20 C.F.R. § 655.705(a), (b).

In addition to the conditions set forth in the LCA, the INA requires employers to pay H1-B nonimmigrants as much as it pays other employees with similar experience and qualifications or the prevailing local wage level for the H-1B nonimmigrant’s occupational classification, whichever is greater. 8 U.S.C. § 1182(n)(1)(A)(i)(I), (II). The Administrator, Wage and Hour Division (“Administrator”) has alleged that XCEL Solutions Corporation and its officers, Jit and

Renu Goel (“Respondents” or “XCEL”) violated this provision of the Act. On February 4, 2011, this case was referred to the United States Department of Labor Office of Administrative Law Judges (“OALJ”) and assigned to me. I held a hearing from May 17 through 19, 2011 in New York, New York.

I. STATEMENT OF THE CASE

By letter dated October 28, 2009, the Administrator notified Respondents that it would be initiating an investigation pursuant to 20 C.F.R. § 655 after receiving complaints from several former employees alleging various violations of § 1182 by Respondents. (AX 8, 21 (a)-(g).)¹ The initial period covered by the investigation was from July 1, 2007 to September 30, 2009. (AX 8.) Following investigation, the Administrator issued a determination letter finding that Respondents had violated § 1182 by failing to pay the prevailing wage, provide notice of filing of the LCA, make required displacement inquiry of secondary employers, maintain adequate documentation, and cooperate in the investigation. (AX 1.) The Administrator assessed \$228,045.39 in back wages and \$72,450.00 in civil money penalties. (Id.)

Respondent timely requested a formal hearing and the matter was assigned to me. At the hearing, the parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. Part 18. The following decision is based on the Act and its implementing regulations, and the evidence and testimony presented by the parties.

II. ISSUES PRESENTED

The following issues are presented for adjudication:

- 1) Whether Respondents failed to pay the prevailing wage to eighteen former H-1B nonimmigrant employees pursuant to 20 C.F.R § 655.731;
- 2) Whether the Administrator properly calculated Respondents’ back wage liability;
- 3) Whether Respondents willfully failed to pay the prevailing wage;
- 4) Whether Respondents failed to post notice of H-1B nonimmigrant LCAs at end client worksites;
- 5) Whether Respondents failed to make secondary displacement inquiries;
- 6) Whether Respondents failed to cooperate in the investigation;
- 7) Whether the Administrator’s assessment of civil money penalties was proper;
- 8) Whether Respondents are personally liable for any assessed back wages and civil money penalties.

¹ Exhibits are designated “AX” for exhibits received from the Wage and Hour Administrator and “RX” for exhibits received from the Respondent.

III. EVIDENCE

A. Exhibits

Summarized below are the exhibits admitted into evidence at the hearing:

1. Administrator's Exhibits

AX 1: Administrator's Determination Letter (February 2011)

The letter states that XCEL:

...willfully failed to pay wages as required, willfully failed to provide notice of the filing of Labor Condition Application, failed to make the required displacement inquiry of secondary employer, failed to maintain documents as required and failed to cooperate in the investigation.

As a result, the Administrator assessed \$72,450.00 in civil money penalties and \$228,045.39 in back wages to 18 H-1B nonimmigrants.

AX 2: Respondents' Hearing Request

Dated February 11, 2011, Respondents challenged the findings listed in the Administrator's determination letter.

AX 3: Administrator's Determination Letter (December 2007)

Issued pursuant to a prior investigation, the Administrator assessed \$47,034.09 in back wages to five H-1B nonimmigrants. This letter was introduced to prove Respondents' knowledge of the wage and posting requirements.

AX 7: Conference Memo

A memorandum authored by Wage Hour investigator ("WHI") Ronald Rehl in November 2007, during the course of the prior investigation. The memo was offered to establish that WHI Rehl discussed the wage and posting requirements and the ramifications of a violation with Respondents.

AX 8: Initiating Letter

This exhibit is an October 2009 letter notifying Respondents that the Administrator was initiating an investigation under the H-1B laws.

AX 9: Investigatory Narrative

A memorandum authored by WHI Seketu Dalal outlining the Administrator's findings and applicable laws. According to WHI Dalal's calculations, XCEL owed back wages to eighteen former employees totaling \$228,045.39.

AX 14 (a)-(b): Employee Information Spreadsheets

These spreadsheets, prepared by XCEL, contain information regarding Respondent's H1-B employees, including wages paid from 2007 through 2009, date of entry into the United States, date the employee commenced work, work site, termination date, dates in unpaid status, and visa status.

AX 15: Employee Information Spreadsheets

These spreadsheets were prepared by the Administrator and include the employees' benching periods, back wage calculations, whether a final paycheck was received, and a response to these findings by Respondents.

AX 16 (a), (b): Employee W-2 Forms

These are earnings statements for employees subject to alleged H-1B violations from 2007 through 2009.

AX 17 (a), (b): Administrator Back Wage Calculations

A spreadsheet calculating back wages owed to employees subject to alleged H1-B violations. The calculations allege Respondent owes \$244,488.60 to seventeen employees who were not paid during benched periods and \$10,605.92 to three employees who did not receive a final paycheck.

AX 18 (a)-(p): Labor Condition Applications

Labor Condition Applications for sixteen employees subject to alleged H1-B violations.

AX 19: Foreign Labor Data Center Prevailing Wage Rate

A website printout from the Department of Labor's Foreign Labor Data Center (FLDC) setting forth the prevailing wage rates for computer programmers in Matawan, New Jersey.

AX 20 (a)-(e): Employee Statements

These are signed statements by four employees outlining alleged H1-B violations by Respondent. Valeria Fuentes stated that she was benched from November 20, 2008 to February 12, 2009. During this period Fuentes reported to XCEL's office in Matawan, New Jersey from 9:00 am to 5:00 pm, Monday through Friday and was paid thirty dollars per day. Fuentes was

terminated on February 13, 2009, but alleged that XCEL backdated her termination to February 10.

Wanda Hightower stated that she was employed as Respondents' Human Resources director from January 21, 2008 through July 13, 2009. According to Hightower, XCEL paid thirty dollars per day to benched H-1B employees. Further, Hightower stated the Respondents would sue employees if they sought permanent employment with an end client. Hightower also stated that XCEL withheld several employees' final paychecks.

Noel Rodriguez stated that he was benched three times, first from March 21, 2007 to July 3, 2007, then from January 26, 2008 to April 13, 2008, and again from February 10, 2009 to February 28, 2009. Rodriguez stated that he was typically paid thirty dollars per day while benched, but alleged that Renu Goel coerced him to request unpaid leave from April 1, 2008 to April 13, 2008. Rodriguez alleged that the Goels did the same during his third benching period. Rodriguez was terminated on March 6, 2009.

Pawan Singh began working for XCEL on October 8, 2008. Singh stated that he negotiated a two-week termination notice into his employment contract. Despite this, Singh alleged that he was terminated suddenly on February 9, 2009. After discussing the termination notice with Wanda Hightower and Jit Goel, Singh was told that his benefits would continue until February 27, 2009. However, Singh stated that he has yet to receive his final paycheck.

AX 21 (a)-(g): Employee Complaint Forms

These exhibits are complaints submitted to the Administrator by employees alleging H-1B violations. Valeria Fuentes alleged that XCEL paid employees a thirty dollar per diem during bench periods rather than the prevailing wage rate listed on the LCA. Fuentes also stated that she was terminated after refusing to be placed on unpaid leave status.

Orlando Geronimo stated that he was not compensated for overtime hours and that many employees who worked through the night were nevertheless expected to be at the office the following morning. Geronimo also stated that Respondents began delaying employees' paychecks in December 2009. Geronimo alleged that XCEL required \$6,000.00 to release Geronimo from his contract.

Jay Maranan alleged that XCEL failed to pay the prevailing wage during employees' bench time and failed to reimburse travel expenses. Rogelio Nantes, Noel Rodriguez and Johnny Ruiz alleged the same. Pawan Singh stated that Respondents refused to issue a final paycheck.

AX 22 (a)-(h): Employee Informational Emails

These are emails between WHI Dalal and employees subject to alleged H-1B violations. The emails clarify the employees' job titles, hourly rates, bench periods, overtime, and whether the employees received a final paycheck.

AX 23 (a)-(g): Lists of Per Diem Payments

These exhibits contain lists of per diem payments made to employees subject to alleged H-1B violations.

AX 24 (a)-(e): Per Diem Checks

These exhibits contain copies and lists of checks written to employees subject to alleged H-1B violations.

AX 25 (a)-(i): Payroll Samples

These exhibits contain sample payroll records for employees subject to alleged H-1B violations.

AX 26: Anabo Declaration

Christopher Anabo submitted a signed declaration stating that he was benched on three occasions, first from February 18 to April 11, 2008, then from April 6 to May 31, 2009, and finally from September 29 to October 31, 2009. During his first bench period, Anabo stated that he worked at Respondent's office from 9:00 a.m. to 5:00 p.m. each weekday and was paid a thirty dollar per diem. Anabo subsequently obtained a project in New York City that lasted from April 14, 2008 to April 3, 2009.

Anabo stated that he received a telephone call from Renu Goel after returning from his New York City project on April 7, 2009. According to Anabo, Goel instructed that he request unpaid leave from April 6 through April 27, 2009 or face termination. Goel again called Anabo on April 27 instructing that he take unpaid leave "until further notice." Anabo stated that he was not paid his salary or per diem from April 6 through May 31, 2009.

After working on a second New York City project from June 1 to September 22, 2009, Anabo stated that he was benched a third time. On September 28, Anabo received a call from Goel again asking that he take unpaid leave or face termination. Anabo submitted this leave request via email. Anabo was not placed on another project and was terminated on November 2, 2009.

AX 27: Email Requests for Personal Leave

This exhibit contains two emails from Christopher Anabo requesting unpaid leave. The emails are dated April 7 and April 27, 2009.

AX 28: Email Requests for Personal Leave

This exhibit contains two emails from Christopher Anabo requesting unpaid leave. The emails are dated September 28 and October 14, 2009.

AX 29: Andre Employment Contract

This exhibit is an employment contract for Gabriela Andre.

AX 30: Vacation Request Form

This exhibit is a "Request for Time Off" form submitted by Gabriela Andre. The period requested is from February 9 to February 13, 2009.

AX 31: First Andre Email Requesting Unpaid Leave

This is an email submitted by Gabriela Andre to Wanda Hightower requesting unpaid leave beginning March 2, 2009. The email is dated February 16, 2009.

AX 32: Second Andre Email Requesting Unpaid Leave

This is a second email submitted by Gabriela Andre to Wanda Hightower requesting unpaid leave beginning March 2, 2009. The email is dated February 16, 2009.

AX 33: Goel Email Regarding Hourly Contract

This is an email submitted by Respondent acknowledging receipt of documents pertaining to Gabriela Andre's hourly contract.

AX 34: Andre Hourly Contract

This is an hourly contract for Gabriela Andre effective February 16, 2009.

AX 35: Andre Emails Regarding Health Benefits

This is an email chain between Gabriela Andre and XCEL regarding the purchase of medical insurance benefits.

AX 36 and AX 37: Client Call Logs

These are call logs indicating that Gabriela Andre received a telephone call from a vendor client. This exhibit was introduced by the Administrator to show that Andre received phone calls from clients and advised XCEL representatives during her benching periods.

AX 38: Bautista Employee Expense Report Form

This exhibit is a "Consultant Expense Report" completed by Maria Bautista. The expense report requests a thirty-dollar per diem and reimbursement of an eighty-three dollar travel expense. The request was signed by Bautista and Wanda Hightower.

AX 39: Vacation Request Form

This is a “Request for Time Off” form submitted by the Administrator to show that employee had to submit an official form to request leave.

AX 40: Bautista Emails Regarding Unpaid Leave Requests

This exhibit contains emails by Maria Bautista requesting unpaid leave. The emails are dated April 6 and April 26, 2009.

AX 41: Bautista Email Regarding Interview

This is an email from XCEL to Maria Bautista regarding a potential project. This email was introduced by the Administrator to show that Bautista was communicating with XCEL regarding potential projects during the period for which she requested unpaid leave.

AX 42: Bautista Hourly Contract

This is an hourly contract for Maria Bautista effective May 1, 2009.

AX 43: Bautista Statement of Work

This is a “Statement of Work” between a vendor client, Guidepoint Global, and XCEL establishing an hourly rate for Maria Bautista.

AX 44: Bautista Emails Regarding Unpaid Leave Request

These are emails from Maria Bautista to Respondent requesting unpaid leave. The emails are dated September 29 and October 17, 2009.

AX 45: Letter to United States Embassy Regarding H-1B Visa Processing

This is a letter from XCEL to the United States embassy in the Philippines indicating that Valeria Fuentes “will be working for our client on a critical project” and that XCEL “would appreciate your help and cooperation in issuing H-1B visa [sic] to the beneficiary.”

AX 46: Fuentes Employment Contract

This is an employment contract for Valeria Fuentes.

AX 47: Fuentes Email Regarding Unpaid Leave Request

This is an email from Valeria Fuentes to Renu Goel indicating that Fuentes was asked to take unpaid leave or be terminated. Fuentes requests that the proposal be placed in writing.

AX 48: Fuentes Termination Letter

This is an email from Wanda Hightower terminating Valeria Fuentes.

AX 49: Knaik Declaration

Mary Ann Knaik submitted a signed declaration stating that she arrived in the United States on June 3, 2008. According to Knaik, she reported to XCEL's office from 9:00 a.m. to 5:00 p.m. each weekday. Knaik was benched from June 9 through November 6, 2008. During this time, she received a thirty dollar per diem. On November 6, Knaik left the United States to work in Malaysia. Knaik was terminated in April 2009.

