

Issue Date: 24 July 2012 U.S. DEPARTMENT OF LABOR

**Office of
Administrative Law Judges**

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Case No.: 2012-LCA-00015

In the Matter of:

**ADMINISTRATOR, WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR,**

Complainant/Prosecuting Party,

v.

ABACUSS SOFTWARE TECHNOLOGIES, LLC,

Respondent.

APPEARANCES: Melanie L. Paul, Esq.
Kristin R. Murphy, Esq.
On behalf of the Complainant

Michael F. Leban, Esq.
On behalf of the Respondent

BEFORE: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER – AWARDING BACK PAY AND INTEREST

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

By the Administrator's Determination of January 4, 2012, the Administrator found that the Defendant had committed two violations of the H1B provisions of the INA. The violations were: (1) the Defendant failed to pay required wages to three non-immigrant workers in the total amount of \$75,840.00 pursuant to 20 CFR §655.731; and (2) the Defendant failed to provide notice of the Labor Certification Application as required pursuant to 20 CFR §655.734. The Administrator imposed no civil money penalties and ordered the Defendant to pay back wages in the amount of \$75,840.00 and to comply with the provisions of 20 CFR §655.731 and 20 CFR §655.734 in the future. On January 19, 2012, the Defendant filed an answer and request for formal hearing. In the filing the Defendant disputed the back wage payments to the three identified H1B nonimmigrant workers.

A formal hearing was held on May 4, 2012 in Newport News, Virginia, with all Parties present with counsel. At the hearing attorney M. Leban appeared for the Respondent with R. Padmanabhan, CEO, member and registered agent of the named Respondent limited liability company. Respondent's counsel reported that counsel of record, C.B. Sharma and P. Sushcelan from the law firm of Sharma, Sokolov, Yaskhi and Ishar, L.L.P., would not be attending the hearing. The Administrator withdrew the alleged violation of the INA involving Nayak Lopamudra (LCA# I-08089-4173757) (TR 9).

At the formal hearing, Administrative Law Judge exhibits (ALJX) 1 through 8 and Solicitor exhibits (GX) 1 through 22 were admitted without objection (TR 5-6, 15-17, 117-119). Solicitor's exhibit 23 was admitted over Respondent's objection (TR 117-119) ALJX 9 included Exhibit A which was a Request for Admissions to be deemed admitted. Respondent objected to the admissions being deemed admitted "because the ball was dropped between two law firms that previously represented the Respondent." The Solicitor's counsel averred that she "had spoken with Mr. Koch around the time that he was withdrawing as counsel ... [and] personally spoke with Mr. Ravi Padmanabhan, Respondent's CEO. Who is present here today, between the time he had counsel and we also discussed his responsibility to respond to discovery and he had indicated to me at the time that he had received the discovery from Mr. Koch at that time." Respondent's objection to the admissions set forth in Exhibit A to ALJ 9 was overruled and the admissions deemed admitted (TR 6-8). Employer's exhibits 1, 2 and 3 were admitted over objection (TR 17-23, 119). Judicial notice was taken of monthly Federal short-term interest rates used in determining pre-judgment and post-judgment interest in immigration back wage cases as summarized in ALJX 10 (TR 89-90). The record was closed at the end of the hearing (TR 168). Subsequently, Respondent submitted a facsimile transmission, marked as Employer's exhibit 4, that contained October 29 and 30 e-mails involving the Respondent and the law firm of Chandler, Sharma as well as e-mails from Vidhya Suvarna that are contained in Solicitor's exhibit 14. Employer's exhibit 4 was not admitted into evidence but is attached for review purposes.

RESPONDENT ADMISSIONS

The following admissions by Respondent were deemed admitted pursuant to 29 CFR §18.20 (TR 8):

1. Respondent submitted an H1B Visa Application/Petition for a Nonimmigrant Worker (form I-129) with USCIS on behalf of Sumati Gupta on or about April 14, 2008.
2. USCIS approved the Petition for a Nonimmigrant Worker (I-129) that Respondent submitted on behalf of Sumati Gupta on or about July 17, 2008.
3. The LCA Respondent filed with the Department of Labor on behalf of Sumati Gupta (LCA # I-08086-4126609) listed her rate of pay as \$30.00 per hour.
4. The LCA Respondent filed with the Department of Labor on behalf of Sumati Gupta (LCA # I-08086-4126609) listed the prevailing wage for a Computer Software Engineer in Atlanta, Georgia as \$28.66 per hour and \$23.28 per hour for Dallas, Texas.
5. The approved Petition, Form 1797A for Sumati Gupta (Receipt Number EAC-08-155-50624), was valid from October 1, 2008 to September 25, 2011.
6. Sumati Gupta was already in the United States, as on or about January 2008, when she posted her resume online at www.dice.com.
7. Sumati Gupta was in the country and available to work for Respondent on October 1, 2008.
8. Respondent sent Sumati Gupta a Preliminary Offer of employment on or about February 20, 2008, to work as a Programmer/Analyst with a base salary of \$42,000.00 and a total compensation package of \$58,300.00, which Ms. Gupta executed on February 24, 2008.
9. In September 2008, Respondent notified Sumati Gupta that her H1B Visa application had been approved and sent her a "Pre-Employment Agreement" dated September 19, 2008.
10. The Pre-Employment Agreement for Sumati Gupta states, under "Terms of Employment" that "this agreement will begin October 1st 2008, ("Effective Date") until September 25th 2011, unless sooner terminated."
11. Sumati Gupta contacted Respondent multiple times to request her H1B Visa documents, but to date (April 26, 2012¹), you still have not provided her with a copy of her LCA.
12. Respondent did not provide Sumati Gupta with any work projects from October 1, 2008, until her Petition was revoked on May 18, 2009 at your withdrawal request sent on March 17, 2009.
13. Respondent did not pay Sumati Gupta any wages, provide her with benefits, or list her on its payroll at any time from October 1, 2008 until Respondent sent USCIS its withdrawal request on March 17, 2009.
14. Respondent an H1B Visa Application/Petition for a Nonimmigrant Worker (form I-129) with USCIS on behalf of Vidhya Suvarna on or about April 14, 2008.
15. USCIS approved the Petition for a Nonimmigrant Worker (I-129) (EAC-08-149-50834) that Respondent submitted to USCIS on behalf of Vidhya Suvarna on or about July 21, 2009.
16. The LCA Respondent filed with the Department of Labor on behalf of Vidhya Suvarna (LCA # I-08086-4126945) listed her rate of pay as \$30.00 per hour.
17. The LCA Respondent filed with the Department of Labor on behalf of Vidhya Suvarna (LCA # I-08086-4126945) listed the prevailing wage for a Computer Software Engineer in Atlanta, Georgia as \$28.66 per hour and New York City, New York at \$29.61 per hour.
18. The approved Petition, Form 1797A for Vidhya Suvarna (Receipt Number EAC-08-149-50834), was valid from July 21, 2009 to September 25, 2011.

¹ Date of filing Motion to have Request for Admissions deemed admitted (ALJX 9).

19. Vidhya Suvarna was already in the United States as when Respondent contacted her about a job after viewing her resume in March 2008.
20. Vidhya Suvarna was already in the United States as when Respondent submitted her H1B Visa Application/Petition for a Nonimmigrant Worker (Form I-129) to USCIS.
21. Vidhya Suvarna was available to work for Respondent the date her H1B Visa became valid on July 21, 2009.
22. Vidhya Suvarna contacted Respondent's HR Recruiter and CEO multiple times from August 2009 through October 2009 to request a copy of her H1B Visa application materials.
23. As of April 26, 2012² Respondent has not provided Vidhya Suvarna with a copy of her LCA submitted to the Department of Labor on her behalf.
24. Respondent did not provide Vidhya Suvarna with any work projects from October 1, 2008, until USCIS revoked her Petition on March 31, 2010, based on Respondent's request to withdraw her Petition sent to USCIS on October 29, 2009.
25. Respondent did not pay Vidhya Suvarna any wages, provide her with benefits, or list her on its payroll at any time from July 21, 2009 until Respondent sent USCIS its request to withdraw her Petition on October 29, 2009.
26. Respondent did not pay/offer to pay for Vidhya Suvarna's return trip home at any time.
27. Respondent did not pay/offer to pay for Sumati Gupta's return trip home at any time.

ISSUES

The remaining issues are (TR 9-15):

1. Did Respondent violate 20 CFR §655.731 by failing to pay appropriate wages and benefits to H1B non-immigrant Sumati Gupta for the period October 1, 2008 to May 18, 2009 ?
2. If so, what is the back wage and benefits, if any, owed by Respondent to H1B non-immigrant Sumati Gupta ?
3. Did Respondent violate 20 CFR §655.731 by failing to pay appropriate wages and benefits to H1B non-immigrant Vidhya Suvarna for the period July 21, 2009 to October 29, 2009 ?
4. If so, what is the back wage and benefits, if any, owed by Respondent to H1B non-immigrant Vidhya Suvarna ?
5. Did Respondent violate 20 CFR §655.734 by failing to provide H1B non-immigrant Sumati Gupta a copy of the applicable LCA ?
6. Did Respondent violate 20 CFR §655.734 by failing to provide H1B non-immigrant Vidhya Suvarna a copy of the applicable LCA ?
7. What are the appropriate sanctions, if any, for Respondent's violations of 20 CFR §655.731 and 20 CFR §655.734, if any ?
8. Is Respondent liable for return travel in the case of non-immigrant Sumati Gupta ?

PARTY POSITIONS / ARGUMENT

Solicitor's position / argument (TR 22-25, 157-165):

² Date of filing Motion to have Request for Admissions deemed admitted (ALJX 9).

Solicitor's counsel submits that Respondent is an IT staffing company that recruits employees and projects for employees. Sumati Gupta was recruited and hired as a software engineer under an H1B petition effective October 1, 2008; however, she was never provided any work despite requesting work and project assignments and requesting where and when to report for work by telephone and e-mail. Sumati Gupta repeatedly requested a copy of her labor condition application, which was never provided. Her H1B status was eventually revoked on May 18, 2009. Sumati Gupta was never given any work nor was she paid. There was never a bone fide termination of her employment and she is entitled to back wages for the period October 1, 2008 to May 18, 2009 in the amount of \$37,372.64, prejudgment interest on the back wage owed, and return transportation home.

Solicitor's counsel submitted that Vidhya Suvarna was recruited by Respondent and hired under an H1B petition effective July 21, 2009; however, she was never provided with any work or projects despite repeated requests by telephone and e-mail, and helping Respondent find projects and work. Vidhya Suvarna was not provided a copy of her labor conditions application despite repeated requests. Her H1B petition and H1B status was withdrawn effective the end of October 2009. Vidhya Suvarna is entitled to back wages for the period July 21, 2009 through the end of October 2009 in the amount of \$16,508.16 and prejudgment interest on the back wage owed.

Solicitor's counsel argued that the Respondent sponsored Sumati Gupta and Vidhya Suvarna by visa petitions that were approved by USCIS. While neither woman was living in Atlanta at the time, they were ready and available to work and awaited project to be assigned by Respondent. They were both willing to commute to Atlanta or any other location where the Respondent's clients were located. At no time during employment with Respondent did they make themselves unavailable. They did not travel outside the country during their respective employment periods, and they were repeatedly and regularly in touch with Respondent's personnel waiting for assignments and a copy of their respective LCA.

Solicitor's counsel argued that Respondent's CEO and limited liability company member had been in business 12 years and was an H1B dependent employer with 300 to 400 H1B petition filings on behalf of employees. Accordingly, Respondent should have been aware of requirements to maintain a public file for Department of Labor review during an investigation and to provide non-immigrant employees with a copy of their respective LCA. She argues that the two women complied with everything asked of them by Respondent, including updating resumes for specific projects and taking interviews with Respondent's clients. They were ready, willing, and able to report for work at any time and did everything asked by the Respondent over an extensive period of time.

Solicitor's counsel argues that Vidhya Suvarna found project to perform and informed Respondent as required by her employment agreement and that Respondent interfered with another company hiring Vidhya Suvarna for a full-time position by withholding LCA documents thus forcing her to return to India at her expense to rectify her immigration / visa status. She argues that Sumati Gupta was unaware of her March employment termination even while seeking work through Respondent in April 2009 and had to return to India at her personal

expense to change her immigration status because Respondent failed to provide her with the LCA documents as required by law.

Solicitor's counsel argues that the two women were employees of Respondent, even in Respondent's own e-mails and contracts; and that Atlanta, Georgia is the appropriate location on which to base back wages owed to the women. She argues that Respondent "wanted to have qualified people around should the projects come up, but in the interim, [Respondent] refused to pay Ms. Gupta or Ms. Suvarna, and that constitutes benching and non-productive status, for which [Respondent is] responsible for paying under the regulations. She seeks to have Respondent found to have violated federal regulations for failure to pay back wages and failure to provide notice of the LCAs, as well as back wages at \$28.66 per hour for Atlanta, Georgia, in the amount of \$37,372.64 for Sumati Gupta and \$16,508.16 for Vidhya Suvarna, prejudgment interest on both accounts, reimbursement for their respective airfare to India, and post-judgment interest.

Respondent's position / argument (TR 26-28, 165-168):

Respondent's counsel submits that Respondent acted in good faith at all times with Sumati Gupta and Vidhya Suvarna. Sumati Gupta was living in Houston, Texas in an F-2 immigration status at all relevant times and chose not to come to Atlanta, Georgia when given the opportunity to work for Respondent. The Respondent had its own contracts available for work in Atlanta, Georgia, but Sumati Gupta failed to show up for training or work, which was the reason she was not paid and her H1B status was withdrawn by the Respondent. He submits that Sumati Gupta was not induced by Respondents to come from India to the United States since she was already living in Texas in an F-2 immigration status.

Respondent's counsel submits that Respondent applied in good faith for H1B status for Vidhya Suvarna for work in Atlanta, Georgia; but it took 18 months for approval to be obtained. Vidhya Suvarna lived in South Carolina in an H-4 immigration status at all relevant times. She failed to come to the home office in Atlanta, Georgia, for orientation and skills assessment, which was the reason she was not paid wages.

Respondent's counsel submits that at all times there was work for the two H1B non-immigrant workers to pursue in Atlanta, Georgia, and they chose not to come to Atlanta to work. He submits that under the circumstances the two individuals are not entitled to back wages or prejudgment interest, and that the case should be dismissed.

Respondent's counsel argues that Respondent is sophisticated in the ways of labor certifications and H1B petitions and it is interesting that after 300-400 petitions only two have come up. He argues that the Respondent had two guiding principles, if there was no work project then no H1B application would be made and employees don't report for work they don't get paid. He argues the two women involved did not report for work in Atlanta for whatever their motivation was.