AX 50: Knaik Employment Contract and Addendum

This is an employment contact for Mary Ann Knaik. The addendum states that the employee could not seek employment with a vendor client.

AX 51: Layo Resume

This is a resume for Joseph Layo. The document indicates employment at XCEL from July 2006 through February 2008.

AX 52: Layo Emails Regarding Projects

This is an email from Joseph Layo to Jit Goel indicating that Layo was having financial difficulties after being benched for an extended period.

AX 53: Layo Interview Report

This document is a spreadsheet outlining the interviews completed by Joseph Layo from February to March 2008.

AX 54: Lopez Letter Regarding Bench Pay

This exhibit is a letter to Maria Lopez summarizing an agreement in which Lopez collected per diem during her bench period rather than full salary.

AX 55: Letter Indicating Lopez Termination

This is a letter to the United States Citizenship and Immigration Services stating that Maria Lopez was terminated effective March 6, 2009.

AX 56: Maralit Airline Ticket

This exhibit indicates XCEL purchased a round trip airline ticket for Benedicto Maralit showing departure from Newark, New Jersey to Manila, Philippines on July 12, 2007 and return on July 28, 2007.

AX 57: Maranan Declaration

Jay Maranan submitted a signed declaration stating that he began work for XCEL on February 14, 2008 after securing an H-1B visa. Maranan stated that upon reporting to XCEL's office he was informed he would receive a thirty-dollar daily per diem in lieu of his salary until he found a project. Maranan reported to XCEL from 9:00 a.m. to 5:00 p.m. to search for potential projects online. Maranan was benched until he resigned on August 15, 2008.

AX 58: Nantes' Instructional Package and Airline Ticket

This is an email sent by XCEL to Rogelio Nantes outlining XCEL's procedures upon an employee's arrival in the United States. Nantes' ticket indicates arrival in Newark on March 3, 2008.

AX 59: Nantes' Full-Time Employment Contract

This is a full-time employment contract for Rogelio Nantes indicating a yearly salary totaling \$67,000.00. The contract was signed in March 13, 2008.

AX 60: Nantes' Hourly Employment Contract

This is an hourly employment contract for Rogelio Nantes signed on October 12, 2009.

AX 61: Nantes' Emails Regarding Interviews

This is an email from Jit Goel to Rogelio Nantes instructing Nantes to prepare for an interview. This exhibit was submitted by the Administrator to show that H-1B employees contacted and interviewed with clients during their bench periods.

AX 62: Nantes' Emails Regarding Availability

This exhibit contains a series of emails between XCEL and Rogelio Nantes. The first email chain dated March 4 and 5, 2008 instructs Nantes to reformat his resume to prepare for interviews with vendor clients. The second email chain, dated March 7, contains a job description for a position in Sunnyvale, California. In the third email chain, dated March 12, 2008, Nantes requests time sheets and expense reports. Another email, dated April 12, 2008, indicates Nantes received \$416.17 in bench pay. A final series of emails indicates that Nantes called out sick on April 17, 2008 and was asked to submit a "Time Off Request Form." Nantes nevertheless was told to be prepared to take calls from prospective clients while out sick.

AX 63: Nantes' Emails Regarding Interviews

This is an email indicating that Nantes traveled to Milwaukee for an interview on September 6, 2008.

AX 64: Nantes' Email Requesting Unpaid Leave

This is an email chain indicating that Nantes requested unpaid leave from September 16 through November 19, 2008.

AX 65: Nantes' Emails Regarding Projects

This exhibit contains a series of emails between XCEL, Rogelio Nantes, and potential clients. The first email chain is between Nantes and Renu Goel dated September 18, 2009 discussing potential projects. (pp. 1-5.) Another email, dated September 21, is from a client advertising a project. (p. 6.) An email chain dated October 5 and 6 indicates Nantes was asked to execute an hourly contract. (pp. 7-8.) Another series of email chains dated October 9 through November 5 indicates that XCEL forwarded potential positions to Nantes during this period. (pp. 8-21.) A series of emails dated November 10-13 indicates Nantes was hired for a project in Dallas Texas. (pp. 22-23.) Nantes withdrew from the project and flew home at his own expense after receiving no further communication from the client upon arrival. (p. 24.) Nantes was hired by another client shortly after his return from Dallas. (p. 25.)

AX 66: Request to Post Notice of LCA

This is a letter from XCEL to a client requesting that they post notice advising of the placement of an H-1B employee.

AX 67: Rodriguez Employment Chronology

This document sets forth the dates of Noel Rodriguez's arrival in the United States, employment with XCEL, and termination.

AX 68: Rodriguez Employment Contract

This is a full-time employment contract for Noel Rodriguez indicating a yearly salary totaling \$60,000.00. The contract was signed in March 22, 2007.

AX 69: Rodriguez Emails Regarding Relocation

This exhibit is an email chain between Noel Rodriguez and Linda Chtaih, XCEL Consultant Manager, indicating Rodriguez's preference for projects near his home in New Jersey. Chtaih informed Rodriguez that, should he refuse to relocate, he would be benched and receive no salary.

AX 70: Rodriguez Emails Regarding Relocation and Benching Procedure

This is an email chain between Noel Rodriguez and Linda Chtaih clarifying XCEL's policies regarding relocation and instructing Rodriguez to report to XCEL's office during his bench period.

AX 71: Rodriguez Request for Unpaid Leave

This is an email submitted by Noel Rodriguez to Wanda Hightower requesting unpaid leave. The email is dated February 10, 2009.

AX 72: Letters Confirming Rodriguez Employment Dates

This exhibit contains a letter prepared by XCEL setting forth Noel Rodriguez's employment dates as March 22, 2007 through March 6, 2009.

AX 73: Rodriguez Termination Letter

This is a letter signed by Wanda Hightower indicating Noel Rodriguez was terminated on March 6, 2009.

AX 75: Ruiz Employment Contract

This is a full-time employment contract for Noel Rodriguez indicating a yearly salary totaling \$65,000.00. The contract was signed in June 9, 2008.

AX 76: Ruiz Resignation Letter and Email Chain Regarding Bench Pay

This exhibit contains a series of emails between Wanda Hightower and Johnny Ruiz setting forth XCEL's benching procedure and pay. Ruiz submitted a resignation letter dated October 16, 2008.

AX 77: Ruiz Email Requesting Bench Pay Information

This exhibit is a series of emails between Wanda Hightower and Johnny Ruiz in which Ruiz requests clarification regarding bench pay.

AX 78: Ruiz Email Regarding Flight Information

This is an email sent by XCEL to Johnny Ruiz containing a flight itinerary and instructions for his arrival in the United States. Ruiz's ticket indicates arrival in Newark on June 8, 2008.

AX 79: Ruiz Email Regarding Log-In Sheets

This is an email chain in which Johnny Ruiz requests copies of his timesheets from June 9 to July 11, 2008.

AX 80: Singh Termination Letter

This is a letter signed by Wanda Hightower indicating Pawan Singh was terminated effective February 27, 2009.

AX 81: Singh Employment Contract

This is a full-time employment contract for Pawan Singh indicating a yearly salary totaling \$115,000.00. The contract was signed in October 8, 2008.

AX 82: Singh Compensation Agreement

This exhibit sets forth a summary of compensation, bonus, and benefits for Pawan Singh.

AX 83: Tingson Timesheets

This exhibit contains a series of timesheets for Alberto Tingson dated July 28 through August 17, 2008.

AX 85: Palacios Email Regarding Per diem

This is an email from Renu Goel to Daniel Palacios dated March 23, 2009 indicating that Palacios would not receive salary, benefits, or per diem until he secured a project. Renu Goel offered a thirty dollar per diem from March 16 through 22. The Administrator offered this evidence to demonstrate Renu Goel's involvement in personnel matters.

AX 86: LCA Notice of Posting

This is a notice completed by Renu Goel indicating Alberto Tingson's LCA was posted at XCEL's office from March 24 to April 9, 2007. The Administrator offered this evidence to demonstrate Renu Goel's knowledge of the posting requirement.

AX 87: Respondents' Response to Administrator's Request for Admissions

This is the Administrator's Request for Admissions with supporting exhibits, and Respondents' responses. Respondents admitted that they employed each of the eighteen H-1B nonimmigrants named in Exhibit A. Respondents further admitted that Exhibit B accurately reflects payments made to the nonimmigrants during the relevant periods.

AX 88: Administrator's Request for Production of Documents

This exhibit is the Administrator's Request for the Production of Documents served on Respondents on March 23, 2011.

AX 89 (a)-(c): Respondents' Corporate Tax Returns

These are XCEL's 2007 through 2009 corporate tax returns setting forth corporate income and compensation paid to Respondents.

AX 90 (a)-(c): Respondents' Individual Tax Returns

These are Respondents' 2007 through 2009 individual tax returns setting forth their annual income.

AX 91: Administrator's Interrogatories

This is a copy of the Administrator's first set of interrogatories served on Respondents on March 23, 2011.

AX 92 (a)-(b): Administrator's Discovery Requests

These are copies of the Administrator's second set of interrogatories served on Respondents on April 6, 2011.

AX 93: Proposed Stipulations of Fact

These are the Administrator's proposed stipulations of fact regarding the names, LCA numbers, and benching periods for H-1B nonimmigrants employed by Respondents.

2. Respondents' Exhibits

RX 1: Geronimo Email Regarding Loan Payment

This is an email from Orlando Geronimo to Jit Goel regarding a \$6,000.00 loan made by XCEL to Geronimo. The email is dated May 9, 2010.

RX 2: Hightower Email

This is an email from Wanda Hightower dated March 28, 2008 instructing Joseph Layo to call Human Resources the following Monday.

RX 3: Hightower Email

This is an email from Wanda Hightower dated April 9, 2008 instructing Joseph Layo to call Human Resources. Respondents introduced this document to show that Layo ceased communicating with XCEL.

B. Summary of Testimony

Noel Rodriguez

Rodriguez testified that he worked for XCEL from March 22, 2007 to March 6, 2009. (Tr. p. 28.) Prior to his employment with XCEL, Rodriguez lived in Caracas, Venezuela. (Id. at 29.) Upon a recommendation from a friend, Rodriguez contacted XCEL and the company agreed to sponsor Rodriguez's H-1B visa application. (Id. pp. 29-30.) Rodriguez arrived in Newark, New Jersey on March 21, 2007. (Id. p. 30.)

The next morning, Rodriguez was driven to XCEL's office in Matawan, New Jersey. (Tr. p. 31.) Upon arrival, Rodriguez spoke to a receptionist, who introduced Jit Goel and XCEL's account managers. (Id. p. 32.) The receptionist accompanied Rodriguez to a desk and explained that he would be taking calls from third party clients to secure a project. (Id. p. 33.) Thereafter, Rodriguez reported to the Matawan office each weekday from 8:30 a.m. to 6:00 p.m., using a spreadsheet to record his arrival and departure. (Id. pp. 33-34.)

While in the office, Rodriguez met with his assigned account manager to discuss opportunities and waited to receive calls from clients advertising open positions. (Tr. 34-35.) The substance of these calls were recorded on a spreadsheet and submitted to the account manager. (Id. p. 41.) Rodriguez would occasionally travel to an interview, the costs of which were paid by XCEL. (Id. p. 36.) On July 2, 2007, Rodriguez was placed on a project for Sony Electronics in Woodcliff Lake, New Jersey. (Id. p. 35.) Rodriguez testified that, prior to being placed on the Sony project, XCEL paid a thirty dollar per diem rather than his contract salary. (Id. pp. 35-36.)

As the Sony project was winding down, Rodriguez again began to take calls from clients. (Tr. p. 40.) In January 2008, Rodriguez received information regarding a project in Sunnyvale, California, but expressed hesitancy to relocate his wife and two children out of New Jersey. (Id. pp. 43-44.) Rodriguez's reluctance garnered a reprimand from XCEL management and Rodriguez thereafter agreed to relocate to any open position. (Id. p. 42-43.) The Sony project ended on January 25, 2008, and Rodriguez resumed taking calls from recruiters at the Matawan office. (Id. p. 39.) From January 25 to April 14, 2008 (the start date of his next project), Rodriguez was paid a thirty dollar per diem, rather than full salary. (Id. p. 40.)

Rodriguez's second project ended on December 31, 2008. (Tr. p. 45.) After taking a one week vacation, Rodriguez resumed taking recruiter calls and corresponding with XCEL's account managers. (Id. p. 44.) On February 10, 2009, Rodriguez received a call from Renu Goel with instructions to request personal, unpaid leave or face termination because XCEL was no longer able to afford paying its H-1B employees the thirty dollar per diem. (Id. pp. 46-47.)

Subsequently, Rodriguez emailed Renu Goel requesting unpaid leave. (Id. p. 47.) From this point forward, Rodriguez received no pay. (Id.) Rodriguez ceased employment with XCEL on March 6, 2009. (Id.)

Gabriela Andre (De Pompignan)

Andre testified that she worked for XCEL from April 24, 2007 to May 8, 2009. (Tr. p. 79.) Prior to her employment at XCEL, Andre lived in Rio de Janeiro, Brazil. (Id.) After speaking with a former co-worker employed by XCEL, Andre provided the company with her resume and subsequently signed an employment contract. XCEL also agreed to sponsor Andre's H-1B application. (Id.) Andre arrived in Newark, New Jersey on April 26, 2007. (Id. p. 80.) Upon arrival, Andre was met by an XCEL employee and driven to the guest house. (Id.) Later that day, Andre was taken to XCEL's Matawan office, where she was told to report each weekday from 9:00 a.m. to 5:00 p.m. until she had secured a project. (Id. p. 81.) Andre used a spreadsheet located at the reception desk to record her arrival and departure. (Id. p. 82.)

While in the office, Andre spent her time updating her resume and speaking with clients and XCEL account managers regarding potential projects. (Tr. p. 82.) On May 24, 2007, Andre secured a project with Suburban Propane in Whippany, New Jersey. (Id.) Prior to the start of this project, XCEL paid Andre a thirty dollar per diem rather than full salary. (Id. p. 83.) After the Suburban Propane project ended, Andre worked at Waste Management in Houston, Texas, and then at the New York Times in New York, New York. (Id. pp. 84-85.) During these projects, Andre was paid her yearly, full-time salary and received paid vacation upon approval from the project manager. (Id. p. 88.)

At the conclusion of the New York Times project in February 2009, Andre's contract was changed to an hourly contract wherein Andre would be paid based on hours worked rather than a yearly salary. (Tr. p. 88.) On February 16, Andre received a call from Wanda Hightower instructing her to take unpaid personal leave effective March 2 or face termination. (Id. p. 90, 93.) Andre requested the leave and from this point forward received no pay. (Id.) However, Andre continued reporting to the Matawan office each day to take calls from clients. (Id. p. 97.) All contact with clients was reported on a spreadsheet and submitted to an XCEL account manager. (Id.) Andre was not placed on another project and ceased employment at XCEL on May 16, 2009. (Id. p. 98.)

Alberto Tingson

Tingson testified that he worked for XCEL from June 9, 2008 to March 26, 2010. (Tr. p. 109.) Prior to his employment at XCEL, Tingson lived in Singapore. (Id.) In 2006 or 2007, Tingson received a call from Jit Goel offering employment at XCEL. (Id.) Subsequently, XCEL sponsored Tingson's H-1B application and he arrived in Newark, New Jersey on June 8, 2008. (Id. at 110.) Tingson then took a taxi to XCEL's guest house. (Id. p. 111.)

The next day, Tingson reported to the Matawan office where he received an orientation and signed necessary paperwork. (Tr. p. 111.) Tingson was told by Wanda Hightower and Jit Goel to report to the Matawan office each day until he secured a project. (Id. p. 112.)

Thereafter, Tingson reported to the Matawan office for forty hours per week and logged his attendance on a spreadsheet. (Id.) From his initial arrival until July 27, 2008, Tingson received a thirty dollar per diem, rather than full salary. (Id. p. 113). From July 28 until March 26, 2010, Tingson worked on an in-house project at XCEL's Matawan office and received full salary. (Id. pp. 115-116.)

Johnny Ruiz

Ruiz testified that he worked for XCEL from June 9, 2008 to October 16, 2009. (Tr. pp. 126, 136.) Prior to his employment at XCEL, Ruiz lived in the Philippines. (Id. p. 126.) At some point prior to his arrival in the United States, Ruiz received an email from Jit Goel offering employment at XCEL. (Id. p. 127.) After expressing his interest, Ruiz was interviewed by Goel, who agreed to sponsor Ruiz's H-1B application. (Id. p. 128.) Ruiz arrived in Newark, New Jersey on June 8, 2008. (Id. pp. 128-29.)

On June 9, Ruiz reported to the Matawan office. (Tr. p. 129.) Ruiz met with Wanda Hightower and, after an orientation in which Hightower explained XCEL's recruiting process, Ruiz signed an employment contract. (Id. pp. 129-30.) Ruiz was told to report to the Matawan office each weekday from 9:00 a.m. to 5:00 p.m. (Id. pp. 130-31.) Ruiz testified that he logged his hours on a timesheet situated at the reception desk. (Id. p. 131.)

On July 14, 2008, Ruiz was placed on a project with the Casey Group. (Tr. p. 131.) Prior to being placed, Ruiz was paid a thirty dollar per diem, rather than full salary. (Id. p. 132.) On September 30, 2008, Ruiz informed Wanda Hightower that his Casey Group project was ending on October 10 and asked whether he was to receive full salary upon his return. (Id. p. 135.) Having received no satisfactory answer, Ruiz submitted his resignation on October 16. (Id. pp. 135-36.)

Orlando Geronimo

Geronimo testified that he worked for XCEL from January 24, 2007 to April 30, 2010. (Tr. pp. 150-51.) Prior to his employment at XCEL, Geronimo lived in Manila, Philippines. (Id. p. 151.) After receiving an email from a friend advertising positions at XCEL, Geronimo contacted XCEL. (Id.) After an interview with Jit Goel, the company agreed to sponsor his H-1B visa application. (Id. p. 152.) On January 22, 2007, Geronimo arrived in Newark, New Jersey. (Id. p. 153.) On January 24, Geronimo reported to XCEL's Matawan office to finalize his paperwork and begin employment. (Id.) Thereafter, Geronimo returned to the Matawan office each weekday to take calls from recruiters regarding potential projects. (Id. p. 154.) On March 14, Geronimo was placed on a project with Standard and Poor's in New York City. (Id. p. 155.) From his arrival through March 14, Geronimo received a thirty dollar per diem. (Id. p. 156.)

Geronimo stopped working on the Standard and Poor's project in June 2007 to work on one of XCEL's in-house projects. (Tr. p. 157.) Geronimo worked on the in-house project until April 2010. (Id.) Geronimo testified that he generally received his full \$60,000.00 salary throughout this period, but stated that XCEL began to delay paychecks for up to a month and a

half beginning in December 2009. (Id. p. 158.) Geronimo also testified that XCEL never issued his final paycheck. (Id.) Geronimo's work ended on April 30, 2010. (Id.)

Joseph Layo

Layo worked for XCEL from June 2006 to February 2008. (Tr. p. 172; AX 51.) Prior to his employment at XCEL, Layo lived in the Philippines. (Tr. p. 173.) After reading a job announcement posted on the internet, Layo contacted XCEL and spoke with Jit Goel. (Id.) XCEL subsequently agreed to sponsor Layo's H-1B application and Layo arrived in Newark, New Jersey in July 2006. (Id. p. 174.) Thereafter, Layo reported to XCEL's Matawan office each weekday, and logged his attendance on a spreadsheet. (Id.) Layo began his first project on July 6, 2006 with Ernst & Young. (Id. p. 175.) Prior to this project, Layo received a thirty dollar per diem payment. (Id. p. 176.)

The Ernst & Young project ended on November 28, 2006 and Layo resumed reporting to XCEL's Matawan office and receiving thirty dollars per day. (Tr. pp. 175-76.) In February 2007, Layo was placed on his second project. (Id. p. 176.) This project lasted until May 2007. (Id.) From June 2007 to August 2007, Layo worked on a project with Navimedix, Inc. (Id. p. 177.) At the conclusion of that project, Layo again reported to the Matawan office and received thirty dollar per diem payments. (Id.) Layo began his final project in October 2007. (Id. p. 178.) That project ended in February 2008. (Id.) In March 2008, Layo was terminated. (Id. p. 179.)

Maria Bautista

Bautista worked for XCEL from February 2008 to November 2009. (Tr. pp. 195-96.) Prior to working at XCEL, Bautista live in the Philippines. (Id. p. 198.) After receiving an email from a friend advertising an opening, Bautista contacted XCEL and was interviewed by Jit Goel. (Id. p. 196.) XCEL agreed to sponsor Bautista for an H-1B visa and she arrived in Newark, New Jersey on February 25, 2008. (Id. pp. 197-98.) After arriving at the airport, Bautista took a cab directly to XCEL's Matawan office, where she was introduced to XCEL personnel. (Id. p. 198.) Bautista was then driven to the guest house. (Id. p. 199.) Thereafter, Bautista reported to the Matawan office each weekday from 9:00 a.m. to 6:00 p.m. to take calls from clients. (Id.)

Bautista was not placed on a project until May 2008. (Tr. p. 201.) From the time of her arrival until the start of her first project, Bautista was paid a thirty dollar per diem, rather than her yearly contract salary of \$60,000.00. (Id. pp. 200-01.) From May 2008 to April 2009, Bautista worked with Vista Research in New York, New York. (Id. pp. 205-06.) At the conclusion of this project, Bautista returned to the Matawan office and spoke with Renu Goel. (Id. p. 206.) During this conversation, Renu Goel instructed Bautista to take unpaid personal leave or be terminated. (Id. p. 207.) Subsequently, Bautista emailed Renu Goel to request three weeks of unpaid personal leave. (Id. p. 208.) At the end of April, Renu Goel instructed Bautista to extend her unpaid leave and Bautista complied. (Id. p. 209.) On April 30, XCEL requested Bautista to revise her employment contract to an hourly contract wherein she would be paid based on hours worked rather than a yearly salary.

Bautista was placed on a project for Guide Point Global on June 1, 2009. (Tr. p. 213.) At the conclusion of this project on September 24, 2009, Bautista was again instructed to take unpaid personal leave through the end of October. (Id. p. 218-19.) Bautista was terminated on November 2, 2009. (Id. p. 220.)

Rogelio Nantes

Nantes worked for XCEL from March 3, 2008 to February 3, 2011. (Tr. p. 245.) Prior to working for XCEL, Nantes lived in Singapore. (Id.) After being referred to XCEL by a co-worker, Nantes contacted XCEL and the company agreed to sponsor his H-1B visa application. (Id. p. 246.) Nantes arrived in Newark, New Jersey on March 3, 2008. (Id. p. 247.) Upon arrival, Nantes took a cab to XCEL's guest house. (Id.) The next day, Nantes reported to the Matawan office and met Wanda Hightower, who had Nantes complete necessary paperwork. (Id. p. 248.) From then on, Nantes reported to the Matawan office for eight hours each weekday. (Id. p. 249.)

On September 8, 2008, Nantes was placed on a project with Northwestern Mutual in Milwaukee, Wisconsin. (Tr. p. 255.) From his arrival until the start of the Northwestern Mutual project, EXCEL paid Nantes thirty dollars per day. (Id.) Nantes worked on the Northwestern Mutual project until September 9, 2009. (Id. p. 261.) At the conclusion of the project, Renu Goel instructed Nantes to take unpaid leave and Nantes complied. (Id. p. 261.) On October 12, Renu Goel requested Nantes to revise his employment contract to an hourly contract wherein he would be paid based on hours worked rather than a yearly salary. (Id. p. 266.)

On November 9, 2009, Nantes was placed on a project with Wiz Pro Pyramids in Dallas, Texas. (Tr. pp. 273-74.) At his own expense, Nantes flew to Dallas and stayed in a hotel room for a week. (Id. p. 274.) Nantes withdrew from the project and flew home after receiving no further communication from the client upon arrival. (Id.) Because the project failed to materialize, Renu Goel again contacted Nantes and requested he take unpaid leave retroactive to November 9. (Id. p. 276.) On November 20, Nantes was placed on a second project with Northwestern Mutual in Milwaukee. (Id. pp. 274-75.) Nantes ceased employment with XCEL at the conclusion of this project in February 2011. (Id.)

Wanda Hightower

Hightower was employed in XECL's Human Resources department from January 21, 2008 to July 13, 2009. (Tr. p. 301.) As a Human Resources Manager and, subsequently, Human Resources Director, Hightower oversaw employee disciplinary actions, training, hiring, terminations, and other issues involving XCEL employees. (Id.) Hightower's direct supervisors were Jit and Renu Goel. (Id. p. 302.) Hightower testified that XCEL recruited H-1B nonimmigrants to work at various client locations throughout the United States. (Id. p. 304.) Although some H-1B employees were placed on projects immediately after their arrival, others were "benched," or waited a period of time to be placed on an open project. (Id. p. 305.) While H-1B employees were benched, they were required to report to XCEL's Matawan office to take telephone calls from clients with open positions and communicate with XCEL's account representatives. (Id. p. 306.) Employees were required to log their time on a sheet located at the

reception desk. (Id.) Hightower explained that benched employees were paid thirty dollars per day, seven days per week. (Id. p. 307.)

According to Hightower, each H-1B employee was required to maintain a “Consultant Expense Report” indicating that they reported to work throughout the week and were entitled to the thirty dollar per diem. (Tr. pp. 308-09.) The expense report also included employee expenses incurred traveling to and from client interviews. (Id.) Each expense report had to be approved and signed by Hightower and Jit Goel before an employee’s expenses were reimbursed. (Id. pp. 309-10.) Hightower also testified that throughout 2008 and 2009 many H-1B employees were instructed by Renu Goel to take unpaid leave or face termination. (Id. p. 313.) Hightower explained that Ms. Goel would instruct the employees verbally because she was uncomfortable putting the requests in writing. (Id. p. 315-16.)

At the end of 2008, Hightower advised Jit and Renu Goel to revise XCEL’s bench pay policy. (Tr. p. 318.) Under Hightower’s proposed policy, an H-1B employee who “rolled off” a project would receive full salary until he or she was placed on a new project. (Id. p. 318-19.) This policy was utilized for a single employee before Jit Goel instructed the Accounting Department to end the policy. (Id. p. 320.) Hightower testified that her relationship with Jit and Renu Goel deteriorated until her employment ended in July 2009. (Id.)

Valeria Fuentes

Fuentes worked for XCEL from November 20, 2008 to February 13, 2009. (Tr. p. 354.) Fuentes testified that, on her first day, Wanda Hightower instructed that she report to the Matawan office each weekday. (Id.) Hightower further instructed Fuentes to record her time on a sheet in the reception area. (Id. at 355.) While in the office Fuentes would take calls from clients and communicate with her assigned account manager. (Id.) From her arrival to February 2009, Fuentes was paid a thirty dollar per diem. (Id.)

In early February 2009, Fuentes spoke with Renu Goel who instructed Fuentes to take unpaid leave or face termination because XCEL was no longer able to afford paying its H-1B employees the thirty dollar per diem. (Tr. p. 358.) Fuentes expressed reluctance to forego the per diem because it was her only income. (Id.) On February 12, Fuentes informed Hightower that she would be financially unable to take unpaid leave. (Id. p. 359.) Later that day, Fuentes received a call from Ms. Goel instructing that she take unpaid leave or be terminated. (Id.) The next day, Fuentes emailed Hightower and Ms. Goel asking that the request be put in writing. (Id. p. 360.) Four hours later, Hightower replied with a termination letter. (Id.)