Respondent argues that Respondent invested money in the H1B process that they would not recover and it was in Respondent's best interest to bring the two workers onboard, get them through orientation in the Atlanta office, assess their technical capabilities and speaking skills,

and get them up to speed. Both women were recruited for in-house projects at the Atlanta office and the Respondent would work with them to get reorganized if there was work outside Atlanta since the applications were specific to Atlanta, Georgia. He argues that the Respondent was trying to do the right thing in this case, in so far as DOL regulations and USCIS regulations pertaining to visas. He argues that the Respondent's hands were tied in this case by the failure of the two women to report to the Atlanta office.

STAUTORY AND REGULATORY FRAMEWORK

The Act provides for the professional employment of non-immigrant individuals with specialized knowledge and a recognized degree of specific specialty for specific periods of employment under the H-1B visa program, 20 CFR Chapter V, Part 655, Subpart H. To employ a non-immigrant professional under the H-1B visa program, an employer must submit a Labor Condition Application (LCA) to the Department of Labor (DOL) for certification. By submitting the LCA, the employer agrees to (1) pay the H-1B employee the greater of the actual wage and benefits paid to similarly situated employees or the prevailing wage for the job classification, unless excused from such payment by statutory and regulatory provisions [20 CFR §655.371] and (2) afford working conditions to the H-1B employee on the same basis as provided similarly situated employees [20 CFR §655.372] for the “duration of the alien’s authorized period of stay” [8 CFR §214.2(h)(4)(iii)(B)(2)]. The employer reaffirms these duties when it submits the certified LCA with an I-129 Petition for Nonimmigrant Worker to the USCIS in order to obtain authorization from the Department of Homeland Security (DHS) for the non-immigrant worker to enter the United States under the H-1B classification [20 CFR §655.705(c); 8 CFR §214.2(h)(4)(iii)(B)].

When a form I-129 Petition for H-1B visa “is approved before the date the [employer] indicates the services or training will begin, the approved petition and approval notice shall show the actual dates requested by the [employer] as the validity period [if] approved after the date the [employer] indicates that the services or training will begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and end with the date requested by the [employer]” provided in either case, that validity period does not exceed the limits specified in USCIS policy or 8 CFR §214.2(h)(9)(iii). See 8 CFR §214.2(h)(9)(ii) The employer is required to immediately notify the USCIS of any changes in the terms or condition of employment of an H-1B non-immigrant worker including when the employer no longer employs the non-immigrant worker [8 CFR §§214.2(h)(2)(i)(E) and 214.2(h)(11)(i)]. The approval of a visa petition, and necessarily the validity period, is automatically revoked when the employer goes out of business or files a written withdrawal of the petition [8 CFR 214(h)(11)(ii)]. The U.S. Government may also revoke a visa petition at any time using revocation notice procedures [8 CFR §214.2(h)(11)(iii)].

An employer may not permit a H-1B non-immigrant worker to begin work until after the DHS has granted authorization for the alien to work in the United States for the petitioning employer and then, work only for the authorized visa petition validity period [8 CFR §214.2(h)(13)(i); 20 CFR §655.705(c)(4)]. An H-1B non-immigrant worker “enters into employment” when the individual first makes him/herself available for work or otherwise comes under the control of the employer; but, even if the H-1B non-immigrant has not “entered into employment”, an employer

who has had the LCA certified and I-129 visa petition approved for the H-1B non-immigrant worker “shall pay the non-immigrant the required wage beginning 30 days after the date the non-immigrant first is admitted into the U.S. pursuant to the petition” [20 CFR §655.731(c)(6)].

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

In order for there to be a “bona fide termination of the employment relationship” under the Act, there must be (1) notice to the employee that the employment relationship has ended; (2) notice to the USCIS that the employment relationship has ended; (3) revocation of the LCA validity period during which the non-immigrant H-1B worker can remain in the United States to work for the specific employer; and (4) payment for transportation of the non-immigrant H-1B worker back to his/her last place of foreign residence “if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to Section 214(c)(5) of the Act” but payment of transportation of the alien is not required “if the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition ... [and thereby] has not been dismissed.” [§214(E)(5)(A) of the Act; 8 CFR §214.2(h)(4)(iii)(E)] See also – *Pegasus Consulting Group v. Administrative Review Board, U.S. Department of Labor*, 2008 WL 920072 (D. NJ, Mar. 31, 2008), *unpub*; *Amtel Group of Florida, Inc. v. Rungvichit Yongmahapakorn*, ARB Case No. 04-087 (Sep. 29, 2006); *Mao v. George Nasser and Nasser Engineering & Computing Services*, ARB Case No. 06-121 (Nov. 26, 2008); *Administrator v. Avenue Dental Care, et. al.*, ARB Case No. 07-101 (Jan. 7, 2010); *Rajan v. International Business Solutions, Ltd.*, ARB Case No. 03-104 (Aug. 31, 2004); 8 CFR §§ 214.2(h)(11)(i)(A), 214.2(h)(11)(ii), and 214.2(h)(4)(iii)(E)

SUMMARY OF RELEVANT EVIDENCE

Testimony of R. Padmanabhan (TR 120-156)

Ravi Padmanabhan testified that he is the CEO of Abacuss Software, LLC, a 12 year-old IT consulting company. The company recruits and hires software programmers from the United States and India for internal projects and client projects. In 2008 there were 35 employees. Over the past 12 years the company has filed 300 to 400 H1B petitions.

The corporate office is in Atlanta Georgia. The office is a 2000 square foot facility with space for programmers to work on internal projects, space for training, offices for company officers, and an area for marketing. Internal projects are Abacuss projects and people are also sent out to third party clients. He reported that the company has facilities for orientation of new hires.

Ravi Padmanabhan testified that Abacuss filed the H1B in April 2008 for Sumati Gupta and it was approved before the start date of October 1, 2008. He stated that EX 1 was a letter sent to Ms. Gupta, like that sent to all new resources, to come to Atlanta office for orientation and completion of I-9 and W-4 and “all those things which are required as part of reporting to the company.” He stated that during orientation “we help prepare them ... technically and non-technically, and then put them in the in-house project for them so they get familiar with how the system works.” The orientation is done for all new resources but not for an H1B transfer. Some employees with good communication ability don’t require orientation and they report to wherever the H1B has as the location. He testified that Ms. Gupta did not come to the Atlanta office at any time after the October 1, 2008 letter and, to his knowledge, did not respond to the October 1, 2008 letter. He reported that when he called Ms. Gupta he would talk to her husband most of the time. He reported that Ms. Gupta’s communication in court was improved over the intervening four years since 2008. He reported that the H1B for Sumati Gupta had only one location, which was for Atlanta, Georgia. The work was “100% consistent with the I-129 petition, 100% matching the LCA, we had project, in-house project.”

Ravi Padmanabhan testified that “a lot of people ... [were] under the impression that when Abacuss filed an H1B ... they are pretty much under the impression it is going straight to the client, [they]do not have to come to Abacuss, [they] do not want to do the orientation, [they] do not want the internal project.” He testified that “visas are filed purely for a project, if we don’t have a project, we cannot file the H1Bs, period. ... We had a project ... for training and projects.” If they do not want to come to Atlanta for an in-house project, we send them the requirements for external work. We have to amend the H1B visa if the work is not in Atlanta, and we do that. If no amended, then we withdraw the petition. He stated that in Sumati Gupta’s case the company withdrew her petition because she did not come to Atlanta and had not taken on a project. Had Sumati Gupta reported to the company in Atlanta in 2008, there were projects for her to do.

Ravi Padmanabhan testified that as CEO of the company for 12 years he has seen people who are new to the United States, they do not know the United States system. When they come to the company, they use the company as a token employer and want the H1B petition transferred without coming to the company.

Ravi Padmanabhan testified that the company applied for an H1B and LCA for Vidhya Suvarna; but it did not process smoothly. The company applied for the visa in April 2008 and it was not approved until July 2009, almost 15 months later. She and the company were frustrated by the delay. The company received the RFE in July 2009. EX 3 is the company’s response to USCIS’s RFE. The in-house project mentioned in EX3 is “Easy and Direct.” We told the INS that “Easy and Direct” was the project Vidhya Suvarna was to work for one month if she came to Atlanta. We were ready to hire Vidhya Suvarna for that in-house project when the H1B was approved, per the petition. He reported that Vidhya Suvarna never came to Atlanta. He stated he told his people that he wanted to meet Vidhya Suvarna when she came to Atlanta on a personal trip, “because I encourage them to come and see my office ... just talk to me for one hour ... see that training room, see the project team, the developer’s team ...”

Ravi Padmanabhan testified that the company was doing as well now as it was in 2008 when there were about 35 employees. Currently there were 10 employees, with only himself in the Atlanta office, which was being relocated to a smaller 700 square foot office space. In 2011 net earnings were “minus \$60,000.00.” In 2012 things are bad and “three days back ... we were out of cash for running the payroll so I have to move \$20,000 from my personal account to my business account ... two days back.”

Ravi Padmanabhan testified that it was true that they did not send the I-797 or LCA documents to Sumati Gupta or Vidhya Suvarna; but Sumati Gupta got her LCA about a month later. He stated the company practice was to give the LCA, I-9 and I-797 to new employees when they report to Atlanta. He testified “We did not give [to Sumati Gupta and Vidhya Suvarna]. That was our mistake.”

On cross-examination, Ravi Padmanabhan testified that part of what Abacuss Software does is to place employees with outside clients who would then pay the employee’s salary. He reported that prior to hiring to an outside client Abacuss Software had to amend the LCA location and petition before they could start paying the employee. If Abacuss Software is unable to find a project for a new employee, they are not paid.

Ravi Padmanabhan testified that he personally signed the LCA for Sumati Gupta and Vidhya Suvarna. He acknowledged signing the agreement to comply with Department of Labor regulations under §655 on paying H1Bs but explained that it was when they reported to the company in Atlanta if their H1B is approved. He stated that he was aware of the requirement to provide a copy of the LCA to new employees and he did not provide them to Sumati Gupta or Vidhya Suvarna because they never reported to work in Atlanta. He stated he was advised by counsel that “LCA’s have to be provided to employees when they join the first day of the work ... in this case Atlanta.” He reported that he was aware that his company was being investigated by the Department of Labor but was not aware that the Department of Labor had requested copies of the LCA’s in this case. He stated he signed the I-129, I-129H supplement and I-129H data collection supplement for Vidhya Suvarna and stated on the supplement that Abacuss Software was an H1B dependent employer. He reported that the H1B petitions for Sumati Gupta and Vidhya Suvarna were only for the Atlanta, Georgia location but that the LCAs also contained another location, Dallas, Texas for Sumati Gupta and New York City for Vidhya Suvarna. He reported he was aware that he would need to file an amended LCA if he moved an employee to another location. He testified that the H1B petitions in this case were filed in 2008 and the positions were for work as a computer software engineer for in-house projects in Atlanta.

Ravi Padmanabhan testified that the EX 1 letter was sent to Sumati Gupta in September and she was supposed to report to the Atlanta office on October 1, 2008, at the address in the letter, as well as in the employment offer, employment agreement, and the H1B petition. He acknowledged his work telephone number and that there were 11 telephone calls to that number from Sumati Gupta’s telephone between June 2008 and June 2009. He acknowledged that there were also 48 e-mails between Sumati Gupta and Abacuss Software. He reported that “most of the times we don’t get to talk to Ms. Sumati Gupta. We get to talk most of the times to her spouse ... she never talks much to us because of her communication and other problems. So we send a letter. She did not report after that. Talking about getting the documents, H1B

documents, like I said before, we did not give, that was a mistake.” He stated the letter sent to Sumati Gupta requested she provide an updated resume, which she did. He reported that when employees want projects in a different location, “Champa, my marketing people” send out the requirements of the outside project to make sure they are comfortable with the requirements of the project and they will give us a resume for that project. He reported that he was not sure of the number, but Sumati Gupta had provided updated resumes for projects. He testified that Sumati was never issued a paycheck because she never joined the company in Atlanta and that she was never offered return airfare to India because she never asked for that at any time.

Ravi Padmanabhan testified that he was aware of “chats” between Vidhya Suvarna and Abacuss Software employees. The chat involved a project she discussed with one of the marketing employees where she wanted a copy of her H1B to provide to an outside client. He was aware that Vidhya Suvarna had a second interview with Cognizant and that Vidhya Suvarna had provided contact information about Cognizant to Abacuss Software. He reported that Abacuss Software contact with Cognizant revealed that Cognizant did not want to work through Abacuss Software but “they wanted to take her directly and so we said if you want to go through Abacuss, we have to file an amendment and you can work through Abacuss, so they declined the offer.” He acknowledged that Vidhya Suvarna “chatted” with Anuje Kotha to start marketing from September 1, 2009 and that her H1B petition was effective from July 21, 2009. He stated that the visa was effective July 2009 for Vidhya Suvarna in Atlanta but that she never wanted to join in Atlanta and stated in her questionnaire to the Department of Labor that she was available in October 2009. He acknowledged that Abacuss Software never paid Vidhya Suvarna and never offered her return transportation home.

On re-direct examination, Ravi Padmanabhan testified that had either woman in this case reported to work in Atlanta Abacuss Software would have put them to work.

On examination by this Administrative Law Judge, Ravi Padmanabhan testified that Abacuss Software is organized as a limited liability company. He reported that Chandler Sharma³ was the registered agent but that he is now the registered agent for the company. He reported that he and Champa Padmanabhan are the two K-1 members of the limited liability company. He acknowledged that Champa Padmanabhan is the same “Champa” individual identified by the prior witnesses as being the Abacuss Software HR marketing team.

Testimony of Sumati Gupta (TR 55-89)

Sumati Gupta testified that she has a bachelor’s degree in mathematics and a master’s degree in computer applications from colleges in India. She posted her resume on Dice Career Website in January 2008, while living in Houston, Texas, and looking for a position as a programmer or technical position. In January 2008, Mr. R. Padmanabhan from Abacuss Software contacted her about a job opening as a programmer at Abacuss Software. She reported Mr. Padmanabhan told her about Abacuss as an IT staffing company to Fortune 500 companies and then took her interview, which included questions about her technical qualifications and work experience. He was aware she lived in Houston at the time and reported he would look for a project for her

³ Chandler Sharma is the counsel of record in this case who did not appear at the hearing.

where she would have to travel to the client worksite. She testified that Mr. Padmanabhan did not ask her to come to Atlanta to work.

Sumati Gupta testified that she was subsequently called by Champa, the HR manager for Abacuss Software. Brenda from Abacuss Software HR called and took another interview and said she Abacuss Software wanted to hire me and she would send the H1B checklist by e-mail. She reported Mr. Raj from Abacuss Software HR sent an e-mail with the H1B checklist. In February 2008 she received an offer letter which she signed and returned to Abacuss Software. She identified the first two pages of GX 4 as containing the offer letter for the position of programmer and analyst as a full-time position with a salary of \$58,300.00 per year and containing her signature at the bottom of page two. She stated that she sent the documents requested for the H1B to Abacuss Software by e-mail in February 2008 and by postal mail in March 2008. She reported receiving an e-mail from Champa indicating Abacuss Software had filed her H1B application the first week of April 2008. In May 2008 she received an e-mail from Champa indicating that her H1B application had been selected for processing. In August 2008 she received an e-mail from Champa indicating her H1B application had been approved.

Sumati Gupta testified that her first day of work with Abacuss Software was to be October 1, 2008, the first day of the fiscal year. At that time she was in Houston, Texas. She stated she was told to remain in Houston and when Abacuss Software found a project she would have to travel to the client site. She reported that she received a letter about the orientation process, that she called Mr. Padmanabhan about travel to Atlanta, and that he instructed her not to come to Atlanta at that time since they did not have a project for her and would let her know when a project was found. She stated she never received a project assignment from Abacuss Software and never received a paycheck from them either. She stated that between October 1, 2008 and May 18, 2009 she remained in the United States and contacted Abacuss Software by telephone and e-mail concerning assignment to a project. She talked to Champa, Mr. Raj and Mr. Padmanabhan on occasion and was told they were still looking for a project.

Sumati Gupta testified that the pages of GE 4 beginning with page three are the documents she received from Abacuss Software, signed and returned to them in November 2008. She stated that from the employment agreement (GX 4) she understood she was to start work on October 1, 2008. She reported that many times she sent an updated resume to Abacuss Software because they would e-mail project requirements and ask for an updated resume according to the project requirements. She reported that several companies called her after they had discussions with Abacuss Software and had reviewed the resume for their project. She stated she never got any assignments after that.

Sumati Gupta testified that she never received a copy of her LCA even after asking for it many times after August 2008. She asked Champe and Mr. Raj about the LCA and was told to ask Mr. Padmanabhan as CEO of the company. When she asked Mr. Padmanabhan she was told the company's law firm, Chandler and Sharma had the documents. She testified that she contacted the law firm for the LCA documents and was told the company kept those documents. She reported that after attempts to get the documents from the company and law firm, she sent an e-mail to the law firm requesting the documents.

Sumati Gupta identified GE 6 as copies of her e-mails with Abacuss Software during the period February 21, 2008 through April 1, 2009. She stated that the February 11, 2009 e-mail at 11:42AM was an e-mail from Champa that had requirements for a project attached and a request for an updated resume. She updated the resume and e-mailed it back to Champa on February 11, 2009. By March 14, 2009 and March 16, 2009 e-mails she requested copies of her I-797 and I-94 from Champa, Mr. Raj and Mr. Padmanabhan. She also sent an e-mail to the company's law firm for a copy of her I-797 and I-94 and received them the next day. She reported that she never received a copy of the LCA. She reported the April 1, 2009 e-mail to Champa was asking about the market, asking about getting work assigned for her, and asking about a project. She testified that she still believed she was employed by Abacuss Software when she sent the April 1, 2009 e-mail. She stated that she was never offered return fare home to India.

Sumati Gupta identified GE 5 as copies of her mobile telephone bill for the July 2008 to July 2009 period. She identified the number 404-329-1444 as the law firm number; 678-596-9020 as the cell phone number for Mr. Raj; 404-248-9294 as the Abacuss Software number; and 404-808-7304 as the number for Mr. Padmanabhan.

On cross-examination, Sumati Gupta testified that she came to the United States in February 2007 with her husband who was on a student visa, so she was on a spouse derivative visa. She reported she did not remember if she ever asked Abacuss Software to pay for a trip back to India. She stated she never received a letter from Abacuss Software telling her to report to Atlanta. She acknowledged receiving the letter in EX 1. She stated that she called Abacuss Software many times to come to Atlanta but was repeatedly told to stay in Houston and they are trying to find a project for her and would tell her when they found a project for her. She specifically stated that when she received EX 1, she called Abacuss Software about coming to Atlanta and was told by Champa and Mr. Padmanabhan not to come right now. Mr. Padmanabhan told her to stay in Houston because they did not have a project for her and he would let her know when they found her a project. She stated she did not ask for a project closer to home and was ready to go to Atlanta for work.

Sumati Gupta testified that she read the employment agreement (GE 4) before she signed it and understood the principal place of performance would be Atlanta, Georgia or such other locations as she would be required to travel to in order to perform her responsibilities. Sumati Gupta testified that the March 14, 2009 e-mail (GE 6) concerned the I-797 approval notice that showed her legal status in the United States. She reported that she has not been employed since and has not tried to transfer her H1B status to another company. She stated she could not change her H1B status back to F2 because she did not have a paystub.

On re-direct examination, Sumati Gupta testified that she had tried to change her status back to F2 in June 2009 but USCIS denied the application because she was not getting paid and did not have a pay stub. She filed a motion to reopen the denial but it was taking too much time so she had to return to India to fix the situation. She reported she paid all her own expenses back to India.

On examination by this Administrative Law Judge, Sumati Gupta testified that she did not remember the cost of the airplane ticket back to India. On re-direct examination she reported she

could check her e-mails for ticket information. On re-cross examination, she stated that she is not an expert in immigration law.

Testimony of Vidhya Suvarna (TR 90-116)

Vidhya Suvarna testified that she has a bachelor and master's degree in computer science from the University of Mumbai, India, as well as certification as a java programmer. She had posted her resume on several websites and Mr. Rajan from Abacuss Software HR department called around February 2008. Mr. Rajan stated that the company had lots of projects and different vendors for Fortune 500 companies such as Blue Cross, Sprint, AT&T had employed a lot of their employees. In response to her desire to work in South Carolina or Atlanta, Mr. Rajan stated that "most of their clients were around Atlanta and even finding clients in South Carolina would not be a problem for them." She reported her understanding was that she would be working at a client location. She understood that Abacuss Software had requirements for her skill sets and she could go through the interview process and be an employee of Abacuss Software. In February 2008 she was interviewed by Mr. Rajan. The interview involved her resume, education background, skill sets, past experience and some technical areas around her skill sets. She understood that "once they have an offer letter which is accepted, then they have an H1B petition submitted to USCIS, and then once the H1B is approved, the employee is placed at the client location for work." After she accepted the offer she was interviewed by the CEO for Abacuss Software who explained the company and they would be initiating the H1B process. She identified GE 12 as the job offer she received from Abacuss Software that she accepted through e-mail. She reported understanding that Abacuss Software had a lot of projects and that she could work on a client's project at a 75/25 pay split and that if she found a job at the location and took that job, the pay split would be 80/20. She stated that since she was in South Carolina and found a job, Abacuss Software and that company would work out details and she would get 80% of whatever the company paid to Abacuss Software.

Vidhya Suvarna testified that Abacuss Software requested documents on an H1B checklist, such as passport, transcripts, previous work history and reference letters, which she sent to the company. She reported receiving an e-mail from Champa, in Abacuss Software HR, around April 1, 2008 stating that the H1B application had been filed. Around May 17, 2008 she received an e-mail from Champa that her H1B petition had been selected for processing. She obtained the USCIS tracking number and followed the processing status on the USCIS website. On July 22, 2009, her H1B application was approved. A few days later Mr. Rajan from Abacuss Software confirmed that the H1B for Abacuss Software had been approved. She reported that she was not given a work project in July 2009, was told the company didn't have any projects for her and had not begun marketing her resume but that once they had a project Abacuss Software would send the client information and location to go to work. She reported she was never asked to report to Atlanta, was never asked to report to orientation, and was never asked to report to any other location for work. At that time she was living in Greenville, South Carolina and was willing to commute the 1-1/2 hours for work in Atlanta, Georgia.

Vidhya Suvarna testified that Abacuss Software did not have any work for her after the H1B was approved so she began to look for contract positions on job portals. She found projects with two companies and was offers the jobs but lost both jobs because negotiations between Abacuss

Software and the two companies. She reported that she notified Anuje Kotha, of Abacuss Software HR department, of the two job offers and kept her informed of the progress through the interview schedule, interview process, and offer details so she could expect some contact from those companies. She never heard anything from the companies afterwards.

Vidhya Suvarna testified that she notified Anuje Kotha that she would be traveling to Atlanta on one occasion and was told that the company was closed that day so she could not meet anyone from Abacuss Software. She reported that she used e-mail and Gmail chat to request a copy of her LCA but never received a copy. She identified GE 13 as a September 1, 2009 "chat" with Anuje Kotha indicating that Abacuss Software intended to begin marketing her resume that day but that she was still an employee of Abacuss Software. She testified that Anuje Kotha had contacted her initially and asked her e-mail address be added to Gmail so they could be in constant contact. She stated her understanding that if she found a project with another company to give Anuje Kotha's contact information as the Abacuss Software HR contact point to the other company. She stated her understanding that she was a full-time employee of Abacuss Software and could not work for another company on a full time basis without a contract via Abacuss Software as the employer.

Vidhya Suvarna testified that Cognizant was one of two companies that offered her employment. Cognizant was the second company to offer her work on for an IT project. The job offer was to be through Abacuss Software for three months and after that she would work full-time for Cognizant. She indicated that her chat question to Anuje Kotha on what to do if asked for a pay stub by Cognizant (GX 15) was because she was not being paid by Abacuss Software since the H1B had been approved. She reported that during October 2009 she had received another full-time employment offer and her October 19, 2009 chat (GX 15) included a request to talk to Ravi Padmanabhan to get her H1B documents and discussion of her need to have a project assigned with Abacuss Software to show employment with Abacuss Software if she left the country to visit India.

Vidhya Suvarna identified GX 14 as e-mails from her to R. Padmanabhan and Mr. Rajan in October 2009. In the e-mails she was requesting her I-797 approved copy of H1B and the LCA. She stated the e-mails to Chandler Sharma were to the company's law firm to get the H1B documents. She reported leaving voice mail messages with Abacuss Software personnel as well as the law firm about obtaining the H1B documents. She testified that she never received her H1B documents from Abacuss Software.

Vidhya Suvarna testified that Abacuss was just keeping her without projects so she looked for other work. She was offered full-time employment with a company in Greenville, South Carolina and accepted the position on October 16, 2009. That company had to file an H1B transfer with the processing consulate which required her travel back to India at her own expense.

On cross-examination, Vidhya Suvarna testified that she lived about 1-1/2 hours from Atlanta in general and had told Anuje she was planning a personal trip to Atlanta and wanted to visit but was told that they were not available then. She did not make any trips to Atlanta to make an unannounced visit to Abacuss Software. She reported that she had not met with Ravi

Padmanabhan but only talked with him over the telephone and he would not talk about projects. She stated her contact with him “started when I start requesting my H1B documents.” She testified that “my discussion was mainly with Rajan and Anuje, because they were the ones recruiting, looking for projects.”

On examination by this Administrative Law Judge, Vidhya Suvarna testified that she did not exactly remember how much she paid for her return flight to India but that she had her travel ticket.

Testimony of Tonya Williams (TR 28-54)

Tonya Williams testified that she is an investigator for the Wage and Hour Division of the U.S. Department of Labor. She has completed approximately 30 investigations based on complaints filed with the Department of Labor. If a complaint on a WH4 form is legitimate an investigator is assigned. The investigator schedules a visit with the company and looks at the public access file for the individual involved. The public access file should contain the labor condition application (LCA), the petition application (I-129) and the approval notice (I-797).

Tonya Williams testified she was assigned to investigate Abacuss Software in May 2011 following retirement of the originally assigned investigator, and started the investigation in July 2011 due to being out of work for an accident the week the case was assigned to her. She left messages with Rajan Veeraraghavan in Abacuss Software HR department to arrange a meeting to discuss missing documents and obtain the company’s position on the complaints. The company would not return telephone calls and did not respond to two faxes sent to schedule a meeting. Since the company would not respond she sought a joint review committee meeting within the Department of Labor.

Tonya Williams testified that she did not receive the missing LCAs for Sumati Gupta or Vidhya Suvarna from Abacuss Software but did receive the LCAs, I-129 petitions, and I-797 approval notices for Sumati Gupta and Vidhya Suvarna in September 2011 from USCIS. She also received a copy of Abacuss Software’s request of withdrawal for the visas.

Tonya Williams testified that since “there had been no W-T earnings provided or any other contact with the company, I computed back wages according to regulations in the Code of Federal Regulations 655.” She reported that the primary location listed on the LCAs was Atlanta, Georgia with a prevailing wage rate of \$28.66 per hour.

Tonya Williams testified that for Sumati Gupta she first used the higher \$30.00 per hour rate and the period from October 1, 2008 to March 31, 2009 to calculate back wages but later recalculated the wages on the lower \$28.66 per hour for the period October 1, 2008 through May 18, 2009, the date of revocation from the USCIS. That amount totaled \$37,372.64, including prejudgment interest.

Tonya Williams testified that for Vidhya Suvarna she first used the higher \$30.00 per hour rate and the period from July 21, 2009 to October 29, 2009 to calculate back wages but later recalculated the wages on the lower \$28.66 per hour for the period July 21, 2009 through

October 29, 2009, the date she had employment with another firm and was unable to work for Abacuss Software. That amounted to \$16,508.16 in back wages and \$1,485.01 in prejudgment interest to May 4, 2012.

On cross-examination, Tonya Williams testified that she has been an investigator for 11 years and went to formal H1B training in 2007 and averages four to six H1B case investigations per year. She reported that she determined that Abacuss Software was a LLC and the company identified Ravi Padmanabhan as CEO of the company. She reported that she never met anyone from Abacuss Software because they would not agree to a meeting. She reported receiving a letter from attorney Ryan Green stating the Department of Labor should only deal with the law firm of Murphys Law and no longer deal with members of the company.

Tonya Williams testified that the LCA for Sumati Gupta listed Atlanta, Georgia as the first work location and Dallas, Texas as the second location. She reported she interviewed Sumati Gupta by e-mail and also had talked with her before the investigation report was submitted. She stated that Sumati Gupta forwarded an e-mail to her that indicated Sumati Gupta had asked Abacuss Software of a time and location to report. She testified that she had never seen EX 1. She stated that after review of EX 1 her opinion of the case does not change much “because the letter states she should be prepared to start the orientation by October 1st. It does not tell her the location.” She reported that Sumati Gupta was living in Houston, Texas in an F1 family immigration status when she contacted her.