Ron Rehl

Mr. Rehl is a Regional Immigration Coordinator for the United States Department of Labor Wage and Hour Division. (Tr. p. 371.) As Regional Immigration Coordinator, Rehl trains investigators regarding H-1B matters, reviews complaints, and assigns cases. (Id. p. 372.) Rehl, along with Wage and Hour District Director Patrick Riley, drafted the determination letter issued to XCEL. (Id.) According to Rehl, XCEL violated the H-1B regulations by willfully failing to pay its H-1B employees required wages. (Id. p. 373.) Rehl testified that although H-1B

employees need not be paid for legitimate personal leave, wages must be paid if an H-1B employee's non-productive status is the fault of the employer. (Id. p. 376.) If the employee is benched, or non-productive, because the employer has no projects or because the employee does not have the necessary documentation, the fault lies with the employer and wages must be paid. (Id. p. 377.) Rehl determined that XCEL's violation was willful because the company was investigated and assessed \$47,039.09 in back wages in a separate 2007 investigation. (Id. pp. 378-81.) A memo dated November 16, 2007 indicates that Jit Goel was present at a conference to review these findings, was briefed on the H-1B wage laws and benching regulations, and agreed to future compliance. (Id. pp. 379-82.)

Rehl further testified that XCEL violated the H-1B laws by willfully failing to provide notice of filing of an LCA. (Tr. p. 383.) Rehl stated that the H-1B regulations require an employer to give notice at each work location of the intent to hire H-1B nonimmigrants. (Id.) These notices must be placed at the employer's primary place of business and any other location that an H-1B employee may be placed. (Id. pp. 383-84.) According to Rehl, XCEL violated this provision by failing to provide notice at end client locations. (Id. p. 384.) Rehl found the violation willful because notice requirements were discussed with Jit Goel in the course of the 2007 investigation. (Id. pp. 385-86.)

Rehl also testified that XCEL failed to make displacement inquiries at end client work sites, failed to maintain documentation regarding displacement inquiries, and failed to cooperate in the investigation. (Tr. pp. 387-90.) Rehl explained that H-1B employers have a responsibility to ensure that United States citizens are not displaced at work sites where H-1B nonimmigrants are placed. (Id. p. 387.) H-1B employers are also required to maintain documentation confirming their displacement inquiries. (Id. p. 389.) And, upon being notified of an investigation, H-1B employers are obligated to produce relevant records and participate in the investigation. (Id. p. 390.) Based upon the aforementioned violations, Rehl assessed \$67,500.00 in civil money penalties.

Suketu Dalal

Suketu Dalal is an investigator for the United States Department of Labor Wage and Hour Division and led the investigation into XCEL's H-1B compliance. (Tr. pp. 421-22.) The period covered by the current investigation ran from February 9, 2007 to April 30, 2010. (Id. p. 423.) After concluding the investigation, WHI Dalal found XCEL willfully failed to pay required wages, willfully failed to post notice of an LCA, failed to conduct displacement inquiries, failed to maintain posting and displacement inquiry documentation, and failed to cooperate with the investigation. (Id. p. 424.) With regard to wages, Dalal testified that the regulations require H-1B immigrants to be paid a prevailing wage dependent upon their occupational specialty and geographic location. (Id.) These wages must be paid when the employee reports for work and must continue even when the employee is benched. (Id. p. 431.) According to WHI Dalal, the Department of Labor's prevailing wage rate for XCEL's H-1B employees for the relevant period was \$42,411.00. (Id. p. 425.) And, after calculating the periods of nonproductive time for which XCEL's H-1B employees were not paid, WHI Dalal found that XCEL owed eighteen employees \$255,094.52 in back wages. (Id. pp. 426-28.) To arrive at this figure, WHI Dalal relied upon the evidence listed *supra*. (Id. pp. 429-68.) XCEL's

thirty dollar per diem payments were not credited because those payments were not reported to the Internal Revenue Service and no taxes were withheld. (Id. p. 452.) Further, WHI Dalal found that many of the leave requests submitted by XCEL's H-1B employees throughout 2008 and 2009 were involuntary and that the employees were therefore entitled to wages during involuntary leave. (Id. pp. 456-57.)

Regarding XCEL's failure to post notice of an LCA, WHI Dalal explained that XCEL often placed its employees on projects using "intermediate vendors." (Tr. p. 469.) Intermediate vendors are staffing agencies, like XCEL, which have their own direct clients. (Id.) XCEL often entered into agreements with these staffing agencies to place H-1B employees at one of their direct clients. (Id.) These agreements often forbade XCEL from contacting the end client to prevent "building a rapport" and "taking [the end client] away from the intermediate vendor." (Id.) WHI Dalal stated that these agreements did not relieve XCEL from the obligation to post notice of the H-1B employee at the end client work site. (Id. p. 470.)

With regard to XCEL's failure to maintain posting and displacement inquiry documentation and failure to cooperate with the investigation, WHI Dalal testified that XCEL received an initiating letter in October 2009 requesting relevant H-1B documents. (Id. p. 475.) However, according to WHI Dalal, XCEL could not provide the Administrator with any displacement inquiry documentation. (Id.) XCEL did not provide LCAs or payroll records until "three or four months" after the initiating letter. (Id.) XCEL did not provide employee leave request emails until November 2010, after Jit Goel had claimed that the emails were stored on a laptop hard drive erased by Wanda Hightower. (Id. p. 476.) WHI Dalal also testified that Jit Goel represented two checks totaling \$5,000.00 to be per diem payments to Noel Rodriguez. (Id. p. 478.) According to WHI Dalal, these payments were actually loans made to Rodriguez which he paid back. (Id. pp. 478-81.)

Renu Goel

Renu Goel is the Vice President of XCEL Solutions Corporation. (Tr. p. 518.) She and her husband, Jit Goel, are the company's sole shareholders. (Id. p. 519.) Although Ms. Goel often signed LCAs on behalf of XCEL, she testified that she has never reviewed the applicable regulations. (Id. pp. 519-20.) Ms. Goel acknowledged receiving leave requests from Noel Rodriguez, Maria Bautista, and Valeria Fuentes in February 2009. (Id. pp. 524-29.) Ms. Goel also acknowledged executing hourly contracts in which H-1B employees were ineligible for bench pay. (Id. p. 525.) According to Ms. Goel, both Gabriela Andre and Rogelio Nantes signed an hourly contract. (Id. p. 526.)

Ms. Goel testified that H-1B employees have to post their resumes on online job boards and interview with clients before being placed on a project. (Tr. pp. 530-32.) Many client interviews are conducted telephonically and the calls can be taken by the employees at the office or at home. (Id.)

On November 5, 2009, Ms. Goel emailed Rogelio Nantes the address of a client in Dallas, Texas to whom Nantes was to report. (Tr. p. 535.) On November 12, Ms. Goel received an email from Nantes stating that he had been in Texas for four days but had not yet heard from

the client. (Id. p. 536.) Nantes informed Ms. Goel that he was withdrawing from the project and requesting leave. (Id. p. 540.) Ms. Goel subsequently placed Nantes on a project through an intermediate vendor. (Id. p. 543-44.)

Jit Goel

Jit Goel is the President of XCEL Solutions Corporation. (Tr. p. 570.) He and his wife are the company's sole shareholders. (Id. p.571.) Mr. Goel testified that XCEL does not hold formal shareholders' meetings and does not observe many other corporate formalities. (Id. p. 572.) According to XCEL's 2007 corporate tax return, XCEL loaned \$48,414.00 to Jit and Renu Goel. (Id.) Mr. Goel could not produce a promissory note evidencing the terms of this loan and claimed that this figure resulted from a glitch in XCEL's accounting software and actually represents state and federal taxes paid by XCEL. (Id.) \$48,414.00 was also listed as a loan on XCEL's 2008 corporate tax return. (Id. p. 576.) Mr. Goel explained that XCEL paid an identical amount of state and federal taxes in 2007 and 2008 and that an accounting glitch designated the figure as a loan. (Id.) By the end of the 2008 tax year, this figure had increased to \$128,915.00. (Id.) Again, Mr. Goel explained that the figure resulted from a programming error. (Id. p. 578.) \$129,000.00 in corporate shareholder loans is listed on XCEL's 2009 tax return. (Id. p. 579.) Although the Goels loaned money to XCEL from 2007 through 2009, these transactions were not documented. (Id. pp. 581-583.)

In order to house newly-admitted H-1B immigrants, Mr. Goel testified that XCEL rented several properties to be used as guest houses. (Tr. p. 583.) The first guest house, located on Ravine Drive in Matawan, New Jersey, was used throughout 2006 and 2007. (Id. p. 583.) The Goels stopped using this property as a guest house after purchasing a second property on Forest Gardens Drive in Matawan. (Id.) Both properties were purchased by the Goels and leased to XCEL for approximately \$3,000.00 per month. (Id. p. 586.) The Goels currently live in the Forest Gardens Drive property. (Id. p. 583.) XCEL's Matawan office is owned by Goel Associates, a corporation wholly owned by Jit Goel, and leased to XCEL for \$7,000.00 to \$10,000.00 per month. (Id. p. 591.)

In 2007, XCEL opened an office in the Philippines. (Tr. p. 595.) In order to fund the transaction, Mr. Goel opened a personal bank account with money from XCEL's corporate account. (Id.) Mr. Goel testified that the transaction was funded through a personal account to avoid Philippine bureaucratic formalities. (Id. pp. 595-96.)

Mr. Goel testified that it cost approximately \$10,000.00 to bring an H-1B nonimmigrant to the United States. (Tr. pp. 602-03.) During their initial bench period, H-1B employees reported to XCEL's Matawan office and were paid thirty dollars per day. (Id. pp. 606-10.) Mr. Goel testified that he knew that the thirty dollar per diem policy violated H-1B wage laws. (Id. p. 610.) Mr. Goel acknowledged an obligation to pay back wages for the initial bench periods listed on Administrator's Exhibit 17(a). (Id.) Mr. Goel also testified that once a project ended, an H-1B employee was paid full salary for two weeks. (Id. p. 611.) Thereafter, the employee was paid thirty dollars per day until their next project. (Id.) Mr. Goel acknowledged being told in 2007 that this policy violated the H-1B wage laws. (Id.)

According to Mr. Goel, he and his wife were responsible for making the secondary displacement inquiry after Wanda Hightower left work in March 2009. (Tr. p. 627.) In order to fulfill this requirement, Mr. Goel instructed intermediate vendors to complete a verification form. (Id. pp. 628, 637.) However, Mr. Goel testified that no intermediate vendor ever returned the form. (Id. p. 629.) Mr. Goel also stated that he never contacted an intermediate vendor or end client to confirm whether an H-1B employee's LCA was posted at the end client's work site. (Id.) Prior to March 2009, Mr. Goel assumed that Hightower made the secondary displacement inquiries, but "did not wish" to check for himself. (Id. p. 630.)

III. ANALYSIS

A. Back Wages

The INA's implementing regulations at 20 C.F.R. § 655.731 set forth the requirements employers must meet in employing nonimmigrant workers in specialty occupations. As stated above, employers must pay H1-B nonimmigrants as much as they pay other employees with similar experience and qualifications or the prevailing local wage level for the H-1B nonimmigrant's occupational classification, whichever is greater. 8 U.S.C. § 1182(n)(1)(A)(i)(I), (II). To satisfy this obligation, § 655.731(c) provides as follows:

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

Section 655.731(c) further requires that the cash wages be: 1) recorded in the employer's payroll records as earnings for the employee; and 2) reported to the Internal Revenue Service as the employee's earnings, with appropriate withholding for the employee's tax paid. 20 C.F.R. § 655.731.

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). For hourly employees, the wages are due for all hours worked at the end of the employer's ordinary pay period but no less frequently than monthly. 20 C.F.R. § 655.731(c)(5).

Finally, H-1B employees must be paid a prevailing 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 the XCEL failed to pay the prevailing wage to eighteen employees during times when they were “benched” without assigned projects.

1. Prevailing Wage

Prior to filing an LCA, an H-1B employer must determine the prevailing wage rate for the occupational classification in the nonimmigrant’s area of intended employment. 20 C.F.R. § 655.731(a)(2). This determination may be made using a prevailing wage survey for the occupation of intended employment published within a twenty-four month period preceding the LCA filing. 20 C.F.R. § 655.731(b)(3)(iii)(B).

Each of the LCAs at issue in this case list the FLDC’s Online Wage Library as the source for XCEL’s prevailing wage determination. (AX 18a-p.) WHI Dalal testified that the FLDC’s published prevailing wage rates are typically relied upon by Wage and Hour investigators. (Tr. p. 425.) Accordingly, I find that the FLDC provides the applicable prevailing wage rate for the H-1B employees working at XCEL’s Matawan office during the relevant period.² Therefore, I affirm the Administrator’s prevailing wage determinations as to the sixteen employees for which the Administrator submitted an LCA listing the FLDC prevailing wage rate.