Tonya Williams testified that she interviewed Vidhya Suvarna by e-mail and by telephone. She was in an H1B immigration status with another company that had completed paperwork to transfer her H1B status from Abacuss Software. She was told by Vidhya Suvarna that she never reported to Abacuss Software offices in Atlanta, Georgia.

On re-direct examination, Tonya Williams testified her understanding that Vidhya Suvarna did not report to Abacuss Software because she was never notified her H1b had been approved. She testified that there “was a letter from the Murphy Law attorney Ryan Green that stated these workers were never employees and never employed by Abacuss Software Technologies.”

On examination by this Administrative Law Judge, Tonya Williams identified the previous case investigator as Joch Lebon and that she used simple interest in computing prejudgment interest.

On re-direct examination, Tonya Williams testified that Vidhya Suvarna knew when Abacuss Software applied for her LCA in 2008 but had no idea when it was approved, so she did not discuss the amount of time it took for approval.

Labor Condition Application for ETA case #I-08086-4126609 (GX 1)

This exhibit indicates Abacuss Software Technologies applied for the position of “Computer Software Engineers, Applications” for the period September 26, 2008 through September 25, 2011 as a full-time position at \$30.00 per hour wage rate. The exhibit indicates the prevailing wage rate in Atlanta, Georgia was \$28.66 per hour and in Dallas, Texas at \$23.28 per hour. The exhibit indicates that Ravi Padmanabhan declared on March 26, 2008, that he had read and

agreed to certain condition in the LCA, including the condition to “pay non-immigrants at least the local prevailing wage or the employer’s actual wage, whichever is higher, and pay for non-productive time [and] Offer nonimmigrants benefits on the same basis as U.S. workers.” It also indicates that the company identified itself as “Employer is H-1B dependent and/or a willful violator.” On August 28, 2008, the LCA was approved for the period of September 26, 2008 through September 25, 2011.

I-129 Petition for a Nonimmigrant Worker (GX 2)

This exhibit indicates that Abacuss Software Technologies applied for a change in immigration status for Sumati Gupta who had arrived in the United States on February 20, 2007 in an F2 nonimmigrant status and was living in Houston, Texas. The exhibit identified the proposed employment to be a full time position as computer software engineer referred to in LCA case #I-08086-4126609 at \$30.00 per hour wage rate and medical insurance. The intended period of employment was October 1, 2008 to September 25, 2011. The exhibit indicated Abacuss Software was a software development and consulting business established in 1988 with a gross annual income of \$3,200,000.00 and Net annual income of \$71,069.00. Ravi Padmanabhan certified the information as true and correct on March 31, 2008.

In the attached Classification Supplement, Ravi Padmanabhan certified on March 31, 2008, agreement to the terms of the LCA for the period of Sumati Gupta’s employment and certified “that the Employer will be liable for the reasonable costs of the return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized stay.”

In the attached H-1B Data Collection and Filing Fee Exemption Supplement, Ravi Padmanabhan indicated on March 31, 2008, that Abacuss Software was a dependent employer and had never been found to be a willful violator.

I-797 Notice of Action (GX 3)

This exhibit indicates that the I-129 petition for a nonimmigrant from Abacus Software Technologies on behalf of Sumati Gupta was received on May 9, 2008 and H1B status was approved on July 17, 2008, for a valid period of October 1, 2008 through September 25, 2011. The exhibit directed the petitioning company to retain the upper portion of the notice and to give the alien worker the lower portion so that the right half could be turned in with an I-94 when departing the United States and the left half could be retained for record purposes and for applying for a new visa. It identified Sumati Gupta’s I-94 as #518735288 10 and the Notice as receipt #EAC-08-155-50624.

Preliminary Offer, Pre-Employment Agreement and Promissory Note (GX 4)

The “Preliminary Offer” dated February 20, 2008 was sent to Sumati Gupta by Ravi Padmanabhan as CEO of Abacuss Software Technologies. This offered the position of programmer/analyst to Sumati Gupta at an annual budgeted compensation of \$42,000.00 base salary, \$6,000.00 per diem, \$2,000.00 medical insurance, \$2,000.00 relocation allowance,

employer's maximum for Medicare and Social Security employer contribution of \$6,300.00. The document indicated "you will be deemed to have 'commenced your employment' with abacuss software technologies on the date on which you are first placed on the abacuss software technologies payroll." Work was to be performed "at the locations designated by abacuss software technologies and/or its customers." The document provided that Sumati Gupta would pay Abacuss Software one month's pay if she terminated employment without 30 days' notice or the company terminated her employment due to a situation caused by her. It also provided for her to pay for damages the company may have paid to a customer due to her actions while at a customer location. It also provided for her to pay Abacuss Software for the "damages and losses occurred during recruitment and staffing" if she could not join Abacuss Software, terminated the offer, or did not respond properly to client interviews. The offer was contingent on "approval of the H1B visa and final offer from abacuss software technologies with joining date." Sumati Gupta signed the preliminary offer on February 24, 2008.

The "Pre-Employment Agreement" states that it was entered into on September 19, 2008 between Abacuss Software Technologies, a Georgia Limited Liability Company, as employer, and Sumati Gupta as employee. The agreement is unsigned by an employer agent but was signed by Sumati Gupta on November 26, 2008. The document indicates employer's desire to hire the employee as a software engineer for the employment period beginning October 1, 2008 as an effective date and ending on September 25, 2011, unless sooner terminated. The salary was to be \$30.00 per hour payable at regular payroll periods along with benefits. The document provided that "the employee shall be furnished with facilities and services suitable to his/her position and adequate for the performance of his/her duties under this Agreement. The principal place of performance by the employee of his/her duties hereunder shall be in Atlanta, Georgia, or such other location as he/she may reasonably be required to travel in the performance of his/her responsibilities. If required, employee will perform his/her services at the client location." The agreement could be terminated by the employer at any time and by the employee upon receipt of 30-days written notice. The agreement provided that if termination was for cause, the employee would compensate the employer for all reasonable monetary damages. The agreement provides for "Joining Date" by stating that "once the employee confirms joining with the employer, employer will send reporting information for joining employment/client after confirming all procedures completed." It also provides that if the employee does not report to the client or perform services for a client after receiving reporting details, documentation or completing client interview, the employee is to compensate employer \$15,000.00 "for the time and efforts spent on recruitment and staffing. Employee will execute a promissory note (Exhibit 'A' attached hereto) for this amount \$15,000.00 ... to cover the expenses and damages caused." The agreement required the employee to "devote full time, attention and energies to the business of the employer and, during this employment, will not engage in any other business activity, regardless of whether such activity is pursued for profit, gain, or other pecuniary advantage." The agreement required that all requests for leave of absence without pay for prolonged illness, injury or exceptional personal circumstances must be requested in writing from the employee.

The "Promissory Note" was identified as Exhibit "A" and signed by Sumati Gupta on November 26, 2008. The document stated "For value received, Sumati Gupta (hereinafter referred to as 'Borrower') hereby promises to pay to the order of Abacuss Software Technologies LLC (hereinafter referred to as 'Lender'), the principal sum of Fifteen Thousand and no/100 dollars

(\$15,000.00) in legal tender of the United States of America, bearing interest at Zero (0%) interest per annum, as follows: one (1) payment in the amount of Fifteen Thousand and No/100 Dollars (\$15,000.00) shall be due and payable on September 30th, 2009. ..." The remainder of the document related to prepayment, late fees, and enforcement.

Telephone Calling Log for June 8, 2008 to July 7, 2009 (GX 5)

This exhibit highlights the following telephone calls involving Atlanta telephone numbers:

- 1 call to 404-329-1444
- 5 calls to and 4 calls from 678-596-9020
- 2 calls to and 2 calls from 404-248-9293
- 25 calls to and 1 call from 404-248-9294
- 17 calls to 404-441-9141
- 11 calls to and 2 calls from 404-808-7304

E-mail correspondence during February 21, 2008 to April 1, 2009 (GX 6)

This exhibit includes e-mail strings between Sumati Gupta and Abacuss Software Technologies. The first string was started by Raj of HR Abacuss Software on February 21, 2008 when he sent a revised offer and H1B checklist as attachments. He referenced a prior discussion and requested the offer be reviewed and a signed copy be faxed to 404-601-9618. He asked that Sumati Gupta prepare that documentation in the H1B checklist and "send it to us so that we can start the documentation of H1B process ASAP." He listed his cell number as 678-596-9020 and office number as 404-248-9293 x 228. He identified his manager as Ravi at 404-248-9293 x 225 or 404-808-7304. Sumati Gupta e-mailed the requested documents back February 28, 2008. Raj acknowledged receipt on February 29, 2008. A March 15, 2008 e-mail indicates the documents were sent to Raj also by Federal Express.

The second string was started by Champa at Abacuss Software on March 20, 2008 when she sent and H1B checklist and H1B document as attachments to Sumati Gupta and requested she review the checklist to "confirm whether you sent all copies reqd for filing." Champa indicated her direct telephone number was 404-441-9141 and the facsimile machine number was 586-279-1253. Sumati Gupta returned a completed excel spreadsheet by March 26, 2008 e-mail, which Champa acknowledged receipt the same day.

By an April 7, 2008 e-mail, Champa notified Sumati Gupta that Abacuss Software filed her H1B application the first week of April and noted her "hope for the best to get selected thru Lottery system." By e-mail of May 16, 2008, Champa notified Sumati Gupta that her H1B application had been selected for processing.

On May 17, 2008, Champa started a new string of e-mails when she directed Sumati Gupta that "during the process [of the H1B application], pl do not make any travel out of country (US) even to Canada and in any special case, pl send details and we will discuss with our Lawyers and let you know. Traveling out of country during the H1B processing will jeopardize the entire process. Thanks for your cooperation." Sumati Gupta advised Champa the next day that she

would not be traveling out of the country until the process was complete and requested “the petition number for my case so that I may track the approval of my petition.” On August 6, 2008 another e-mail again requested the case processing number and provided an address update for Sumati Gupta. The next day Champa replied that the H1B was approved and provided the receipt notice number EAC0815550624.

Sumati Gupta submitted an updated resume for marketing purposes by an attachment to an October 27, 2008 e-mail.

On November 11, 2008, Rajan of Abacuss Software Technologies started a string of e-mails when he provided Sumati Gupta with a sample resume and employment agreement by attachment. He requested she sign and return all four pages of the agreement, sign as borrower on the two page “Exhibit A” before a notary public, and provide an updated resume. Sumati Gupta returned an updated resume by attachment to a December 1, 2008 e-mail. She sent scanned copies of the Agreement and Exhibit “A” for review by e-mail of December 3, 2008. Rajan requested the documents be mailed to Abacuss Software the next day.

Sumati Gupta submitted scanned copies of her resume to Rajan on December 5, 2008 and December 8, 2008.

By e-mail of December 11, 2008, Champa sent Sumati Gupta a copy of the position, duties, responsibilities, and requirements for a position of web developer.

By e-mail of January 29, 2009, Sumati Gupta advised Champa that two companies, Deegit.com and Datagr.com, had requested her resume on December 26 and she sent it to them the same day. She also reported that she completed an interview with Deegit.com on December 27, 2008.

Sumati Gupta submitted her updated resume to Champa and Rajan on January 30, 2009.

By e-mail of February 11, 2009, Champa sent Sumati Gupta a copy of the skill and knowledge requirements for a position as a C programmer. Sumati Gupta submitted her updated resume to Champa on February 23, 2009.

By March 14, 2009, e-mail to Ravi Padmanabhan, with copies to Champa and Rajan, Sumati Gupta stated “Please send my I-797 approval notice. Now it is going to complete 6 months very soon and I have been asking for my I-797 approval notice since October. So please send it to me ASAP.” On March 16, 2009, Sumati Gupta asked of the same addressees “Please send my I-797 and I-94 for change of status. I need it as soon as possible. Now it is going to complete 6 months very soon and I have been asking for my I-797 approval notice and I-94 since October. So please send it to me ASAP.” In a March 17, 2009 e-mail Sumati Gupta referenced an earlier discussion and sent Rajan her current mailing address for the I-797 and I-94 documents.

By e-mail on April 1, 2009, Sumati Gupta asked Champa “How is the market, I am waiting for the updates regarding projects from you, if there is anything please let me know.”

March 16, 2009, Petition Withdrawal Letter (GX 7)

This exhibit indicates that Abacuss Software HR Specialist Rajan Veeraraghavan signed a letter to the USCIS on March 16, 2009 indicating that the company “withdraw[s] the petition for the above referenced beneficiary” EAC-08-155-506224, Ms. Sumati Gupta.

USCIS Letter of May 18, 2009 (GX 8)

This exhibit refers to the Petition for Nonimmigrant Worker (I-129) filed by Abacuss Software on April 14, 2008 on behalf of Sumati Gupta, EAC0815550624. It indicates that USCIS approved the petition non July 17, 2008 and that as of May 18, 2009, USCIS was aware that Abacuss Software wished to withdraw the petition. USCIS indicated that the petition was automatically revoked pursuant to 8 CFR §214.2(h)(11)(ii).

Labor Condition Application for ETA case #I-08086-4126945 (GX 9)

This exhibit indicates Abacuss Software Technologies applied for the position of “Computer Software Engineers, Applications” for the period September 26, 2008 through September 25, 2011 as a full-time position at \$30.00 per hour wage rate. The exhibit indicates the prevailing wage rate in Atlanta, Georgia was \$28.66 per hour and in New York City, New York at \$29.61 per hour. The exhibit indicates that Ravi Padmanabhan declared on March 28, 2008, that he had read and agreed to certain condition in the LCA, including the condition to “pay non-immigrants at least the local prevailing wage or the employer’s actual wage, whichever is higher, and pay for non-productive time [and] Offer nonimmigrants benefits on the same basis as U.S. workers.” It also indicates that the company identified itself as “Employer is H-1B dependent and/or a willful violator.” On August 28, 2008, the LCA was approved for the period of September 26, 2008 through September 25, 2011.

I-129 Petition for a Nonimmigrant Worker (GX 10)

This exhibit indicates that Abacuss Software Technologies applied for a change in immigration status for Vidhya Suvarna who had arrived in the United States on February 1, 2008 in an H4 nonimmigrant status and was living in Simpsonville, South Carolina. The exhibit identified the proposed employment to be a full time position as computer software engineer referred to in LCA case #I-08086-4126945 at \$30.00 per hour wage rate and medical insurance. The intended period of employment was October 1, 2008 to September 25, 2011. The exhibit indicated Abacuss Software was a software development and consulting business established in 1988 with a gross annual income of \$3,200,000.00 and Net annual income of \$71,069.00. Ravi Padmanabhan certified the information as true and correct on March 31, 2008.

In the attached Classification Supplement, Ravi Padmanabhan certified on March 31, 2008, agreement to the terms of the LCA for the period of Vidhya Suvarna’s employment and certified “that the Employer will be liable for the reasonable costs of the return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized stay.”

In the attached H-1B Data Collection and Filing Fee Exemption Supplement, Ravi Padmanabhan indicated on March 31, 2008, that Abacuss Software was a dependent employer and had never been found to be a willful violator.

I-797 Notice of Action (GX 11)

This exhibit indicates that the I-129 petition for a nonimmigrant from Abacus Software Technologies on behalf of Vidhya Suvarna was received on May 1, 2008 and H1B status was approved on July 21, 2009, for a valid period of July 21, 2009 through September 25, 2011. The exhibit directed the petitioning company to retain the upper portion of the notice and to give the alien worker the lower portion so that the right half could be turned in with an I-94 when departing the United States and the left half could be retained for record purposes and for applying for a new visa. It identified Vidhya Suvarna's I-94 as #110711866 17 and the Notice as receipt #EAC-08-149-50834.

Preliminary Offer (GX 12)

The "Preliminary Offer" dated February 29, 2008 was sent to Vidhya Suvarna by Ravi Padmanabhan as CEO of Abacuss Software Technologies. This offered the position of programmer/analyst to Vidhya Suvarna at compensation in either "through a fixed annual with benefits or hourly rate." The actual hourly rate depended on the billing rate charged to clients and whether Abacuss Software identified the project/assignment or Vidhya Suvarna identified the project/assignment. If Abacuss Software identified the project/assignment then 75% of the client billing rate would be "budgeted towards your payroll, payroll liabilities, relocation expenses, per diem, medical insurance and benefits etc as per the standards allowed and company will take 25%. ... If you identify the project/assignment we will work on 80-20 percentages." It provided that "your joining date with abacuss software technologies will be notified once we have the confirmation from client."

The document provided that Vidhya Suvarna would pay Abacuss Software one month's pay if she terminated employment without 30 days' notice or the company terminated her employment due to a situation caused by her. It also provided for her to pay for damages the company may have paid to a customer due to her actions while at a customer location. It also provided for her to pay Abacuss Software for the "damages and losses occurred during recruitment and staffing" if she could not join Abacuss Software, terminated the offer, or did not respond properly to client interviews. The offer was contingent on "approval of the H1B visa and final offer from abacuss software technologies with joining date." Vidhya Suvarna signed the preliminary offer on March 5, 2008.

September 1, 2009 Chat-mail between Vidhya Suvarna and Anuje Kotha (GX 13)

This exhibit indicates that Abacuss Software would begin marketing of Vidhya Suvarna's services on September 1, 2009. Anuje Kotha of Abacuss Software directed Vidhya Suvarna to "not keep [her] resume in any job portals [because she] shall do that. ... [and] if they ask for the employer details, give my details ... you can only work corp to corp." Anuje Kotha stated that

W2 basis “is working as an independent employee ... but now since you are an employee of abacuss you cannot go on W2.”

October 2009 E-mails initiated by Vidhya Suvarna (GX 14)

Vidhya Suvarna began the e-mail string on October 21, 2009 when she renewed a request made to Rajan in telephone calls that day for a copy of her I-797 or H1B approval notice and LCA application “immediately as I have to file for my Social Security Number as soon as possible. Also let me know when would be a good time to talk to you regarding this.”

On October 22, 2009, Vidhya Suvarna inquired of Ravi Padmanabhan what time she should expect a telephone call from him as reported to her by Rajan.

On October 26, 2009, Rajan Veeraraghavan from Abacuss Software notified Vidhya Suvarna that “we will talk to our attorney today and get back to you ... you have to understand that the company has spent lot of time and effort for a year and half for the recruitment and immigration and now you are coming up all of a sudden and don’t want to join us instead you want to join full time locally and asking for documents. We really not clear on what exactly you want to do with the documents if you are not going to join us. You can discuss with Champa as well and I will also get back to you today.” Later that day Vidhya Suvarna inquired, by e-mail to the Chandler Sharma Law firm, how to contact the law firm because the telephone number used gave “a constant engage dial tone.” Later that day she sent an e-mail to “Chandler” at the law firm stating “I am urgently seeking my H1B approval notice and LCA documents for my H1B petition filed through your law firm. I would greatly appreciate if you could send me these documents by the end of the day as I need them urgently for applying for SSN and H1B transfer. My H1B receipt [number] is EAC-08-149-50834.” She provided her e-mail address and telephone number and restated her problem with a constant dial tone when she called the law firm’s office telephone number. She resent the e-mail to “Binal” of the law firm on October 29, 2009. On October 30, 2009, Binal Bhatt, Immigration Manager with Smith, White, Sharma, Yashki, Halpern & Ishar (Chandler/Sharma law firm), replied “Please allow us some time till Tuesday and we will respond to your e-mail.”

Chat-mail between Vidhya Suvarna and Anuje Kotha (GX 15)

On September 24, 2009, Vidhya Suvarna began a string with Anuje Kotha by stating that she had “just finished my 2nd interview with Cognizant ... project manager. She gave positive response and said HR will take over. ... If they ask for pay stubs what should I say?” Anuje Kotha advised that HR at Cognizant would not ask for pay stubs but if they did ask just say OK. In response for a “one view of my approval; form for which I have been longing,” Anuje Kotha advised that she would try to send a snapshot of the H1 copy, she would tell Rajan to call her about it after she talks to him. Later the same day, Anuje Kotha wrote she had talked to Rajan, both would try to send her a scan of the H1 copy, and Rajan said “If you want to leave the country its better you have a project in hand and then go.”

On October 19, 2009, Vidhya Suvarna asked Anuje Kotha if she had heard anything from Cognizant.” Anuje Kotha replied nothing was heard from Cognizant and inquired about another

company request. Vidhya Suvarna replied that she had “mailed Jagan today, haven’t heard back” and that she had not heard back from the other company in South Carolina. She indicated that she wanted to talk to Ravi Padmanabhan casually about her H1 documents but was referred to Rajan. She indicated to Anuje Kotha she had to go to Canada and was planning to visit India in December or January and would need to have her visa stamped in either trip. Anuje Kotha advised she would find out the H1 documents.

October 23, 2009, Petition Withdrawal Letter (GX 16)

This exhibit indicates that Abacuss Software HR Specialist Rajan Veeraraghavan signed a letter to the USCIS on October 23, 2009 indicating that the company “withdraw[s] the petition for the above referenced beneficiary as since the beneficiary has not joined the petitioner company.” The referenced beneficiary was for EAC-08-149-50834, Ms. Vidhya Suvarna.

Nonimmigrant Worker Information Form WH-4 from Sumati Gupta (GX 17)

This undated WH-4 form was used by Sumati Gupta to file a complaint with the Wage and Hour Division, U.S. Department of Labor indicating that Abacuss Software Technologies of Atlanta, Georgia, had obtained an approved H1B status for her as an employee and “Employer failed to pay [her] for time off due to a decision by the employer or for time needed by [her] to acquire license or permit” since October 1, 2008, and had failed to provide her with a copy of the approved LCA. She indicated that Abacuss Software had provided her a copy of the I-797 and I-94 on the day of the complaint, after contacting the company law firm the day before.

Nonimmigrant Worker Information Form WH-4 from Vidhya Suvarna (GX 18)

This undated WH-4 form was used by Vidhya Suvarna to file a complaint with the Wage and Hour Division, U.S. Department of Labor indicating that Abacuss Software Technologies of Atlanta, Georgia, had obtained an approved H1B status for her as an employee and “Employer failed to pay [her] the higher of the prevailing or actual wage. Employer failed to pay [her] for time off due to a decision by the employer or for time needed by [her] to acquire license or permit. Employer failed to provide [her] ... with a copy of the LCA. [and] Employer retaliated or discriminated against [her] ... for disclosing information, filing a complaint, or cooperating in an investigation or proceeding about a violation of applicable nonimmigrant program laws and regulations.” She indicates she was an employee from October 1, 2009 to present and that the violations began August 1, 2009. She indicated that Abacuss Software withheld the I-797 and I-94 documents and made her pay for the H1B application until “recently reimbursed after I told to complain to DOL.” She indicated the H1B application was filed in April 2008 and approved in July 2009. She indicated she was asked to find projects on her own, had several offers of employment which were lost due to wage and employment discussions between Abacuss Software and the companies. She indicated that she had an employment offer with a company that was applying to transfer her H1B status from Abacuss Software but that Abacuss Software “refuses to handover the H1B approval letters which are required for the H1B transfer. [Abacuss Software] isn’t paying me either since 1st October 2009. They also threatened to cancel my current H1B visa.”

January 5, 2012, Notification of Administrator's Determination (GX 19)

By separate letters dated January 5, 2009, the Assistant District Director of the Wage and Hour Division, Atlanta Regional Office, U.S. Department of Labor notified Sumati Gupta and Vidhya Suvarna that it had reached a determination on their respective complaints against Abacuss Software Technologies, LLC. The January 4, 2009 determination letter indicated to Ravi Padmanabhan of Abacuss Software that "it has been determined that your firm committed the following violations: failed to pay wages as required and failed to provide notice of the filing of the Labor Condition Application as required. ... No civil money penalty is assessed as a result of these violations. Your firm owes back wages ..."

April 27, 2012, Summary of Unpaid Wages, Form WH-56 (GX 20)

This exhibit reflects Investigator Tonya William's calculation of gross amounts due to Sumati Gupta of \$37,372.64 and due to Vidhya Suvarna of \$16,508.16.

September 14, 2011, Wage Transcription and Computation Worksheet, Form WH-55 (GX 21)

The exhibit indicates Vidhya Suvarna was due \$16,508.16 in wages from July 21, 2009 through October 29, 2009 and also due interest of \$1,495.01.

The exhibit indicates Sumati Gupta was due \$37,372.64 in wages from October 1, 2008 through May 18, 2009 and also due interest of \$4,084.53.

Airline Flight Receipt for Sumati Gupta (GX 22)

This exhibit reflects that Sumati Gupta paid \$1,033.00 for a coach flight on Northwest Airlines departing Houston George Bush Intercontinental Airport, Houston, Texas on November 30, 2009 and arriving at the Delhi Indira Gandhi International Airport, India on December 1, 2009.

Airline Flight Receipt for Vidhya Suvarna (GX 23)

This exhibit reflects that Sumati Gupta paid \$1,147.70 for a coach flight on Delta Airlines departing Greenville / Spartanburg International Airport, Spartanburg, South Carolina on March 10, 2010 and arriving at the Mumbai / Bombay International Airport, India on March 10, 2010.

September 17, 2008 Letter From Abacuss Software to Sumati Gupta (EX 1)

By letter dated 17, 2008, Rajan from Abacuss Software HR department advised Sumati Gupta that they had "filed [her] H1B visa in April 2008 and the petition has been approved. Please be prepared to start the orientation process by October 1st week and also send us a copy of your updated resume."

April 12, 2010 E-mail from Vidhya Suvarna to DOL Investigator (EX 2)

In this exhibit Vidhya Suvarna responded to questions presented to her by Jaques Lebon, Wage and Hour Division Investigator. Her response indicated that she was contacted by Rajan in March 2008 of the HR department of Abacuss Software Technologies after posting her resume on Dice, Monster and Career Builder. At the time she was already in the United States. She reported Abacuss Software mentioned they had many current projects and wanted to hire her as programmer/analyst. She reported that she had a Master's degree in computer science, was certified as a Java programmer, and had more than three years' experience in software development and quality assurance. She reported the salary would depend on the billing rate from clients with 75% of the rate budgeted towards her payroll but that the salary minimum would be \$60,000.00 annually. She had "signed a preliminary offer letter which did not have a contract mentioned in it."

Vidhya Suvarna indicated she was on an H4 visa prior to the H1B filing in April 2008 which was approved in July 2009 with H1B status valid from October 2009. She reported being "available to start working with Abacuss Software Technologies immediately." She reported "the company did not have any project available since October 2009."

Vidhya Suvarna reported that "the company withheld all my H1B approval documents and LCA and did not provide me a copy of them in spite of constant request to handover. ... The company did not have any project available and would not pay me anything for the time I was employed with them. ... The company asked me to pay the lawyers fee which they said would be refunded to me on start of employment. I paid an amount of \$1500 to the Law Firm of Chandler Sharma through which the H1B petition was filed. The company reimbursed the fee paid for H1B after I told them I am filing a complaint with DOL." She reported "The company did not have any project since October 2009 and also did not pay me any wages. So I filed for WH4 with DOL in November 2009 and was also simultaneously looking for direct employment. ... I did not take any vacation." She indicated that there was no contract and that "since the company did not have any projects and also were withholding all my H1B documents which they refused to hand over after constant request, I started looking for other employment opportunities and got an offer from a company in November 2009 who then filed for my H1B transfer. I stopped any communication /contact with Abacuss from November 2009 after I filed a WH4 with the DOL."

July 8, 2009 I-129 RFE Response to USCIS by Abacuss Software (EX 3)

The July 8, 2009, cover letter was signed by Rajan Veeraraghavan as HR Specialist for Abacuss Software.

The exhibit indicates the Director, USCIS, was informed by Rajan Veeraraghavan as Project Coordinator for Abacuss Software in a March 19, 2008 letter that EzInteract was a platform to communicate with software used within organizations and "is a next generation tool for information technology consulting and is a complete solution for User Management, HRMS, Accounting, Recruitment & Staffing and Employment Eligibility Verification Program E-Verify. Presently this project has been planned for a total of 3 years for complete implementation with an estimated start date from October 6th, 2008. This project is divided into five main phases. ...

Ms. Vidhya Suvarna has the required qualifications and technical experience in analysis, design, development and testing computer software, for development of our product. Ms. Vidhya Suvarna is planned to depute to our EzInteract Product after 5 weeks of initial orientation (October 6th, 2008 to November 7th, 2008) as per the table below. ... Ms. Vidhya Suvarna will contribute for the EzInteract as follows: Period November 10th, 2008 to September 25th, 2011 100 Percentage of time spent at this [Atlanta, Georgia] location.

The exhibit indicates USCIS was informed by Rajan Veeraraghavan as HR Specialist for Abacuss Software "will retain all control over the salient employment attributes ... and otherwise control Ms. Vidhya Suvarna" in an at-will employment with a rate of compensation no less than \$30.00 per hour. Abacuss Software indicated "Ms. Vidhya Suvarna will be responsible for the following duties as a Computer Software Engineer ... The work performed by Ms. Vidhya Suvarna will be supervised by Rajan Veeraraghavan, HR Specialist at abacuss software technologies."