For two individuals, Benedicto Maralit and Pawan Singh, the Administrator did not submit an LCA. The Administrator’s back wage calculations list Maralit’s prevailing wage as \$42,411.00, which matches the 2006 wage rate for a “Programmer Analyst.” (AX 18b) The Administrator did not list a prevailing wage for Pawan Singh, but asserted that he is owed \$4,791.00 for the final pay period of his employment. This total seems to be derived from Singh’s private employment contract with XCEL, which lists his yearly salary as \$115,000.00. (AX 81.) Because the record contains no other documentary or testimonial evidence pertaining to either Maralit or Singh’s prevailing wage, I must reverse the Administrator’s prevailing wage determination as to these individuals. Only six other XCEL H-1B employees were admitted as “Programmer Analysts,” a number insufficient to justify a presumption that Maralit was also admitted under that classification. The Administrator’s prevailing wage determination for Pawan Singh is also erroneous because it is based upon a private agreement over which the Administrator holds no enforcement authority under the H-1B regulations and is not, in fact, Singh’s prevailing wage. See Kersten v. Lagard, Inc., et al., ARB Case No. 06-111 at n. 23 (October 17, 2008) citing Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); Amtel Group of Florida, Inc. v. Yongmahapakorn, ARB No. 04-087, (Sept. 29, 2006). As a result, I remand these cases to the Wage Hour Division, Lawrenceville, New Jersey for a determination of the applicable prevailing wage for Benedicto Maralit and Pawan Singh.

² Although the Administrator submitted a printout from the FLDC’s Online Wage Library indicating that the prevailing wage for computer programmers in Matawan, New Jersey ranges from \$42,411 to \$83,054 per year (AX 19), not all of XCEL’s H-1B employees were admitted under that occupational classification. (AX 18 a-p.) Therefore, I will use the prevailing wage rate listed on each nonimmigrant’s LCA to calculate back wages.

2. Calculations³

The employees testified that XCEL required each employee to report to the Matawan office or be available to take calls from clients during their bench periods. (Tr. pp. 33-34, 81-82, 112, 130-31, 154, 174, 355.) XCEL paid each employee a per diem payment of thirty dollars for days when they were benched and did not otherwise have a project. Copies of checks presented in evidence conclusively establish that the employees' per diem payments were issued with no taxes withheld. (Tr. pp. 83, 176, 200-01, 355, 610; AX 23a-g, 24a-e, 49.) XCEL did not begin withholding taxes until employees began their first project. (*Id.* p. 4.) Because tax was not withheld, the per diem payments do not satisfy the H-1B wage requirements and cannot be credited as wages paid to the affected employees. 20 C.F.R. § 655.731(c)(2)(iii). Employee testimony, payroll records, and W-2 forms establish that employees were paid their contract salaries while on a project and that the contract salaries were greater than the prevailing wage. (Tr. 35-36, 113, 131-32, 176, 200-01; AX 16a-b, 25a-i.) I thus find that the affected employees are not entitled to back wages for periods in which they were placed on a project.

Christopher Anabo

Anabo was admitted as a "Computer Systems Analyst" at a prevailing wage rate of \$47,050.00 per year, or \$904.81 per week. (AX 18a.) Anabo arrived in the United States on February 7, 2008 and reported to XCEL's Matawan office on February 18. (AX 26 p. 2.) According to Anabo's signed affidavit, he was benched on three occasions: February 18 to April 11, 2008; April 6 to May 31, 2009; and September 29 to October 31, 2009. (AX 26.) These dates are uncontroverted and are corroborated by XCEL's employee information spreadsheet. (AX 14a p. 1.) During his first bench period, XCEL paid Anabo a thirty dollar per diem and reimbursed work related travel expenses. (AX 26 p. 2)

The Administrator submitted copies of three checks XCEL deposited into Anabo's bank account during his first bench period. (AX 24a) The first check, dated February 25, 2008, totals \$222.00 for "Per Diem from 2/18 - 2/24/08 & Taxi." (*Id.*) The second check, dated March 10, 2008, totals \$210.00 for "Per Diem from 2/23 - 3/2/08." (*Id.*) The final check, dated March 28, 2008 totals \$210.00 for "Per Diem from 3/3 - 3/9/08." (*Id.*) XCEL's payroll summaries indicate that these payments were direct deposited into Anabo's account. (AX 25a.) Regardless of the mode of payment, the checks and payroll summaries conclusively establish that Anabo's per diem payments were issued with no taxes withheld. XCEL did not begin withholding taxes until Anabo began his first project. (*Id.* p. 4.) Because tax was not withheld, the per diem payments do not satisfy the H-1B wage requirements and cannot be credited as wages paid to Anabo. 20 C.F.R. § 655.731(c)(2)(iii).

Anabo was benched and not paid his prevailing wage. Thus, I find that XCEL owes Anabo back wages from February 18 to April 13, 2008, or eight weeks. Based on Anabo's \$47,050.00 prevailing wage, he is owed \$7,238.48 for his first bench period.⁴

³ Each of the H-1B employees testifying in this matter stated that XCEL required they report to the Matawan office each weekday for eight hours. (Tr. pp. 33-34, 81-82, 112, 130-31, 154, 174, 355.) The calculations are therefore based on a five-day work week.

Anabo's affidavit states that he was placed on a project for Standard & Poor's from April 14, 2008 to April 3, 2009. (AX 26 p. 3.) On April 7, 2009, Anabo received a call from Renu Goel instructing that he request unpaid leave from April 6 through April 27 or face termination. (Id.) Anabo complied with the request. (Id. p. 12.) Ms. Goel again called Anabo on April 27 instructing that he take unpaid leave "until further notice." (Id. pp. 3, 14.) Anabo stated that he was not paid his salary or per diem from April 6 through May 31, 2009. (Id. p. 4.)

Anabo's reported bench dates correspond with those on XCEL's self-prepared employee information spreadsheet, which lists Anabo's non-productive time from April 3 to June 1, 2009. (AX 14a.) Although the spreadsheet also indicates that Anabo took unpaid leave beginning April 3, his statement regarding the ultimatum presented by Renu Goel was echoed by many of his fellow H-1B employees' testimony. (Tr. pp. 46-47, 90, 93, 207-09, 261, 358.) I find Mr. Anabo to be a credible witness based on his demeanor and on the consistency between his testimony and the testimony of the other employee witnesses. In contrast, I found Renu and Jit Goel to be less credible than any of the employee witnesses. Their testimony was self-serving and inconsistent with the documentary evidence as well as the testimony of all of their employees. I therefore find that Anabo's unpaid, nonproductive status during his second bench period was involuntary and "due to a decision by the employer" under 20 C.F.R. § 655.731(c)(7)(i). Accordingly, XCEL owes Anabo back wages from Monday, April 6, 2009 to May 31, 2009, or eight weeks. Based on Anabo's \$47,050.00 prevailing wage, he is owed \$7,238.48 for his second bench period.

From June 1 to September 22, 2009, Anabo worked on a project with Guide Point Global. (AX 26 p. 4.) On September 28, 2009, Renu Goel called Anabo and requested that he take unpaid leave from September 29 to October 13, 2009 or be terminated. (Id.) On October 14, Ms. Goel again contacted Anabo instructing that he extend his unpaid status through October 30. (Id. p. 5.) On November 2, Anabo was terminated. (Id.) Anabo stated that he received no salary or per diem from September 29 to October 31, 2009. (Id.)

Again, I note that Anabo's reported bench dates comport with XCEL's self-prepared employee information spreadsheet, which lists Anabo's nonproductive time from September 23, 2009 to his termination on November 2, 2009. (AX 14a.) And, although the spreadsheet indicates Anabo requested unpaid leave beginning September 28, the evidence establishes this request to be involuntary. XCEL therefore owes Anabo back wages from September 23 through November 2, 2009, or five weeks and four days. Based on Anabo's \$47,050.00 prevailing wage, he is owed \$5,066.93 for his third bench period.

Based on the above, Christopher Anabo is owed \$19,724.85 in back wages.

⁴ An annual prevailing wage of \$47,050.00 divided by fifty-two weeks of work amounts to a weekly wage of \$904.81.

Gabriela Andre

Andre was admitted as a “Programmer Analyst” at a prevailing wage rate of \$42,411.00 per year, or \$815.60 per week. (AX 18b.) Andre arrived in the United States and reported to XCEL’s Matawan office on April 26, 2007. (Tr. p. 80.) Andre testified that she was first benched from April 25 to May 23, 2007 before being placed on the Suburban Propane project. (*Id.* pp. 81-83.) Andre’s testimony corresponds with XCEL’s self-prepared employee information spreadsheet. (AX 13a p. 3.) Andre testified that during her initial bench period, she was paid only a thirty dollar per diem. (Tr. p. 83.) This testimony was corroborated by that of Jit Goel. (*Id.* p. 610.) Therefore, I find that XCEL owes Andre back wages from April 25 to May 23, 2007, or four weeks and 3 days. Based on her \$42,411.00 prevailing wage, Andre is owed \$3,751.76 for this period.

After the Suburban Propane project ended, Andre worked at Waste Management in Houston, Texas from November 5, 2007 to January 10, 2008. (Tr. pp. 84-85; AX 14a p. 3.) Andre was subsequently benched until February 3, 2008. (AX 14a p. 3.) Andre testified that she was paid full salary during the first two weeks of this bench period and was thereafter paid a thirty dollar per diem. (Tr. p. 85.) Based upon this uncontroverted testimony, I find that Andre is owed back wages from January 28 to February 3, 2008, or one week. Accordingly, Andre is entitled to \$815.60 for this period.

According to XCEL’s employee information spreadsheet, Andre worked at the New York Times from February 4, 2008 to February 5, 2009. (AX 14a p. 3.) Andre subsequently (and voluntarily) requested unpaid leave from February 9 to February 13, 2009. (Tr. p. 90; AX 30.) On February 16, Wanda Hightower instructed Andre to extend her unpaid leave effective March 2, or face termination. (*Id.* pp. 92-93; AX 32, 33.) As above, I find this testimony to be corroborated by many other H-1B nonimmigrants employed by XCEL. (Tr. pp. 46-47, 207-09, 261, 358; AX 26.) Therefore, I find Andre’s unpaid leave beginning February 16 to be involuntary. 20 C.F.R. § 655.731(c)(7)(i). After failing to place Andre on another project, XCEL terminated her employment on May 8, 2009. (*Id.* p. 98; AX 14a p. 3.) Andre is owed back wages from February 16, 2009 to May 8, 2009, or twelve weeks, totaling \$9,787.20.

Based on the above, Gabriela Andre is owed \$14,354.56 in back wages.

Maria Bautista

Bautista was admitted as a “Computer Systems Analyst” at a prevailing wage rate of \$47,050.00 per year or \$904.81 per week. (AX 18c.) She arrived in the United States and reported to XCEL’s Matawan office on February 25, 2008. (*Id.* pp. 197-98; AX 14a p. 5.) Bautista was not placed on a project until May 21, 2008. (Tr. p. 201; AX 14a p. 5.) From the time of her arrival until the start of her first project, Bautista was paid a thirty dollar per diem. (*Id.* pp. 200-01.) Bautista’s testimony regarding her first bench period and per diem pay is corroborated by XCEL’s employee information spreadsheet and Jit Goel’s testimony. (Tr. p. 610; AX 14a p. 5.) Therefore, I find that XCEL owes Bautista back wages from February 25 to May 20, 2008, or twelve weeks and two days. Based on her \$47,050.00 prevailing wage, Bautista is owed \$11,219.64 for her first bench period.

Bautista's first project ended on April 3, 2009 and Bautista thereafter returned to the Matawan office (Tr. pp. 205-06; AX 14a p. 5.) On April 6, Bautista spoke with Renu Goel and was told to take unpaid personal leave or be terminated. (Tr. pp. 206-07; AX 40.) On April 28, Ms. Goel instructed Bautista to extend her unpaid leave and Bautista complied. (Tr. p. 209; AX 40 p. 2.) Again, because this testimony is corroborated by Bautista's fellow employees, I find these leave requests to be involuntary. (Tr. pp. 46-47, 90, 93, 261, 358; AX 26.) Bautista's second bench period ended on June 1, 2009 after she was placed on a project for Guide Point Global. (Tr. p. 213; AX 14a p. 5.) XCEL therefore owes Bautista back wages from April 6 to May 31, 2009, or eight weeks, totaling \$7,238.48.

At the conclusion of the Guide Point Global project on September 22, 2009⁵, Bautista was again instructed to take unpaid personal leave through the end of October. (Tr. p. 218-19; AX 44.) Bautista was not placed on another project and terminated on November 2, 2009. (Tr. p. 220.) For the period September 23, 2009 to November 2, 2009 (five weeks and three days) Bautista is owed \$5,066.93.

In total, Maria Bautista is owed \$23,525.05.

Remar Cuyugan

Cuyugan was admitted as a "Database Administrator" at a prevailing wage rate of \$50,045.00 per year or \$962.40 per week. (AX 18d.) According to XCEL's employee information spreadsheet, Cuyugan arrived in the United States on April 8, 2008. (AX 14a p. 7.) Although the spreadsheet also states that Cuyugan never reported to work, I find that assertion incredible given that XCEL paid Cuyugan per diem totaling \$850.00 between April 7 and May 4, 2008. (AX 23b.) The Administrator offered no testimony regarding Cuyugan's employment. The employee information spreadsheets conflict as to Cuyugan's termination date. XCEL's spreadsheet indicates Cuyugan was terminated on May 21, 2008, when XCEL notified the INS of the withdrawal of the LCA. (AX 14a.) The Administrator's spreadsheet, on the other hand, indicates Cuyugan was employed through May 10, 2008. (AX 15.) The payroll records establish Cuyugan's employment though at least May 4, 2010. In light of this contradictory evidence, I defer to XCEL's spreadsheet indicating that the company withdrew the LCA on May 21, 2008. I find that Cuyugan's employment with XCEL extended from April 7, 2008 to May 21, 2008, or six weeks and three days. Therefore, Remar Cuyugan's back wages total \$6,351.84.

Olalekan Fabode

Fabode was admitted as a "Database Administrator" at a prevailing wage rate of \$50,045.00 per year or \$962.40 per week. (AX 18d.) According to XCEL's employee information spreadsheet, Fabode arrived in the United States on February 18, 2008. (AX 14a p. 12.) The spreadsheet also notes that Fabode was "taking care of personal matters and was not available for work" until May 12, 2008, the same day Fabode began a project with Duke Energy.