DISCUSSION

I. The Respondent violated 20 CFR §655.731 by failing to pay appropriate wages and benefits to H1B non-immigrant Sumati Gupta for the period October 1, 2008 to May 18, 2009.

As noted above, when an I-129 is approved before the date the employer indicates the services or training will begin, the validity period is the actual dates requested by the employer. The I-129 for Sumati Gupta (GX 2) establishes that the intended period of employment was for the period October 1, 2008 to September 25, 2011 and that Sumati Gupta had entered the United States on February 20, 2007 in an F2 status. The I-797 (GX 3) approved the I-129 on July 17, 2008 for the validity period of October 1, 2008 through September 25, 2011.

Under 20 CFR §655.731(c)(6), Sumati Gupta "enters into employment" when she first makes herself available for work or otherwise comes under the control of the employer; but, even if she has not "entered into employment", Abacuss Software must pay her the required wage beginning 30 days after the date she is in the U.S. pursuant to the approved I-129 visa petition. Regulations at 20 CFR §655.731(c)(7)(i) excuse the payment of required wages if the non-immigrant's nonproductive periods away from employment are at the employee's voluntary request and convenience.

Here the employment period was approved to begin October 1, 2008. Ravi Padmanabhan testified for Abacuss Software that Sumati Gupta was sent a letter September 17, 2008 (EX 1) about orientation in Atlanta, Georgia; that she never came to Atlanta for the orientation or work; and Atlanta was the only place approved for her to work. EX 1 indicates that Sumati Gupta was asked "please be prepared to start the orientation process by October 1st week and also send us a copy of your updated resume."

The e-mails in GX 6 indicate that Champa Padmanabhan, one of the two K-1 members of Abacuss Software Technologies, LLC and marketing member of Abacuss Software, notified Sumati Gupta of her I-797 approval on August 7, 2008; Sumati Gupta submitted an updated

resume on October 27, 2008; Sumati Gupta responded for requests for updated resumes placed by Rajan Veeraraghaven of Abacuss Software human resources department on December 1, 5, 26 of 2008, January 30, 2009, and February 23, 2009; Rajan Veeraraghavan forwarded an employment agreement and promissory note attachment to Sumati Gupta on November 11, 2008 which was returned by e-mail on December 3, 2008 and mailed the next day; Champa Padmanabhan was aware Deegit.com and Data.com had requested Sumati Gupta's resume on January 29, 2009 and requested an update resume from Sumati Gupta based on the skill and knowledge requirements for a C programmer given her on February 11, 2009.

Sumati Gupta testified that her first day of work was to be October 1, 2008 and that she had received a letter from Abacuss Software indicating an orientation process would be held in Atlanta in October 2008. She reported that she called Ravi Padmanabhan about reporting for orientation but was told to remain in Houston and that when Abacuss found her a project she would travel to the client site. She testified she understood Atlanta was the principal place of work performance and that she was repeatedly told by Abacuss Software personnel to not come to Atlanta but stay in Houston until Abacuss Software found her a project to work. She testified that she was never paid by Abacuss Software. Sumati Gupta left the United States for India on November 30, 2009 (GX 22).

Ravi Padmanabham's testimony was that all new resources go through orientation but some employees with good communication skills don't require orientation and they report to wherever the H1B has set as the location, which for Sumati Gupta was Atlanta, Georgia. Ravi Padmanabhan acknowledged 11 telephone conversations with Sumati Gupta between June 2008 and June 2009 and testified that there were in-house projects to perform as of October 1, 2008 in the Atlanta office if she had reported there. He acknowledged the responsibilities of Abacuss Software as set out in the LCA. EX 3 goes further and describes in detail to the Director of USCIS the existence of an EzInteract software platform project that was to start in October 2008 and continue through September 25, 2011 in the Atlanta office. While the letter was to document an in-house project to support the application of Vidhya Suvarna, neither Vidhya Suvarna nor Sumati Gupta were assigned to this project. The claim of available projects coupled with the interactions of the Abacuss Software marketing and human resource personnel with Sumati Gupta after October 1, 2008 and Ravi Padmanabham's testimony that he had 12 years' experience with 300 to 400 H1B employees but that "it was a mistake" not to give Sumati Gupta or Vidhya Suvarna copies of their LCA, I-129 and I-797, undermine Ravi Padmanabham's credibility. He testified that Sumati Gupta was never paid by Abacuss Software because she never reported to Atlanta, Georgia.

GX 8 establishes that as of May 18, 2009, USCIS was aware that Abacuss Software wished to withdraw the I-129 for Sumati Gupta. The withdrawal was based on the written request of Rajan Veeraraghavan dated March 16, 2009 (GX 7). While the petition is automatically revoked upon withdrawal, there is no evidence of record to establish when or how the letter was transmitted to the USCIS or when the USCIS actually received the written request to withdraw the I-129. Accordingly, the I-129 for Sumati Gupta is found to have been revoked on May 18, 2009, the date of GX 8.

After deliberation on the evidence of record, this Administrative Law Judge finds that Sumati Gupta entered employment within the meaning of the INA on October 1, 2008 and that a bone fide termination of her employment was effective on May 18, 2009. During that time Abacuss Software interacted in such a manner that failed to utilize Sumati Gupta for in-house projects in Atlanta, Georgia and actively marketed Sumati Gupta to at least three other companies. During that time the failure to utilize Sumati Gupta in an active work role was the sole decision of the Respondent and not due to any nonproductive status due to conditions unrelated to Sumati Gupta's employment which would take her away from work duties. During that time Abacuss Software failed to pay the appropriate wages and benefits required by the LCA. Accordingly, the Respondent has violated 20 CFR §655.731 by failing to pay appropriate wages and benefits to H1B non-immigrant Sumati Gupta for the period October 1, 2008 through May 18, 2009, inclusive.

II. The Respondent owes H1B non-immigrant Sumati Gupta back wages and benefits in the amount of \$40,310.96 for the period October 1, 2008 through May 18, 2009, inclusive.

As set forth above, Sumati Gupta entered employment on October 1, 2008 and was continued in a non-productive status through May 18, 2009 by the decisions and actions of the Respondent. The I-129 submitted by Respondent for Sumati Gupta (GX 2) attested to a full-time position as a computer software engineer for the period October 1, 2008 through September 25, 2011 at a wage rate of \$30.00 per hour plus medical insurance. It referenced the LCA (ETA case no. I-08086-4126609) which indicated the prevailing wage rate in Atlanta for the period was \$28.66 per hour (GX 1).

The "Pre-Employment Agreement" sent by Abacuss Software with a September 19, 2008 effective date (GX 4) indicated "The Employer shall pay the Employee a salary of \$30.00 per hour payable at regular payroll periods along with benefits." The term "regular payroll periods" is not defined, but the February 20, 2008, "Preliminary Offer" sent by Abacuss Software to Sumati Gupta (GX 4) indicates salary and benefits are paid monthly. The term "benefits" was not defined within the Agreement, but was defined as "medical insurance" in the I-129 for Sumati Gupta. The term "medical insurance" was further defined as \$2000.00 per annum, paid monthly, in the February 20, 2008 "Preliminary Offer" (GX 4).

Since Abacuss has never paid Sumati Gupta any wages or benefits, the Respondent's owe Sumati Gupta the following in wages and benefits:

	Work Days in Monthly Period including Federal Holidays	Monthly Pay Due (Work Days x 8 Hours/Work Day x \$28.66/Hour)	Monthly Insurance Benefit Payable (\$2,000/12 months)	Total Monthly Liability of Respondent (before legally required deductions)
October 2008	23	\$ 5,273.44	\$ 166.67	\$ 5,440.11
November 2008	20	\$ 4,585.60	\$ 166.67	\$ 4,752.27
December 2008	23	\$ 5,273.44	\$ 166.67	\$ 5,440.11
January 2009	23	\$ 5,273.44	\$ 166.67	\$ 5,440.11
February 2009	20	\$ 4,585.60	\$ 166.67	\$ 4,752.27
March 2009	22	\$ 5,044.16	\$ 166.67	\$ 5,210.83

April 2009	21	\$ 4,814.88	\$ 166.67	\$ 4,981.55
May 2009	18	\$ 4,127.04	\$ 166.67	\$ 4,293.71

The benefits mentioned in the “Preliminary Offer” related to budget amounts for per diem and relocation expenses are not payable in this case since there was no travel or relocation involved. The budget for Medicare and Social Security is not considered since the employee’s contribution is reflected as legally required deductions from wages and benefits paid.

In view of the foregoing, this Administrative Law Judge finds that the Respondent owes H1B non-immigrant Sumati Gupta back wages and benefits in the total amount of \$40,310.96 for the period October 1, 2008 through May 18, 2009, inclusive.

III. The Respondent owes H1B non-immigrant Sumati Gupta \$ 1,033.00 for reimbursement of travel costs from the United States to India pursuant to 8 CFR §214.2(h)(4)(iii)(E).

As noted above, one of the requirements of a bone fide termination of employment of an H1B non-immigrant employee is for payment for the transportation of the non-immigrant H-1B worker back to his/her last place of foreign residence “if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to Section 214(c)(5) of the Act” but payment of transportation of the alien is not required “if the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition ... [and thereby] has not been dismissed.” §214(E)(5)(A) of the Act; 8 CFR §214.2(h)(4)(iii)(E)

In the case of Sumati Gupta, the I-129 was for the validity period from October 1, 2008 through September 25, 2011; the USCIS acknowledged receipt of the Respondent’s request to withdraw the petition on May 18, 2009; and the validity period was revoked on May 18, 2009.

The evidence of record fails to establish that Sumati Gupta voluntarily terminated her employment prior to September 25, 2011. Accordingly, the Respondent is not excused from the obligation to pay for the return transportation to India. GX 22 established that the cost of the return transportation was \$1,033.00 for coach fare on November 30, 2009. No other evidence rebutted this amount.

In view of the foregoing, this Administrative Law Judge finds that the Respondent must reimburse Sumati Gupta \$1,033.00 for her return transportation expenses.

IV. The Respondent owes H1B non-immigrant Sumati Gupta \$ 24,854.26 in pre-judgment interest.

The purpose of applying interest to pre-judgment and post-judgment monetary awards is to make the recipient whole again. The rationale is based on the perception that the party responsible for payment of accrued monies had the use of those funds during the interim period and that the recipient had been denied use of those funds during the period, such that one party gained an investment opportunity and the other was denied the investment opportunity and had to make up monetary shortfalls during the interim period by use of other personal funds that could have been managed in other ways beneficial to the individual.

The INA does not specifically provide for the award of pre-judgment interest or post-judgment interest on back pay by statute or regulation and the Administrator has failed to provide specific Department of Labor policy guidance on this issue, related Department of Labor programs involving employer discrimination and payment of back pay in enforcement of the discrimination provisions of Federal contracts is addressed by Federal regulations at 41 CFR §60-1.26(a)(2), 41 CFR §60-250.65(a)(1), 41 CFR §60-300.65(a)(1) and 41 CFR §60-741.65(a)(1) which provide –

“OFCCP⁴ may seek back pay and other make whole relief for [aggrieved individuals / victims of discrimination] identified during a complaint investigation or compliance investigation. ... Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the under-payment of taxes.⁵”

OFCCP’s Federal Contract Compliance Manual, Chapter 7, “Identification & Remedy of Employment Discrimination,” sets forth Departmental policy related to remedies to “make whole” the identified aggrieved individuals. “Make whole relief means simply that the [aggrieved individual / victim of discrimination] is restored to the position, both economically and in terms of status, that he/she would have occupied had the [underlying event] never taken place. ... This would normally include things such as back pay with interest ... and any other employment benefits denied the victim. In construing what constitutes make whole relief, OFCCP has followed Title VII principals.” Ibid, at 7F03. “The purpose of interest on back pay awards is to compensate the discriminatee for the loss of use of his/her money. OFCCP’s policy is that interest on back pay be calculated at the same percentage rate as the Internal Revenue Service’s underpayment formula. Simple interest is to be calculated from the first date that is covered by the back pay award. ... The IRS may adjust its rate quarterly. The interest rate applicable to various periods are set out in Appendix A to this Chapter.” Ibid, at 7F07.e. Appendix A explains that interest on back pay is calculated separately for each quarter that back pay is owed and the resulting quarterly interest is added together over the period covered to determine the amount of pre-judgment interest owed. The Appendix indicates that the quarterly “average back pay” amount to which the appropriate quarterly interest is applied is composed of the total back pay owed at the beginning of the quarter plus one-half of back pay due for the quarter itself. It provides that partial quarters are calculated the same way as full quarters. The total money due is the sum of the back pay owed for the period and the sum of the quarterly interests computed individually.

This approach of applying quarterly compound interest based on the underpayment rate set forth under 26 USC §6621(a)(2) to back wages is followed by the Administrative Review Board in cases under the INA. See *Wirth v. University of Miami, Miller School of Medicine*, ARB Case No. 2010-090 / 093 (Dec. 20, 2011)⁶ and the cases cited therein.

Within the 11th Circuit, in which this case arises, “an award of prejudgment interest adjusts the back pay for inflation and reflects the present day value of income that should have been paid to

⁴ Office of Federal Contract Compliance Programs

⁵ 26 USC §6621(a)(2), see also §6621(c) when a large corporation is involved.

⁶ See also, OALJ 2009-LDA-00026 (ALJ, July 6, 2012) Decision and Order on Remand from the Administrative Review Board to compute pre-judgment interest.

the claimant in the past.” *Armstrong v. Charlotte County Bd. of Comm.*, 273 F. Supp. 2d 1312, *2 (M.D. Fla. 2003) citing to *EEOC v. Joe’s Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1379 (S.D. Fla. 1978). Prejudgment interest is applied to back pay to make the aggrieved individual whole, compensate the individual for the true cost of money damages incurred, and prevent the offending party from attempting to enjoy an interest-free loan for as long as it can delay paying out back wages, and to avoid a windfall to either party. *Richardson v. Tricom Pictures & Productions, Inc.*, 334 F. Supp. 2d 1303 (S.D. Fla. 2004) and the cases cited therein. The U.S. Court of Appeals for the Eleventh Circuit directed that prejudgment interest in Title VII employment discrimination cases is to be calculated in accordance with 26 USC §6621. *McKelvy v. Metal Container Corp*, 854 F.2d 448 (11th Cir. 1988) citing *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507 (11th Cir. 1987). On remand to calculate the amount of prejudgment interest owed McKelvy, the District Court found that for periods after the 1986 amendment to 26 USC §6621, the underpayment rate set forth in 26 USC §6621(a)(2) should be applied. *McKelvy v. Metal Container Corp*, 125 F.R.D. 179 (M.D. Fla. 1989). However, the District Court later found “that the over-payment rate, which is effectively the rate at which one lends money to the government to be a more accurate approximation of the return one would have likely achieved over the back-pay period through reasonably safe market investment” and went on to “average the quarterly over-payment rate for 2008, 2009, 2010 and 2011 and compound the interest annually.” *Soliday v. 7-Eleven, Inc.*, 2011 WL 4949652 (M.D. Fla. 2011). It is specifically noted that 26 USC §6621 currently provides –

(a)(1) Overpayment rate The overpayment rate established under this section shall be the sum of -

- (A) the Federal short-term rate determined under subparagraph (b), plus
- (B) 3 percentage points (2 percentage points in the case of a corporation). ...