⁵ Bautista testified that she "believed" the Guide Point Global project ended on September 24, 2009 but XCEL's employee information spreadsheet has the project ending on September 22. (AX 14a p. 5.) Given the equivocality of Bautista's testimony, I find the employee information spreadsheet to be more probative as to the project's end date.

(Id.) As above, I find this assertion not credible given that XCEL paid Fabode \$2,105.00 in per diem and taxi reimbursements between March 7 and May 11, 2008. (AX 23c.) The overwhelming testimonial evidence indicates that H-1B employees reported to the Matawan office shortly after their arrival into the United States. (Tr. pp. 30-32, 82-83, 112-13, 199, 248-49, 305-07, 606-08). Employee testimony also established XCEL's practice of paying employees a thirty dollar per diem during their bench periods. (Tr. pp. 83, 176, 200-01, 355, 610; AX 23a-g, 24a-e, 49.) I thus find that XCEL's employee information spreadsheet is not credible with regard to Fabode's start date and that the per diem records establish his dates of employment. Accordingly, I find that Olalekan Fabode is owed back wages from March 14 to May 11, 2008, or eight weeks and one day, totaling \$7,891.68.

Valeria Fuentes

Fuentes was admitted as a "Computer Programmer" at a prevailing wage rate of \$68,515.00 per year or \$1,317.60 per week. (AX 18f.) Both Fuentes' testimony and XCEL's employee information spreadsheet indicate that she arrived in the United States on October 30, 2008 and reported to XCEL on November 20, 2008. (Tr. p. 354; AX 14a, 20a.) Fuentes was never placed on a project and was benched until her termination in February 2009. (Tr. pp. 354-62; AX 14a p. 14, 20a.) Fuentes further testified that she received a thirty dollar per diem, rather than the prevailing wage listed on her LCA. (Tr. pp. 355; AX 20a, 24c.) This testimony is corroborated by Jit Goel's testimony and XCEL's bank records, which indicate \$1,905.00 in per diem payments made to Fuentes between December 2008 and February 2009. (Tr. 610; AX 24c.)

The evidence conflicts, however, as to Fuentes' termination date. According to the employee information spreadsheet, Fuentes was terminated on February 10, 2009. (AX 14a p. 14.) Fuentes testified, however, that she was terminated on February 13 after refusing Renu Goel's instructions to take unpaid leave status. (Tr. pp. 356-57.) Fuentes' testimony is corroborated by a series of emails dated February 13 between Fuentes, Ms. Goel, and Ms. Hightower. The emails indicate that Fuentes wrote to Ms. Goel recapping a conversation in which Ms. Goel instructed Fuentes to take unpaid leave and requesting that Ms. Goel's instructions be placed in writing. (AX 47.) Less than four hours later, Fuentes received an email from Wanda Hightower with an attached termination letter. (AX 48 p. 3.) I therefore find that the evidence establishes Fuentes' employment with XCEL from November 20, 2008 to February 13, 2009, or twelve weeks and two days. Fuentes testified that she (voluntarily) took six personal days during this period, which reduces the nonpayment period to eleven weeks and one day. (Tr. p. 355.) Accordingly, XCEL owes Valeria Fuentes \$14,757.12 in back wages.

Orlando Geronimo

Geronimo was admitted as a "Programmer Analyst" at a prevailing wage rate of \$42,411.00 per year or \$815.60 per week. (AX 18g.) Geronimo testified that he arrived in the United States on January 22, 2007 and reported to XCEL on January 24. (Tr. p. 151.) The Administrator and XCEL's employee information spreadsheets conflict as to the date of arrival, but agree that Geronimo's first project began March 12, 2007. (AX 14a p. 14, 15 p. 3.) Given the uncontroverted witness testimony that all H-1B employees spent the first few weeks of

employment at XCEL marketing themselves to prospective clients (Tr. pp. 33-41, 82-83, 112-13, 129-31, 174-75, 199, 248-49, 305-07, 606-08), I find that XCEL benched Geronimo from January 24, 2007 to March 11, 2007, or six weeks and three days. XCEL therefore owes Geronimo \$5,382.96 in back wages.

Geronimo's employment ended on April 30, 2010. (Tr. p. 158; AX 15 p. 3.) Geronimo testified that XCEL withheld his final paycheck. (Tr. p. 158) Geronimo's testimony is corroborated by XCEL's notations on the Administrator's employee information spreadsheet. (AX 15 p. 3.) Although XCEL notes that the paycheck was withheld to satisfy a breach of contract claim, I note that this forum has no jurisdiction to enforce agreements existing outside of INA. Kersten v. Lagard, Inc., et al., ARB Case No. 06-111 at n. 23 (October 17, 2008). I therefore find that Geronimo is owed back wages for the two week pay period running from April 16, 2010 to April 30, 2010 totaling \$1,631.20.

In total, Orlando Geronimo is owed \$7,014.16.

Mary Ann Knaik

Knaik was admitted as a "Programmer Analyst" at a prevailing wage rate of \$42,411.00 per year or \$815.60 per week. (AX 18h.) In her signed declaration, Knaik stated that she arrived in the United States on June 3, 2008 and reported to XCEL's Matawan office on June 9, 2008. (AX 49.) XCEL's employee information spreadsheet also indicates that Knaik reported to work on June 9, 2008. (AX 15.) XCEL could not find a project for Knaik, who voluntarily left XCEL on November 6, 2008 to find work in Malaysia. (AX 49 p. 3.) Knaik stated that she received a thirty dollar per diem, rather than the prevailing wage listed on her LCA. (AX 49 p. 2.) This testimony is corroborated by Jit Goel's testimony and XCEL's bank and payroll records, which indicate that Knaik was paid per diem while waiting to be placed on a project.⁶ (Tr. 610; AX 24d, 25f.) Based on this evidence, I find that Mary Ann Knaik is owed back wages from June 9, 2008 to November 6, 2008, or twenty-two weeks, totaling \$17,943.20.

Joseph Layo

Layo was admitted as a "Programmer" at a prevailing wage rate of \$35,006.00 per year or \$673.19 per week. (AX 18i.) Layo arrived in the United States on June 15, 2006. (Tr. pp. 172-74; AX 14a.) Although XCEL's employee information spreadsheet indicates Layo reported to XCEL on July 6, 2006 – the start date of his Ernst & Young Project – Layo testified that he reported to XCEL's Matawan office the day after he arrived in the United States. (Tr. p. 174.) Given the uncontroverted witness testimony that each H-1B employee spent the first few weeks of their employment at XCEL marketing themselves to prospective clients (Tr. pp. 33-41, 82-83, 112-13, 129-31, 199, 248-49, 305-07, 606-08), I find Layo's testimony to be more credible with regard to the date he reported. Prior to being placed on a project with Ernst & Young on July 6, Layo testified that he was paid a thirty dollar per diem. (Tr. p. 176.) This testimony is corroborated by that of Jit Goel and other H-1B employees. (Tr. pp. 83, 200-01, 355, 610; AX

⁶ Although XCEL's payroll records pertaining to Knaik prior to June 1, 2008 are "missing" (AX 15 p. 3), payroll records submitted by the Administrator and uncontroverted witness testimony provide preponderant evidence that Knaik was paid a thirty dollar per diem throughout her bench period.

23a-g, 24a-e, 49.) XCEL therefore owes Layo back wages from June 16, 2006 to July 5, 2006, or two weeks and three days, totaling \$1,750.30.

Layo testified, and his resume indicates, that the Ernst & Young project ended on November 28, 2006. (AX 51; Tr. p. 175.) Layo resumed reporting to XCEL's Matawan office and received thirty dollars per day. (Tr. pp. 175-76.) Layo was placed on his second project on February 13, 2007. (Tr. pp. 176-77; AX 14a.) Based upon Layo's uncontroverted testimony, I find that XCEL owes back wages from November 29, 2006 to February 12, 2007, or eleven weeks and four days, totaling \$7,943.65.

From February 13 to May 31, 2007, Layo worked on a project with MMA Realty Capital. (Tr. p. 176; AX 14a.) On June 6, 2007 Layo was assigned to a project with Navimedix, Inc. (Id. p. 177.) The Navimedix project ended on August 17, 2007; Layo again reported to the Matawan office and received a thirty dollar per diem. (Id.; AX 14a.) Layo did not begin another project until October 8. Again, based upon Layo's uncontroverted testimony, I find that XCEL owes back wages from June 1, 2007 to June 5, 2007 (three days, excluding the weekend, for a total of \$403.92) and from August 18, 2007 to October 7, 2007, (seven weeks at \$4,712.33), totaling \$5,116.25.

Layo's final project lasted from October 8, 2007 to February 8, 2008, and Layo thereafter returned to the Matawan office. (Tr. p. 179; AX 52.) Although Layo testified that he was terminated in March 2008, XCEL's employee information spreadsheets indicate that Layo's final bench period lasted until April 8 and that a formal termination was effected July 14. (Id.; AX 14a.) XCEL put forth two emails sent by Wanda Hightower to Layo indicating that Layo ceased communicating with XCEL in late March/early April 2008. (Resp. 2, 3.) Given this evidence, I find that the employee information spreadsheet is most probative as to the end of Layo's final bench period. As a result, I find XCEL owes back wages from February 9, 2008 to April 8, 2008, or eight weeks and two days, totaling \$5,654.80.

Given the foregoing, XCEL owes Joseph Layo \$20,465.00, the sum of all items listed above.

Maria Katarina Lopez

Lopez was admitted as a "Programmer Analyst" at a prevailing wage rate of \$42,411.00 per year or \$815.60 per week. (AX 18j.) Determining the precise dates of Lopez's bench periods is difficult because the Administrator did not elicit testimony from Lopez, nor did Lopez file a W-4 complaint or submit a signed declaration. According to XCEL's self-prepared employee information spreadsheets, Lopez arrived in the United States on October 1, 2007. (AX 14a.) The Administrator lists Lopez's initial bench period as October 1 to December 31, 2007. (AX 15 p. 3.) In an email to investigator Suketu Dalal, Lopez stated that she received a thirty dollar per diem before beginning her first project in January 2008. (AX 22d.) This statement is corroborated by XCEL's employee information spreadsheets, which state that Lopez received \$2,730.00 during this period, or thirteen weeks' worth of thirty dollar per diem payments. (AX 15 p. 3.)

The Administrator also produced a signed agreement dated December 28, 2007 in which Lopez agreed to accept the thirty dollar per diem rather than the prevailing wage listed on her LCA. (AX 54.) Jit Goel acknowledged that this agreement violated XCEL's H-1B wage obligations. (Tr. p. 613.) In light of the foregoing, XCEL owes back wages to Lopez from October 1, 2007 to December 31, 2007, or thirteen weeks and one day, totaling \$10,765.92.

The Administrator's employee information spreadsheet lists Lopez's second bench period as October 15, 2008 to December 15, 2008. (Ax 15 p. 3.) Lopez, on the other hand, alleged that she was benched from October 20, 2008 to March 6, 2009. (AX 22d.) I note that both employee information spreadsheets are self-contradictory, indicating that Lopez's Home Depot project ended October 17 but that her second bench period began two days prior. (AX 14a, Ax 15 p. 3.) Given Lopez's statement, I find it more likely that the Home Depot project ended October 17 and that Lopez's second nonproductive period began on October 20, the following Monday.

Lopez's statement that she was benched through March 6, 2009, however, cannot be credited. Although the evidence indicates that Lopez was formally terminated on this date (AX 55), the Administrator put forth no evidence indicating that Lopez was available for work during this period. In fact, the Administrator's employee information spreadsheet indicates Lopez's second bench period ended on December 15, 2008 (AX 15 p. 3.) XCEL controverted this assertion by noting that Lopez remained in California and was unavailable for work. (*Id.*) Lopez's statement and the Administrator's spreadsheet are contradictory, and the Administrator has put forth no evidence, including payroll or per diem records, establishing that Lopez worked or was available for work after the Home Depot project ended. As a result, the Administrator has failed to meet its burden to establish Lopez's entitlement to back wages during this period.

In total, XCEL owes Maria Katarina Lopez \$10,765.92 in back wages.

Jay Maranan

Maranan was admitted as a "Computer Systems Analyst" at a prevailing wage rate of \$47,050.00 per year or \$904.81 per week. (AX 18k.) XCEL's employee information spreadsheet and Maranan's signed declaration state that Maranan arrived in the United States on February 14, 2008. (AX 14a p. 18, 57 p. 2.) Although XCEL's spreadsheet states that Maranan was terminated prior to reporting to XCEL, this assertion is not credible given that XCEL paid Maranan \$5,220.00 in per diem through August 15, 2008. (AX 15 p. 5, 24e.) In his signed declaration, Maranan stated that he reported to XCEL's Matawan office each weekday from February 15 to August 15, 2008 to search for potential projects. (AX 57 p. 2.) Maranan stated that he was never placed on a project and was paid a thirty dollar per diem during this period. (*Id.*) This testimony is consistent with that of Jit Goel and other H-1B employees. (Tr. pp. 83, 179, 200-01, 355, 610; AX 23a-g, 24a-e, 49.) I find Maranan's testimony credible, and XCEL therefore owes him back wages from February 15 to August 15, 2008, the date of his resignation. (AX 57 p. 3.) For twenty-six weeks and one day, XCEL owes Jay Maranan \$23,706.02.

Christopher Munez

Munez was admitted as a “Programmer Analyst” at a prevailing wage rate of \$42,411.00 per year or \$815.60 per week. (AX 18l.) According to XCEL’s employee information spreadsheet, Munez arrived in the United States on May 18, 2008 but did not report to XCEL until he began his first project. (AX 14a p. 20.) As above, I find it uncontroverted that all H-1B employees spent the first few weeks of their employment at XCEL marketing themselves to prospective clients (Tr. pp. 33-41, 82-83, 112-13, 129-31, 199, 248-49, 305-07, 606-08). I therefore find the Administrator’s spreadsheet more credible as to Munez’s start date, which is listed as May 18, 2008. (AX 15 p. 5.) The spreadsheets both list July 22, 2008 as the end of Munez’s initial bench period. (AX 14a p. 20, 15 p. 5.) Bank records indicate that Munez was paid \$210.00 per week, or thirty dollars daily, during this period. (AX 23e.) This is consistent with the extensive, uncontroverted evidence indicating that XCEL’s H-1B employees were paid a thirty dollar per diem during their bench periods. (Tr. pp. 83, 176, 200-01, 355, 610; AX 23a-g, 24a-e, 49.) The record indicates that Munez remains an XCEL employee. (AX 14a, 15.) Accordingly, XCEL owes Christopher Munez \$7,666.64.

Rogelio Nantes

Nantes was admitted as a “Computer Systems Analyst” at a prevailing wage rate of \$47,050.00 per year or \$904.81 per week. (AX 18m.) Nantes testified that he arrived in the United States on March 3, 2008 and reported to the Matawan office the next day. (Tr. p. 247.) Thereafter, Nantes reported to the Matawan office for eight hours each weekday to take calls from prospective clients. (*Id.* p. 249.) XCEL’s employee information spreadsheet indicates Nantes reported to work on September 8, 2008 – the start date of Nantes’ Northwestern Mutual Project. (AX 14a p. 20.) I find Nantes’ testimony in this regard credible given the great weight of evidence establishing that XCEL’s H-1B employees spent their initial bench period marketing themselves to prospective clients (Tr. pp. 82-83, 112-13, 30, 129-31, 199, 305-07, 606-08.) Emails between Nantes and XCEL management during this period also indicate Nantes was marketing himself during the initial bench period. (AX 61, 62.)

Nantes further testified that he was paid thirty dollars per day during this period. (*Id.* p. 255.) This testimony is corroborated by bank records indicating Nantes was paid \$5,610.00 in untaxed per diem from March 6 through September 12, 2008. XCEL therefore owes Rogelio Nantes back wages from March 4, 2008 to September 7, 2008, or twenty-six weeks and four days, totaling \$24,248.90.

Nantes worked on the Northwestern Mutual project until September 9, 2009. (Tr. p. 261; AX 14a p. 20.) Nantes testified that Renu Goel instructed him to take unpaid leave through the end of September or face termination. (Tr. p. 261.) Nantes complied with Ms. Goel’s request. (AX 64.) I find Rodriguez’s testimony regarding Ms. Goel’s ultimatum to be corroborated by similar testimony of other XCEL H-1B employees. (Tr. pp. 92-93, 46-47, 207-09, 358; AX 26.) Accordingly, I find his leave request to be involuntary.

On November 9, 2009, Nantes traveled to Dallas at his own expense to meet with a client. (Tr. pp. 273-74; AX 64 p. 2.) After the project fell through, Renu Goel again contacted

Nantes and requested he take unpaid leave retroactive to November 9, 2009. (*Id.* p. 276.) An email from Nantes to Ms. Goel dated November 16, 2009 states that Nantes failed to report to work for “personal reasons” despite an earlier correspondence indicating Nantes traveled to Dallas at XCEL’s behest the week prior. (AX 64 pp. 2-3.) Nantes was placed on his second project with Northwestern Mutual on November 20, 2009. (AX 14a p. 20) Again, I find the November 16, 2009 leave request to be involuntary. In light of the foregoing, XCEL owes back wages from September 10, 2009 to November 19, 2009, or ten weeks, totaling \$9,048.10.⁷

In total, XCEL owes Rogelio Nantes \$33,297.00.

Noel Rodriguez

Rodriguez was admitted as a “System Administrator” at a prevailing wage rate of \$49,046.00 per year or \$943.19 per week. (AX 18n.) Rodriguez testified at the hearing that he arrived in the United States on March 21, 2007 and reported to XCEL’s Matawan office the following day. (Tr. p. 30.) Although XCEL’s employee information spreadsheet indicates Rodriguez’s arrival on March 21, 2007, it notes that Rodriguez did not report to work until July 2, 2007 because he needed to “adjust himself to US [sic] work culture and to take care of family matters.” (AX 14a p. 22.) July 2, 2007 also happens to be the start date of Rodriguez first project with Sony Electronics. (*Id.*) Again, because overwhelming evidence indicates that XCEL’s H-1B employees spent their initial bench period marketing themselves to prospective clients (Tr. pp. 82-83, 112-13, 129-31, 199, 248-49, 305-07, 606-08), I find Rodriguez’s testimony credible.

Rodriguez further testified that, prior to being placed on the Sony Electronics project, XCEL paid a thirty dollar per diem. (Tr. pp. 35-36.) XCEL acknowledged these payments, but stated that Rodriguez’s inability to secure a project during this period resulted from “poor performance and lack of good communication skills.” (AX 15 p. 5) Rodriguez’s difficulty securing a client does not negate XCEL’s back wage liability. 20 C.F.R. § 655 *et. seq.* Thus, I find XCEL owes Rodriguez back wages from March 21, 2007 to July 1, 2007, or fourteen weeks and three days, totaling \$13,770.58.

Rodriguez testified, and XCEL’s employee information spreadsheet indicates, that the Sony Electronics project ended on January 15, 2008. (Tr. p. 40; AX 14a p. 22.) Rodriguez received a thirty dollar per diem until he started his next project on April 14, 2008. (Tr. p. 40; AX 15 p. 5.) Although Respondents allege that Rodriguez was “not available for opportunities” due to his hesitancy to relocate out of New Jersey (AX 69 p. 1), they have put forth no evidence indicating that a project requiring relocation was available for Rodriguez when he rolled off the Sony Electronics project. I therefore find that XCEL owes back wages from January 16 to April 13, 2008, or twelve weeks and three days, totaling \$11,884.20.

⁷ Nantes testified that his employment with XCEL ended on February 3, 2011, ten months after the investigatory period. (Tr. p. 245.) Thus, the employee information spreadsheets list Nantes as a “current” XCEL employee (AX 14a.) and the Administrator submitted no evidence indicating Nantes is owed back wages beyond November 19, 2009.

Rodriguez's second project ended on December 31, 2008 and Rodriguez resumed receiving per diem after taking a one week vacation. (Tr. p. 45; AX 14a p. 22, 22g p. 5.) Rodriguez testified that he received a call from Renu Goel on February 10, 2009 with instructions to request personal, unpaid leave or face termination because XCEL was no longer able to afford paying its H-1B employees the thirty dollar per diem. (*Id.* pp. 46-47.) Subsequently, Rodriguez emailed Goel requesting unpaid leave "until further notice." (*Id.* p. 47; AX 71.) Thereafter, Rodriguez received no pay and was terminated on March 6, 2009. (*Id.*; AX 15 p. 5.) I find Rodriguez's testimony regarding the unpaid leave request to be corroborated by other XCEL H-1B employees. (Tr. pp. 92-93, 207-09, 261, 358; AX 26.) Accordingly, I find his leave request to be involuntary. XCEL owes Rodriguez back wages from January 8, 2009 to March 6, 2009, or eight weeks and two days, totaling \$7,922.80.

In total, XCEL owes Noel Rodriguez \$33,577.58.

Johnny Ruiz

Ruiz was admitted as a "Computer Systems Analyst" at a prevailing wage rate of \$47,050.00 per year or \$904.81 per week. (AX 18o.) Ruiz testified that he arrived in the United States on June 8, 2008 and reported the XCEL's Matawan office the next day and began work. (*Id.* pp. 128-29.) Although XCEL's employee information spreadsheet indicates the Ruiz arrived on June 8, it notes that he did not report to work until July 14 due to "initial adjustment and time off for personal matters." (AX 14a p. 24.) July 14 is also the start date of Ruiz's first project. (*Id.*) As above, XCEL's employee information spreadsheet is not credible regarding the date Ruiz reported for duty and I instead credit Ruiz's testimony. (Tr. pp. 30-32, 82-83, 112-13, 199, 248-49, 305-07, 606-08).

During his initial bench period, Ruiz testified to being paid a thirty dollar per diem rather than the salary listed on his LCA. (Tr. p. 132.) This testimony is uncontroverted. Ruiz resigned from XCEL at the conclusion of his first project. (AX 76.) Based on the above, I find that XCEL owes Ruiz back wages from June 9, 2008 to July 13, 2008, or five weeks, totaling \$4,524.05.

Ruiz also testified that XCEL withheld his final paycheck. (Tr. p. 138) XCEL acknowledged withholding this paycheck to satisfy a debt. (AX 15 p. 5.) Again, however, I note that this forum lacks jurisdiction to enforce the terms of private loans made by XCEL to its employees. *Kersten v. Lagard, Inc., et al.*, ARB Case No. 06-111 at n. 23 (October 17, 2008). As a result, XCEL owes Ruiz back pay for the two week pay period of October 1, 2008 to October 15, 2008, totaling \$1,809.62.

In total, XCEL owes Johnny Ruiz \$6,333.67.

Alberto Tingson

Tingson was admitted as a "Computer Systems Analyst" at a prevailing wage rate of \$47,050.00 per year or \$904.81 per week. (AX 18p.) Tingson testified that he arrived in the United States on June 8, 2008 and reported the XCEL's Matawan office the next day, where he

worked marketing himself to potential clients. (Tr. pp. 109-11) Although XCEL's employee information spreadsheet indicates the Tingson arrived on June 8, it notes that he did not report to work until July 29 in order to "prepare himself adjust [sic] to US work culture and was taking care of personal matters." (AX 14a p. 26.) July 29 is also the start date of Tingson's first project, which lasted to March 26, 2010. (Id., AX 22h.) XCEL's notation is inapposite XCEL's bank records, which indicate Tingson was paid \$1,570.00 in per diem through July 25. (AX 23g.) The notation also conflicts with the overwhelming testimonial evidence indicating that H-1B employees reported to the Matawan office shortly after their arrival into the United States. (Tr. pp. 30-32, 82-83, 112-13, 199, 248-49, 305-07, 606-08).

Tingson also testified that he received a thirty dollar per diem rather than the salary listed on his LCA. (Tr. p. 114.) This testimony is corroborated by XCEL's bank records. (AX 23g.) XCEL terminated Tingson at the conclusion of his project on March 26, 2010. (AX 22h.) Accordingly, I find that XCEL owes Alberto Tingson back wages from June 9, 2008 to July 28, 2008, or seven weeks and one day, totaling \$6,514.63.

B. Civil Money Penalties

Under the regulations, a civil money penalty of up to \$1,000.00 per violation may be assessed for a violation pertaining to displacement of U.S. workers (§ 655.738), a "substantial" violation pertaining to notification (§ 655.734), and for violations of the requirements pertaining to public access where the violation impedes the Administrator's investigation (failure to cooperate) (§ 655.760). 20 C.F.R. § 655.810(b)(1). Penalties of up to \$5,000.00 per violation may be assessed for each "willful" violation pertaining to wages or working conditions. 20 C.F.R. § 655.810(b)(2). 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).

In determining the amount of a civil money penalty to be imposed, the Administrator shall consider the type of violation and other relevant factors and may apply, among other things, the factors listed in § 655.810(c), which include the employer's previous history; the number of workers affected; the gravity of the violations; the employer's explanations and efforts at compliance; and the extent to which the employer achieved financial gain due to the violation.

1. Willful Failure to Pay Prevailing Wage

As stated above, a civil money penalty of up to \$5,000.00 per violation may be assessed for willful failure to pay required wages. 20 C.F.R. § 655.810(b)(2)(i). In this case, the Administrator assessed a civil money penalty of \$3,750.00 for the Respondents' violation of the wage requirement as to each of the eighteen employees, for a total of \$67,500.00. WHI Rehl testified that the Administrator's standard procedure is to reduce the maximum civil money penalty (\$5,000.00) by fifty percent prior to applying the § 655.805(c) factors. (Tr. p. 392-93.) The Administrator then increased the penalty for each employee by \$750.00 because a 2007 investigation that XCEL had violated identical H-1B provisions in much the same manner. (Tr. p. 393; AX 3, 7). The Administrator increased the penalty another \$750.00 per employee based

upon the financial gain realized by Respondents for failing to pay a prevailing wage. (Tr. p. 395.) The Administrator decreased the penalty by \$250.00 given the relatively small number of affected employees.⁸ (Tr. pp. 393-94.)

After reviewing the evidence, I find the Administrator's penalty to be reasonable. Jit Goel acknowledged meeting with WHI Rehl in 2007 and being told that XCEL's bench pay policies violated the H-1B wage laws. (Tr. p. 611.) Pursuant to that investigation, XCEL was assessed \$47,034.09 in back wages. (AX 3.) The failure to pay prevailing wage in the current case was willful, in that XCEL demonstrated a knowing failure to ensure that its conduct was in compliance with the regulations.

I note that although I only found back wages due for sixteen employees, and have remanded the matter with respect to the other two employees, I agree with the Administrator's proposal to multiply the civil money penalty by a factor of eighteen. With respect to the two employees subject to the remand, Benedicto Maralit and Pawan Singh, I found that the Administrator established that these employees were subject to benching and were not paid the appropriate wage. The only fact not established by the Administrator was the actual amount of back wages due to Mr. Maralit and Mr. Singh, in the absence of copies of their LCA's. It is thus appropriate to multiply the civil money penalty for failure to pay the prevailing wage by all eighteen affected employees.

Given the foregoing, and noting that \$67,500.00 is well under the maximum authorized under the regulation, I affirm the Administrator's determination.