(a)(2) Underpayment rate The underpayment rate established under this section shall be the sum of -

- (A) the Federal short-term rate determined under subparagraph (b), plus
- (B) 3 percentage points.

(b)(3) Federal short-term rate The Federal short-term rate for any month shall be the Federal short-term rate determined during such month by the Secretary in accordance with section 1274(d). Any such rate shall be rounded to the next nearest full percent. ...

In this case, the computation of compound interest requires applying the average monthly applicable federal rate (AFR) of interest for each quarter set forth under 26 USC §6621(b)(3) plus 3%, to the accrued principal and interest owed each separate quarter to the Complainant. The average monthly AFR is determined by averaging the monthly Federal short-term interest rate published by the Internal Revenue Service in their monthly Revenue Rulings.⁷ Judicial notice is taken of monthly Federal short-term interest rates published for the period from October 1, 2008 through July 2012 as set forth in the attached Exhibit “A”.

Attachment “B” set forth the computation of pre-judgment interest applicable for the back wages owed Sumati Gupta. The total in back wages and benefits plus prejudgment interest owed Sumati Gupta through the 2nd quarter ending June 2012 is \$65,165.22. Of that amount,

⁷ www.irs.gov/app/picklist/list/federalRates.html

\$40,310.96 is back wages and benefits. Accordingly, the prejudgment owed Sumati Gupta is \$24,854.26.

V. The Respondent violated 20 CFR §655.731 by failing to pay appropriate wages and benefits to H1B non-immigrant Vidhya Suvarna for the period July 21, 2009 to October 16, 2009.

The I-129 for Vidhya Suvarna (GX 10) establishes that the intended period of employment was for the period October 1, 2008 to September 25, 2011 and that Vidhya Suvarna had entered the United States on February 1, 2008 in an H4 status. The I-797 (GX 11) approved the I-129 on July 21, 2009 for the validity period of July 21, 2009 through September 25, 2011.

Under 20 CFR §655.731(c)(6), Vidhya Suvarna “enters into employment” when she first makes herself available for work or otherwise comes under the control of the employer; but, even if she has not “entered into employment”, Abacuss Software must pay her the required wage beginning 30 days after the date she is in the U.S. pursuant to the approved I-129 visa petition. Regulations at 20 CFR §655.731(c)(7)(i) excuse the payment of required wages if the non-immigrant’s nonproductive periods away from employment are at the employee’s voluntary request and convenience.

Here the employment period was approved to begin July 21, 2009. Ravi Padmanabhan testified that Abacuss Software intended to hire Vidhya Suvarna to work the in-house project “EzInteract” in Atlanta and that EX 3 related to that project. EX 3 was contained three letters from Abacuss Software to the USCIS in March 2008 and July 2009 detailing how Vidhya Suvarna would be utilized during a three year period for the project. He testified that Vidhya Suvarna never came to Atlanta to work.

Vidhya Suvarna testified she posted her resume on an internet site and was contacted by Rajan Veeraraghavan in February 2008 for recruitment. GX 12 is a copy of the “Preliminary Offer” to work for Abacuss Software extended to Vidhya Suvarna on February 29, 2008 and signed by her on March 5, 2008. It set forth a salary split depending on whether she found work to perform with other companies or Abacuss Software found work for her to perform. She testified that her H1B petition was approved on July 22, 2009 and confirmed a few days later by Rajan Veeraraghavan. She stated that Abacuss had no projects for her at that time because they had not begun to market her services to other companies. She denied she was asked or told to report to Atlanta for work on an internal project or orientation. GX 13 indicates, from Abacuss Software HR department representative Anuje Kotha, that Abacuss Software intended to begin marketing of Vidhya Suvarna’s services beginning September 1, 2009 and directed her “do not keep ur(sic) resume in any of the job portals. ... if they ask for employer details, give my details ... u(sic) can only work in Corp to corp ... but now that you are the employee of abacuss you cannot go on W2” where Anuje Kotha explained “W2” “is working as an independent employee.” GX 15 demonstrates that Anuje Kotha was aware and working with Vidhya Suvarna on employment with Cognizant and was aware that a promising second job interview by Vidhya Suvarna had been completed on September 24, 2009. It also includes a statement by Abacuss representatives that she should not leave the country without a work project assignment. October 19, 2009 entries indicate that Vidhya Suvarna had not heard from Cognizant and had inquired if Anuje Kotha had heard anything. Anuje Kotha replied she had not and asked about the status of Jagan

and another company in South Carolina. This demonstrates that Vidhya Suvarna was working with Abacuss Software to locate employment of her services with companies other than Abacuss and undermines Ravi Padmanabham's testimony about in-house work in Atlanta on EzInteract as well as the need to report for orientation.

Vidhya Suvarna testified that she accepted employment with a company in Greenville, South Carolina, October 16, 2009 because Abacuss Software had no project for her to work and had not paid her. By letter dated October 23, 2009 (GX 16) Rajan Veeraraghavan of Abacuss Software notified USCIS of the withdrawal of Vidhya Suvarna's petition "since the beneficiary has not joined the petitioner company." There is no evidence of when this withdrawal letter was received by USCIS.

After deliberation on the evidence of record, this Administrative Law Judge finds that Vidhya Suvarna entered employment within the meaning of the INA on July 21, 2009 and that she voluntarily terminated that employment relationship by her actions on October 16, 2009 when she accepted employment with a different company located in Greenville, South Carolina. During that time Abacuss Software interacted in such a manner that failed to utilize Vidhya Suvarna for in-house projects in Atlanta, Georgia, including the "EzInteract" project proffered by Abacuss Software to the USCIS. Abacuss Software was involved in the active marketing of Vidhya Suvarna's services to at least two other companies during this period. During this time the failure to utilize Vidhya Suvarna in an active work role was the sole decision of the Respondent and not due to any nonproductive status due to conditions unrelated to Vidhya Suvarna's employment with Abacuss Software which would take her away from work duties. During the time from July 21, 2009 through October 15, 2009, inclusive, Abacuss Software failed to pay the appropriate wages and benefits required by the LCA. Accordingly, the Respondent has violated 20 CFR §655.731 by failing to pay appropriate wages and benefits to H1B non-immigrant Vidhya Suvarna for the period July 29, 2009 through October 15, 2009, inclusive.

VI. The Respondent owes H1B non-immigrant Vidhya Suvarna back wages and benefits in the amount of \$15,111.32.

As set forth above, Vidhya Suvarna entered employment on July 21, 2009 and was continued in a non-productive status through October 15, 2009, inclusive, by the decisions and actions of the Respondent. The I-129 submitted by Respondent for Vidhya Suvarna (GX 10) attested to a full-time position as a computer software engineer for the period October 1, 2008 through September 25, 2011 at a wage rate of \$30.00 per hour plus medical insurance. It referenced the LCA (ETA case no. I-08086-4126945) which indicated the prevailing wage rate in Atlanta for the period was \$28.66 per hour and that medical insurance was included as a benefit (GX 9). There is no additional evidence of the value of the medical insurance benefit extended this LCA; however, it is duplicitous of that used for Sumati Gupta (GX 2) for which Abacuss Software assigned a value of \$2,000.00 annually (GX 4). Accordingly, this Administrative Law Judge finds that the reasonable value of the medical benefits extended by the LCA in GX 9 to be \$2,000.00 per annum, payable on a monthly basis, without proration.

Since Abacuss has never paid Vidhya Suvarna any wages or benefits, the Respondent's owe her the following in wages and benefits under the INA:

	Work Days in Monthly Period including Federal Holidays	Monthly Pay Due (Work Days x 8 Hours/Work Day x \$28.66/Hour)	Monthly Insurance Benefit Payable (\$2,000/12 months)	Total Monthly Liability of Respondent (before legally required deductions)
July 2009	9	\$2,063.52	\$ 166.67	\$2,230.19
August 2009	21	\$4,814.88	\$ 166.67	\$4,981.55
September 2009	22	\$5,044.16	\$ 166.67	\$5,210.83
October 2009	11	\$2,522.08	\$ 166.67	\$2,688.75

In view of the foregoing, this Administrative Law Judge finds that the Respondent owes H1B non-immigrant Vidhya Suvarna back wages and benefits in the total amount of \$15,111.32 for the period July 21, 2009 through October 15, 2009, inclusive.

VII. The Respondent is excused from reimbursing H1B non-immigrant Vidhya Suvarna for her travel costs from the United States to India.

As noted above, one of the requirements of a bone fide termination of employment of an H1B non-immigrant employee is for payment for the transportation of the non-immigrant H-1B worker back to his/her last place of foreign residence "if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to Section 214(c)(5) of the Act" but payment of transportation of the alien is not required "if the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition ... [and thereby] has not been dismissed." §214(E)(5)(A) of the Act; 8 CFR §214.2(h)(4)(iii)(E)

In the case of Vidhya Suvarna, the I-129 was approved for the validity period from July 21, 2009 through September 25, 1011 (GX 11) and there is evidence of an October 23, 2009, letter in which the Respondent requested to withdraw the petition of Vidhya Suvarna ECA-08-149-50834; however, but there is no evidence of the request to withdraw the petition ever being received by USCIS. Vidhya Suvarna testified that she accepted employment with another company on October 16, 2009. By accepting employment with another company, Vidhya Suvarna voluntarily terminated her employment with Abacuss Software prior to the end of the validity period on September 25, 2011. Since Vidhya Suvarna voluntarily terminated her employment before the end of the validity period, the Respondent is excused from the obligation to pay for the return transportation to India.

VIII. The Respondent owes H1B non-immigrant Vidhya Suvarna \$6,880.46 in pre-judgment interest.

As noted above, the purpose of applying interest to pre-judgment and post-judgment monetary awards is to make the recipient whole again. For the reasons set forth in paragraph IV above, Vidhya Suvarna is also entitled to prejudgment interest computed on a quarterly compounded interest rate by applying the average monthly applicable federal rate (AFR) of interest for each

quarter set forth under 26 USC §6621(b)(3) plus 3%, to the accrued principal and interest owed each separate quarter to the her.

Attachment “C” sets forth the computation of pre-judgment interest applicable for the back wages owed Vidhya Suvarna. The total in back wages and benefits plus prejudgment interest owed Vidhya Suvarna through the 2nd quarter ending June 2012 is \$21,991.78. Of that amount, \$15,111.32 is back wages and benefits. Accordingly, the prejudgment owed Vidhya Suvarna is \$6,880.46.

IX. The Respondent violated 20 CFR §655.734 by failing to provide H1B non-immigrants Sumati Gupta and Vidhya Suvarna a copy of their respective LCA.

Federal regulations at 20 CFR §655.734(a)(3) provides that “The employer shall, no later than the date the H-1B nonimmigrant reports to work at the place of employment, provide the H-1B nonimmigrant with a copy of the LCA (Form ETA 9035 or Form ETA 9035E) certified by ETA and signed by the employer (or by the employer’s authorized agent or representative). Upon request, the employer shall provide the H-1B nonimmigrant with a copy of the cover pages, Form ETA 9035CP.”

Both Sumati Gupta and Vidhya Suvarna testified that they made numerous requests to Ravi Padmanabhan, Champa Padmanabhan and Rajan Veeraraghavan of Abacuss Software to obtain copies of their respective LCA, I-129 and I-797 and that no copies were ever provided to them by Abacuss Software. Ravi Padmanabhan testified that it was a mistake on the part of Abacuss Software not to give Sumati Gupta and Vidhya Suvarna copies of the requested documents.

Tonya Williams testified that repeated attempts to meet with representatives of Abacuss Software during the investigative phase of the WH-4 complaints of Sumati Gupta and Vidhya Suvarna were unresponsive. She testified that she never received documents from Abacuss Software but had to obtain copies of the relevant documents from USCIS.

After deliberation on the evidence of record, this Administrative Law Judge finds that the Respondent violated 20 CFR §655.734(a)(3) by failing to provide H1B non-immigrants Sumati Gupta and Vidhya Suvarna a copy of their respective LCA.

The actions of Abacuss Software in accepting payment of the additional fee incurred in filing an H-1B petition from Vidhya Suvarna in violation of 20 CFR §655.731(c)(10)(ii) and in failing to give investigators access for public examination the applications and necessary documents of Sumati Gupta and Vidhya Suvarna at the employer’s place of business or worksite in violation of 20 CFR §655.760(a), were not addressed within the determination letter and are not further addressed herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation on all the evidence of record, this Administrative Law Judge enters the following Findings of Fact and Conclusions of Law:

1. H1B non-immigrant Sumati Gupta was an employee of Respondent within the meaning of the INA, during the period from October 1, 2008 through May 18, 2009, inclusive, when a bone fide termination of employment was completed by Respondent.
2. The Respondent did not make, and has not made, any wage or benefit payment to, or on behalf of, H1B non-immigrant Sumati Gupta, for the employment period October 1, 2008 through May 18, 2009, inclusive.
3. The Respondent violated 20 CFR §655.731 by failing to pay appropriate wages and benefits to H1B non-immigrant Sumati Gupta for the period October 1, 2008 to May 18, 2009, inclusive.
4. The Respondent owes H1B non-immigrant Sumati Gupta back wages and benefits in the amount of \$40,310.96 for the period October 1, 2008 through May 18, 2009, inclusive.
5. The Respondent did not make, and has not made, any payment for transportation cost of non-immigrant Sumati Gupta from the United States to her last place of foreign residence as required by 8 CFR §214.2(h)(4)(iii)(E).
6. The Respondent owes H1B non-immigrant Sumati Gupta \$ 1,033.00 for reimbursement of travel costs from the United States to her last place of foreign residence pursuant to 8 CFR §214.2(h)(4)(iii)(E).
7. The Respondent owes H1B non-immigrant Sumati Gupta \$ 24,854.26 in pre-judgment interest.
8. H1B non-immigrant Vidhya Suvarna was an employee of Respondent within the meaning of the INA, during the period from July 21, 2009 through October 15, 2009, inclusive.
9. H1B non-immigrant Vidhya Suvarna voluntarily terminated her employment relationship prior to the expiration of the validity period, on October 16, 2009 when she voluntarily accepted employment with another company.
10. The Respondent did not make, and has not made, any wage or benefit payment to, or on behalf of, H1B non-immigrant Vidhya Suvarna, for the employment period July 21, 2009 through October 15, 2009, inclusive.
11. The Respondent violated 20 CFR §655.731 by failing to pay appropriate wages and benefits to H1B non-immigrant Vidhya Suvarna for the period July 21, 2009 to October 15, 2009, inclusive.
12. The Respondent owes H1B non-immigrant Vidhya Suvarna back wages and benefits in the amount of \$15,111.32.