2. Failure to Post Notice

The regulations require an employer of H-1B nonimmigrants to provide notice of the filing of an LCA. The employer is to post notice of filings in two or more conspicuous locations in the employer's establishment in the area of intended employment. The notice shall indicate that H-1B nonimmigrants are sought; state the number of such nonimmigrants the employer is seeking, the occupational classification, the wages offered, the period of employment, and the locations at which the H-1B nonimmigrants will be employed. 20 C.F.R. § 655.734. The LCA must be available for public inspection at all worksites an employer places an H-1B nonimmigrant "whether the 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). Notification must be given on or within 30 days before the date an LCA is filed and remain posted or available for a total of ten days. 20 C.F.R. § 655.734(a)(1)(ii)(A). In addition, an H-1B employer must make available for public examination the actual LCA and other specified documents at the employer's principal place of business or worksite, within one working day after the date on which an LCA is filed. § 655.760. This regulatory section lists the documentation that must be available for public examination, which include the following: (1) a copy of the LCA; (2) documentation which provides the wage rate to be paid; (3) a full, clear explanation of the system that the employer used to set the actual wage paid; and (4) a copy of the documentation the employer used to establish the prevailing wage for the occupation for which employment for H-1B nonimmigrants is sought.

⁸ \$5,000(.50) + \$750 + \$750 - \$250 = \$3,750.

WHI Dalal testified that XCEL often placed H-1B employees on various projects through other staffing agencies, known as “intermediate vendors.” (Tr. pp. 469-70.) According to WHI Dalal, XCEL’s contracts with intermediate vendors prohibited XCEL from contacting the end client and, consequently, prevented XCEL from directly requesting the end client to post the LCA. (Id.) Jit Goel testified that XCEL provided intermediate vendors with LCA posting verification forms that were to be distributed to end clients to complete and return to XCEL. (Id. p. 628; AX 66.) However, XCEL never verified whether the intermediate vendors distributed the verification and Mr. Goel testified that XCEL never received a completed form. (Tr. p. 629.) From January 2008 to March 2009, Mr. Goel tasked Wanda Hightower with providing the posting verification forms to intermediate vendors, but “did not wish” to check whether Hightower ever actually distributed them. (Id. p. 630.)

As stated above, the regulations provide for a civil money penalty of up to \$1,000.00 per violation for each “substantial” violation of the notification requirement and \$5,000.00 for each willful violation. 20 C.F.R. § 655.810(b)(2)(i). I again note that Respondents were informed of the posting requirements by WHI Rehl during the 2007 investigation. (Tr. p. 625.) WHI Rehl testified that he informed Respondents in 2007 that the LCA must be placed at the H-1B employees’ actual work location. (Id. pp. 385-86, 625; AX 3, 7.) Accordingly, I find that Respondent willfully violated § 655.734. The testimonial evidence evinces a conscious decision by Respondents to ignore whether the LCAs were posted at end client locations despite being notified of the posting requirements throughout the course of the 2007 investigation.

Because the total number of posting violations was unknown, the Administrator assessed \$3,750.00 based upon a single violation. I find this penalty to be reasonable given the testimonial evidence establishing Respondents’ practice of placing employees at end client locations without first ensuring that the LCA would be posted. I affirm the Administrator’s determination.

3. Secondary Displacement Inquiries

Under 20 C.F.R. § 655.738(d)(5), an “H-1B dependent” employer is prohibited from placing workers with a secondary employer without first making inquiries to determine if any U.S. workers would be displaced by the H-1B nonimmigrant to be placed at the secondary employer’s work site. This inquiry must be made within ninety days of the placement of the nonimmigrant worker. 20 C.F.R. § 655.738(d)(5). The parties stipulated that XCEL was an H1-B dependent employer throughout the relevant period.⁹

An employer must exercise due diligence in making the secondary employer inquiries. Reasonable efforts of compliance include: written assurance, memorandum of an oral assurance, or a contractual provision in which the secondary employer agrees that it will not displace U.S. workers. 20 C.F.R. § 655.738(d)(5)(i)(A)-(C). If an H-1B dependent employer has information that some U.S. workers have been displaced, then the employer must exercise more than due

⁹ An “H-1B dependent” employer is an employer that has 1) twenty-five or fewer full-time employees in the U.S., more than seven of whom are H-1B nonimmigrants; 2) between twenty-five and fifty full-time employees in the U.S., more than twelve of whom are H-1B nonimmigrants; or 3) more than fifty full-time employees in the U.S., at least fifteen percent of whom are H-1B nonimmigrants.

diligence by making a particularized inquiry. 20 C.F.R. § 655.738 (d)(5)(ii). Finally, an H-1B dependent employer must document the means it utilized to satisfy its obligation concerning displacement of U.S. workers by secondary employers. 20 C.F.R. § 655.738 (e)(2).

WHI Dalal testified that XCEL failed to conduct secondary displacement inquiries because its contracts with intermediate vendors prohibited contact with the end client. (Tr. p. 474.) Jit Goel testified that it was Wanda Hightower's duty to make the displacement inquiries and that he made no attempt to ensure her compliance. (Id. p. 630.) Like the LCA posting requirement, I find that the testimonial evidence establishes that Respondents purposefully ignored whether secondary displacement inquiries were made. Respondents could produce no documentation showing that XCEL attempted to satisfy its obligations under 20 C.F.R. § 655.738. I therefore affirm the Administrator's determination that Respondents failed to make secondary displacement inquiries and failed to maintain proper documentation.

The regulations provide for a civil money penalty of up to \$1,000.00 for each violation of the secondary displacement inquiry requirement. Because the total number of violations was unknown, the Administrator assessed \$600.00 in civil money penalties. I find this assessment reasonable.

4. Failure to Cooperate

Section 655.800(c) provides:

An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question or inspect.

WHI Dalal testified that Respondents failed to provide employee emails and leave requests until December 2010 – over one year after the Administrator issued the Initiating Letter instructing Respondents to produce documents relevant to the investigation. (Tr. p. 478.) Respondents also failed to produce employee sign-in sheets and expense reports, though Wanda Hightower testified that XCEL maintained hard copies of these documents at the Matawan office. (Id. pp. 322-23, 633.) WHI Dalal testified that, prior to December 2010, Jit Goel had claimed that the employee leave requests were stored on a laptop computer assigned to Wanda Hightower, and that Hightower had deleted the documents from the computer's hard drive prior to her departure in July 2009. (Id. p. 477.) This testimony was corroborated at the hearing by Jit Goel. (Id. p. 634.)

Mr. Goel testified that the production of the employee leave requests was delayed because the requests were stored on a laptop assigned to Ms. Hightower and were deleted when she left the company. I do not find Mr. Goel's testimony credible given that many of the leave requests were made after Hightower had left XCEL and thus could not have been stored on her laptop. (AX 28, 44, 64.) It is also worth noting that much of the evidence produced by Respondents was incomplete and often misleading. For instance, Johnny Ruiz provided WHI Dalal a copy of an email chain in which he asked Wanda Hightower for clarification regarding

bench pay. (AX 77.) Respondents provided WHI Dalal with the same email chain, but excluded five emails in which Ruiz expressed concern to Hightower that he would be paid thirty dollars while benched. (AX 76.)

In light of the foregoing, I affirm that Administrator's determination that Respondents failed to fully cooperate in the investigation. The regulations provide for a civil money penalty of up to \$1,000.00 for violations which impede the Administrator's ability to investigate a violation of the INA's prevailing wage laws. § 655.760. The Administrator assessed \$600.00 in civil money penalties, which is under the regulatory maximum. I find this determination reasonable.

C. Interest

The Administrator's initial determination stated Respondents' back wage liability was subject to the assessment of interest and administrative fees and penalties. (AX 1 p. 2.) As of the date of the Administrator's initial determination, in February 2011, the rate of interest to be assessed on any delinquent payment was one percent, and a penalty at the rate of 6% was to be assessed on any portion of debt remaining after ninety days. (Id.)

The Administrative Review Board has held that, notwithstanding that the Immigration and Nationality Act does not specifically authorize an award of interest on back pay, interest shall be paid on awards of back pay, with compound interest to be paid prejudgment. Innawalli v. Am. Info. Tech. Corp., Case No. 05-165 (ARB Sept. 29, 2006), slip op. at 8-9; Amtel Group of Florida, Inc., v. Yongmahapakorn, Case No. 04-087 (Sept. 29, 2006), slip op. at 12-13.¹⁰ The Board also has set the rate of interest at the rate charged on underpayment of federal income taxes prescribed under 26 U.S.C. § 6621(a)(2). Mao v. Nasser, Case No. 06-121 (ARB Nov. 26, 2008), slip op. at 11-12.

Based on the foregoing, I find that prejudgment compound interest is due on the back wages due. Post-judgment interest is due on all back wages until paid or otherwise satisfied.

D. Piercing the Corporate Veil

The Administrator's initial determination held not only the corporate entity XCEL responsible, but also held Jit and Renu Goel individually responsible for payment of assessed back wages and civil money penalties. (AX 1.) Although corporate entities are presumed to be separate and distinct from its shareholders, a court, on occasion, may hold corporate shareholders personally liable where they have ignored corporate formalities and the situation presents an element of "injustice" or "fundamental unfairness." U.S. v. Pisani, 646 F. 2d 83 (3d Cir. 1981) *citing* DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F. 2d 681 (4th Cir. 1976.) Factors to be considered include undercapitalization, non-payment of dividends, insolvency, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. The burden of

¹⁰ There is no authority for the charging of interest on civil money penalties. *See, e.g., Innawalli*, slip op. at 9.

establishing a basis for piercing the corporate veil rests on the party asserting such claim. *See, e.g., DeWitt*, 540 F. 2d at 683.

Testimonial and documentary evidence establish a basis for disregarding the corporate form here. Jit and Renu Goel are XCEL's sole shareholders and corporate officers. (Tr. pp. 569-71.) Jit Goel testified that XCEL does not regularly hold formal shareholder meetings nor does it distribute shareholder dividends. (Tr. pp. 570-71.) Although Respondents "[i]nitially [] had one or two" official meetings, no minutes or records were kept. (*Id.* p. 571.)

XCEL's corporate tax returns indicate the company loaned Respondents \$129,288.00 between 2007 and 2009. (AX 89 a-c.) Jit Goel testified that these figures represented state and local tax payments that were incorrectly classified as loans by XCEL's accountant and that no promissory notes relating to the loans exist. (Tr. p. 573.) However, I do not find Mr. Goel's explanation credible given that the same "mistake" was made on three consecutive tax returns and that the "beginning of the year" loan amounts match, down to the dollar, the loan amounts for the prior year.

Jit Goel also testified to receiving between \$10,000.00 and \$13,000.00 in monthly rent payments from XCEL. (Tr. pp. 583-91.) XCEL's current guest house is owned by Respondents and leased to XCEL for \$3,000.00 per month. (*Id.* p. 586.) XCEL's Matawan office is owned by Goel Associates, a corporation wholly owned by Mr. Goel, and leased to XCEL for \$7,000.00 to \$10,000.00 per month. (*Id.* p. 591.) In 2007, Mr. Goel funneled money from XCEL's corporate bank account into a personal account in order to open an office in the Philippines. (*Id.* pp. 595-96.) Regarding this transaction, Mr. Goel testified: "for me, it is personal assets and my business. I did not differentiate, this is my personal money. The money I took was from XCEL [sic] United States bank account." (*Id.* p. 597.)

Given the foregoing, I find it clear the XCEL served as the alter-ego of Mr. and Ms. Goel. Respondents observed no corporate formalities, received from XCEL hundreds of thousands of dollars in loans and rents but could produce no documentation memorializing these transactions, and intermingled corporate and personal assets. As a result, Respondents compromised XCEL's ability to comply with the H-1B wage laws. Thus, justice and fundamental fairness require that Mr. and Ms. Goel be held personally liable for back wages and civil money penalties assessed by the Administrator.

ORDER

For the foregoing reasons, I find that Respondents violated the H-1B wage laws. It is hereby ORDERED:

- 1) Respondents must pay \$ 253,888.92 in back wages to the following former H-1B employees: Christopher Anabo (\$19,724.85), Gabriela Andre (\$14,354.56), Maria Bautista (\$23,525.05), Remar Cuyugan (\$6,351.84), Olalekan Fabode (\$7,891.68), Valeria Fuentes (\$14,757.12), Orlando Geronimo (\$7,014.16), Mary Ann Knaik (\$17,943.20), Joseph Layo (\$20,465.00), Maria Katarina Lopez (\$10,765.92), Jay Maranan (\$23,706.02), Christopher Munez (\$7,666.64),

Rogelio Nantes (\$33,297.00), Noel Rodriguez (\$33,577.58), Johnny Ruiz (\$6,333.67), Alberto Tingson (\$6,514.63).

- 2) The claims of two former H-1B employees, Benedicto Maralit and Pawan Singh, are remanded to the Lawrenceville New Jersey Wage and Hour Office for a determination of their applicable prevailing wage during the relevant period.
- 3) The Administrator's assessment of \$67,500.00 in civil money penalties for Respondents' willful failure to pay a prevailing wage is affirmed.
- 4) The Administrator's assessment of \$3,750.00 in civil money penalties for Respondents' failure to post notice of an LCA at end client work sites is affirmed.
- 5) The Administrator's assessment of \$600.00 in civil money penalties for Respondents' failure to make secondary displacement inquiries is affirmed.
- 6) The Administrator's assessment of \$600.00 in civil money penalties for Respondents' failure to cooperate in the investigation is affirmed.
- 7) Respondents are responsible for pre-judgment compound interest on the aforementioned back wage assessments. I also find they are responsible for post-judgment interest on all back wage assessments, until satisfied.

A

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

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

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

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