13. The Respondent is excused from reimbursing H1B non-immigrant Vidhya Suvarna for her travel costs from the United States her last place of foreign residence due to Vidhya Suvarna's actions on October 16, 2009 which voluntarily terminated her employment with Respondent.
14. The Respondent owes H1B non-immigrant Vidhya Suvarna \$6,880.46 in pre-judgment interest.
15. The Respondent violated 20 CFR §655.734 by failing to provide H1B non-immigrants Sumati Gupta and Vidhya Suvarna a copy of their respective LCA.

ORDER

After deliberation on the evidence of record, **it is hereby ORDERED** that –

1. In accordance with the INA, Respondent shall pay H1B non-immigrant Sumati Gupta, that amount of required wages, benefits, transportation expense, and prejudgment interest remaining after all federal, state and local taxes required to be withheld are deducted from:
 - (a) \$40,310.96 in accrued wages and benefits for the period October 1, 2008 through May 18, 2009, inclusive;
 - (b) \$1,033.00 in reimbursement for the cost of transportation to Sumati Gupta's last place of foreign residence; and,
 - (c) \$24,854.26 in accrued prejudgment interest.
2. Respondent is directed to tender payment of the required remaining amount, after required tax withholdings have been deducted, to H1B non-immigrant Sumati Gupta by appropriate certified mail and/or courier, to her at her address of record, or such other address or means mutually agreeable to Sumati Gupta and the Respondent.
3. The Respondent is directed to tender payment of the required remaining amount, after required tax withholdings have been deducted, on or before Friday, August 10, 2012. The date the required remaining amount is placed in certified mail and/or delivered to the courier for personal delivery, or as otherwise mutually agreed in writing by H1B non-immigrant Sumati Gupta and the Respondent shall be the date upon which tender of payment occurs.
4. Should Respondent fail to tender the full required remaining amount, after required tax withholdings have been deducted, to H1B non-immigrant Sumati Gupta on or before August 10, 2012, the Respondent shall pay to Sumati Gupta additional post-judgment interest at the underpayment rate set forth at 26 USC §6621(a)(2) compounded on a calendar quarterly basis, in the manner set forth herein for prejudgment interest, for the calendar quarter commencing July 1, 2012 and continuing until all amounts owed are paid in full.

5. In accordance with the INA, Respondent shall pay H1B non-immigrant Vidhya Suvarna, that amount of required wages, benefits, and prejudgment interest remaining after all federal, state and local taxes required to be withheld are deducted from:
 - (a) \$15,111.32 in accrued wages and benefits for the period July 21, 2009 through October 15, 2009, inclusive; and,
 - (b) \$6,880.46 in accrued prejudgment interest.
6. Respondent is directed to tender payment of the required remaining amount, after required tax withholdings have been deducted, to H1B non-immigrant Vidhya Suvarna by appropriate certified mail and/or courier, to her at her address of record, or such other address or means mutually agreeable to Vidhya Suvarna and the Respondent.
7. The Respondent is directed to tender payment of the required remaining amount, after required tax withholdings have been deducted, on or before Friday, August 10, 2012. The date the required remaining amount is placed in certified mail and/or delivered to the courier for personal delivery, or as otherwise mutually agreed in writing by H1B non-immigrant Vidhya Suvarna and the Respondent shall be the date upon which tender of payment occurs.
8. Should Respondent fail to tender the full required remaining amount, after required tax withholdings have been deducted, to H1B non-immigrant Vidhya Suvarna on or before August 10, 2012, the Respondent shall pay to Vidhya Suvarna additional post-judgment interest at the underpayment rate set forth at 26 USC §6621(a)(2) compounded on a calendar quarterly basis, in the manner set forth herein for prejudgment interest, for the calendar quarter commencing July 1, 2012 and continuing until all amounts owed are paid in full.
9. Respondent shall file with the Administrator, with copy to H1B non-immigrants Sumati Gupta and Vidhya Suvarna, the appropriate documentation evidencing the computation of amounts payable to Dr. Wirth after authorized deductions, as well as, appropriate documentation evidencing the tender of said payment of required wages, benefits, transportation costs and interest, as directed herein to the respective H1B non-immigrant employees.
10. All monetary computations made pursuant to this Order are subject to verification by the Administrator.

A

ALAN L. BERGSTROM
Administrative Law Judge

**Monthly Federal Short-Term Interest Rates
for use in ARB Quarterly Period Compounding**

The monthly Federal short-term interest rates are found in monthly Revenue Rulings at www.irs.gov/app/picklist/list/federalRates.html

	2006	2007	2008	2009	2010	2011	2012
January	4.29	4.77	3.14	.81	.57	.43	.19
February	4.30	4.82	3.07	.60	.72	.51	.19
March	4.49	4.95	2.23	.72	.64	.54	.19
1st Quarter Average	4.36	4.85	2.81	.71	.64	.49	.19
April	4.66	4.79	1.83	.83	.67	.55	.25
May	4.74	4.74	1.62	.76	.79	.56	.28
June	4.88	4.73	2.06	.75	.74	.46	.23
2nd Quarter Average	4.76	4.75	1.84	.78	.73	.52	.25
July	4.94	4.86	2.40	.82	.61	.37	.24
August	5.13	4.89	2.51	.83	.53	.32	
September	5.02	4.71	2.36	.84	.46	.26	
3rd Quarter Average	5.03	4.82	2.42	.83	.53	.32	
October	4.89	4.11	2.17	.75	.41	.16	
November	4.78	4.04	1.61	.71	.35	.19	
December	4.86	3.81	1.36	.69	.32	.20	
4th Quarter Average	4.84	3.99	1.71	.72	.36	.18	

ATTACHMENT "A"

**Computation of Compound Quarterly Interest
Of Pre-Judgment Interest for Accrued Wages
In the Case of Sumati Gupta**

Year	Month	Month Federal Short- term % Interest Rate (AFR)	Quarter AFR Average % Interest Rate	Rounded Quarter AFR Average % Interest Rate PLUS 3%	Monthly Wage Payable (\$\$ Owed +) (\$\$ Paid -)	Total Quarterly Wages Payable (\$\$ Owed +) (\$\$ Paid -)	One-half of Quarterly Wage Payable	Prior Quarter Accrued Principal & Interest Owed	Quarterly Interest Owed	Principal & Interest Owed at End of Quarter Indicated	
2008	Jan	3.14			\$0.00						
	Feb	3.07			\$0.00						
	Mar	2.23			\$0.00						
				2.81	6%		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
	Apr	1.83			\$0.00						
	May	1.62			\$0.00						
	Jun	2.06			\$0.00						
				1.84	5%		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
	Jul	2.40			\$0.00						
	Aug	2.51			\$0.00						
	Sep	2.36			\$0.00						
				2.42	5%		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Oct	2.17				\$5,440.11						
Nov	1.61				\$4,752.27						
Dec	1.36				\$5,440.11						
			1.71	5%		\$15,632.49	\$7,816.25	\$0.00	\$390.81	\$16,023.30	
2009	Jan	0.81			\$5,440.11						
	Feb	0.60			\$4,752.27						
	Mar	0.72			\$5,210.83						
				0.71	4%		\$15,403.21	\$7,701.61	\$16,023.30	\$949.00	\$32,375.51
	Apr	0.83			\$4,981.55						
	May	0.76			\$4,293.71						
	Jun	0.75			\$0.00						
				0.78	4%		\$9,275.26	\$4,637.63	\$32,375.51	\$1,480.53	\$43,131.29
	Jul	0.82			\$0.00						
	Aug	0.83			\$0.00						
	Sep	0.84			\$0.00						
				0.83	4%		\$0.00	\$0.00	\$43,131.29	\$1,725.25	\$44,856.55
Oct	0.75				\$0.00						
Nov	0.71				\$0.00						
Dec	0.69				\$0.00						
			0.72	4%		\$0.00	\$0.00	\$44,856.55	\$1,794.26	\$46,650.81	

2010	Jan	0.57			\$0.00						
	Feb	0.72			\$0.00						
	Mar	0.64			\$0.00						
			0.64	4%		\$0.00	\$0.00	\$46,650.81	\$1,866.03	\$48,516.84	
	Apr	0.67			\$0.00						
	May	0.79			\$0.00						
	Jun	0.74			\$0.00						
			0.73	4%		\$0.00	\$0.00	\$48,516.84	\$1,940.67	\$50,457.51	
	Jul	0.61			\$0.00						
	Aug	0.53			\$0.00						
	Sep	0.46			\$0.00						
			0.53	4%		\$0.00	\$0.00	\$50,457.51	\$2,018.30	\$52,475.81	
	Oct	0.41			\$0.00						
	Nov	0.35			\$0.00						
	Dec	0.32			\$0.00						
		0.36	3%		\$0.00	\$0.00	\$52,475.81	\$1,574.27	\$54,050.09		
2011	Jan	0.43			\$0.00						
	Feb	0.51			\$0.00						
	Mar	0.54			\$0.00						
			0.49	3%		\$0.00	\$0.00	\$54,050.09	\$1,621.50	\$55,671.59	
	Apr	0.55			\$0.00						
	May	0.56			\$0.00						
	Jun	0.46			\$0.00						
			0.52	4%		\$0.00	\$0.00	\$55,671.59	\$2,226.86	\$57,898.45	
	Jul	0.37			\$0.00						
	Aug	0.32			\$0.00						
	Sep	0.26			\$0.00						
			0.32	3%		\$0.00	\$0.00	\$57,898.45	\$1,736.95	\$59,635.41	
	Oct	0.16			\$0.00						
	Nov	0.19			\$0.00						
	Dec	0.20			\$0.00						
		0.18	3%		\$0.00	\$0.00	\$59,635.41	\$1,789.06	\$61,424.47		
2012	Jan	0.19			\$0.00						
	Feb	0.19			\$0.00						
	Mar	0.19			\$0.00						
			0.19	3%		\$0.00	\$0.00	\$61,424.47	\$1,842.73	\$63,267.20	
	Apr	0.25			\$0.00						
	May	0.28			\$0.00						
	Jun	0.23			\$0.00						
			0.25	3%		\$0.00	\$0.00	\$63,267.20	\$1,898.02	\$65,165.22	
	Jul	0.24									
Aug											
Sep											

ATTACHMENT B

**Computation of Compound Quarterly Interest
Of Pre-Judgment Interest for Accrued Wages
In the Case of Vidhya Suvarna**

Year	Month	Monthly Federal Short-term % Interest Rate (AFR)	Quarter AFR Average % Interest Rate	Rounded Quarter AFR Average % Interest Rate PLUS 3%	Monthly Wage Payable (\$\$ Owed +) (\$\$ Paid -)	Total Quarterly Wages Payable (\$\$ Owed +) (\$\$ Paid -)	One-half of Quarterly Wage Payable	Prior Quarter Accrued Principal & Interest Owed	Quarterly Interest Owed	Principal & Interest Owed at End of Quarter Indicated	
2009	Jan	0.81			\$0.00						
	Feb	0.60			\$0.00						
	Mar	0.72			\$0.00						
				0.71	4%		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
	Apr	0.83			\$0.00						
	May	0.76			\$0.00						
	Jun	0.75			\$0.00						
				0.78	4%		\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
	Jul	0.82			\$2,063.52						
	Aug	0.83			\$4,981.55						
	Sep	0.84			\$5,210.83	\$12,255.90	\$6,127.95	\$0.00	\$245.12	\$12,501.02	
				0.83	4%						
Oct	0.75			\$2,688.75							
Nov	0.71			\$0.00							
Dec	0.69			\$0.00							
			0.72	4%		\$2,688.75	\$1,344.38	\$12,501.02	\$553.82	\$15,743.58	
2010	Jan	0.57			\$0.00						
	Feb	0.72			\$0.00						
	Mar	0.64			\$0.00						
				0.64	4%		\$0.00	\$0.00	\$15,743.58	\$629.74	\$16,373.33
	Apr	0.67			\$0.00						
	May	0.79			\$0.00						
	Jun	0.74			\$0.00						
				0.73	4%		\$0.00	\$0.00	\$16,373.33	\$654.93	\$17,028.26
	Jul	0.61			\$0.00						
	Aug	0.53			\$0.00						
	Sep	0.46			\$0.00						
				0.53	4%		\$0.00	\$0.00	\$17,028.26	\$681.13	\$17,709.39
Oct	0.41			\$0.00							
Nov	0.35			\$0.00							
Dec	0.32			\$0.00							

			0.36	3%		\$0.00	\$0.00	\$17,709.39	\$531.28	\$18,240.67
2011	Jan	0.43				\$0.00				
	Feb	0.51				\$0.00				
	Mar	0.54				\$0.00				
			0.49	3%		\$0.00	\$0.00	\$18,240.67	\$547.22	\$18,787.89
	Apr	0.55				\$0.00				
	May	0.56				\$0.00				
	Jun	0.46				\$0.00				
			0.52	4%		\$0.00	\$0.00	\$18,787.89	\$751.52	\$19,539.41
	Jul	0.37				\$0.00				
	Aug	0.32				\$0.00				
	Sep	0.26				\$0.00				
			0.32	3%		\$0.00	\$0.00	\$19,539.41	\$586.18	\$20,125.59
	Oct	0.16				\$0.00				
	Nov	0.19				\$0.00				
	Dec	0.20				\$0.00				
			0.18	3%		\$0.00	\$0.00	\$20,125.59	\$603.77	\$20,729.36
2012	Jan	0.19				\$0.00				
	Feb	0.19				\$0.00				
	Mar	0.19				\$0.00				
			0.19	3%		\$0.00	\$0.00	\$20,729.36	\$621.88	\$21,351.24
	Apr	0.25				\$0.00				
	May	0.28				\$0.00				
	Jun	0.23				\$0.00				
			0.25	3%		\$0.00	\$0.00	\$21,351.24	\$640.54	\$21,991.78
	Jul	0.24								
	Aug									
	Sep									

ATTACHMENT C

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

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

If no Petition is timely filed, then the administrative law judge’s decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 20 C.F.R. § 655.840(a).